# PROBLEMS OF PROXIMATE CAUSATION

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*"It remains a tangle and a jungle, a palace of mirrors and a maze, and the very bewildering abundance of the literature defeats its own purpose and adds its smoke to the fog."*

—William L. Prosser

## INTRODUCTION

The realization of the problems that judges face when confronted with the question of liability has drawn quite an amount of academic thought. This with an equal amount of intellectual frustration. Much of the difficulty arises from the inability of judges and academicians to admit to themselves that however they wish, the law cannot be as stable and predictable as they want it to be. In this field, the realities of the problems posed by these injury-bearing activities in an ever-increasing complex society work quite differently. The answer seems to be in the fact that the rules and principles that govern the subject matter while they indubitably assist in focusing our thoughts on relevant issues and in suggesting viable solutions are themselves constantly bungled up and tempered by the facts of life, in general and in particular, by the facts of the case, and of the judicial reactions to both. This is not to suggest that the reactions of the law are the result of arbitrary and capricious value judgments but only a ventilation of the writer's belief that the law of negligence is built around trends drawn and delimited principles, rules and concepts.

## TESTS FOR PROXIMATE CAUSE

*"For neglect of a nail, the shoe was lost; for the loss of the shoe, the horse was lost; for the loss of the horse, the rider was lost, and for the loss of the rider, the battle was lost."*

—George Herbert

Traditionally, answers to questions of liability have been given in terms of causation.[1] The negligent defendant would be liable for any injury of which the defendant's conduct was the legal cause. The test for determining

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[1] Lynch, *Torts: Foreseeability as an Element of Duty and Proximate Cause*, 41 CORNELL L. Q. 334 (1956).

whether a particular act is or is not the legal cause of a subsequent injury was varied according to the nature of the act being examined and the court which was undertaking the examination.[2] The generally accepted rule for determining legal cause at the present time is to be found in the dissenting opinion of Justice Andrews in the *Palsgraf* case[3] where he writes:

> "What is a cause in legal sense, still more what we do mean by the word 'proximate' is that because of convenience of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. It is all a question of expedience. There are not fixed rules to govern our judgment. These are simply matters of which we may take account."

Sharing the same view is Professor William Prosser who says:

> "'Proximate Cause' is the limitation which the courts have been compelled to place, as a practical necessity, upon the actor's responsibility for the consequences of his conduct. The limitation is sometimes one of causation, but more often is one of various considerations of policy which have nothing to do with causation. The tendency of the courts to state these considerations in terms of causation often obscures the real issues involved."[4]

The use of the word "proximate" is derived from an ancient common-law maxim: "*In jure non remota causa, sed proxima, spectatur*" — in law the nearest cause is looked to, not the remote one.[5] The use of the word "proximate" has been subjected to a considerable criticism since it imports nearness in time and space. While these facts are indeed material, they are not determinative. A druggist, for instance, fails to label a prescription "poison" as required by law. Two weeks later, a child drinks from the bottle which the mother, unaware of its lethal character, has left on the mantel piece. Is the druggist to be relieved of liability for his negligence simply because of the intervening lapse in time?[6]

Our Supreme Court has quoted this definition as satisfactory:

> "...that cause, which, in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. And more comprehensively, the proximate legal cause is that acting first and producing the injury either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person have reasonable

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[2] *Ibid.*
[3] Palsgraf v. Long Island R.R., 248 N. Y. 399, 162 N.E. 90 (1928).
[4] W. PROSSER, LAW OF TORTS 252 (1955 ed.).
[5] *Bacon, Maxims of the Law* 349 (1941).
[6] W. PROSSER, *supra*, note 4 at 349 (1941 ed.).

ground to expect at the moment of his act or default that an injury to some person might probably result therefrom."[7]

Justice Andrews gives his view of the nature of proximate cause on the same dissenting opinion quoted above where he says:

"The plaintiff's right must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking it injures property downstream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former."[8]

In determining liability for a tortious injury, the law looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause. It declines to permit further investigation into the chain of events, and, unless, the act complained of is the proximate cause of the injury, there is no legal liability. The rule is one of universal application,[9] but the difficulty lies in establishing a criterion by which to determine when the cause of an injury is to be considered proximate and when remote.

The search for some test or formula which will serve as a solution for all of the problems connected with proximate causation has occupied many writers and deserves special mention.

One of the first method employed was the direct results test. If a direct result is delimited to mean as one which follows from the defendant's conduct without the assistance of any force not set in motion by the defendant, the test has the virtue of ease of application as a necessary factor in determining a test for proximate causation. If A hits B and B in falling strikes his head upon a rock, the resulting injuries are direct for a pre-existing condition, the rock, is not an intervening force. If A boxes B, and a subsequent storm blows down a tree atop him, the injuries are not direct; similarly, if the unconscious B is later robbed by C. However, even under a narrow definition, the direct results of a wrongdoer's conduct may be so extensive that a court will be prompted to cut off liability. The most famous example is *Ryan v. New York Cent. Ry.*,[10] where the liability of a railroad for a negligently started fire was limited to the first building ignited. Another fault of the test is that obviously, some intervening forces should not

[7] Bataclan v. Medina, 102 Phil. 181 (1957).
[8] Palsgraf v. Long Island R.R., *supra*, note 3.
[9] Williams v. Hines, 109 Neb. 11, 189 N.W. 623 (1922).
[10] 35 N.Y. 210, 91 Am. Dec. 49 (1866).

end defendant's liability. But if the definition of what is direct is broadened to include some other forces, the ease of application of the test is lost. This test has been called unworkable under any circumstances. Those using the test of directness are merely playing with metaphors. If directness is meant to connote the comparative absence of external forces not set in motion by the defendant it is not responsive to the decisions either as a test of inclusion or exclusion.

Another test holds that the last wrongful human actor be held responsible for the damages. Although this rule still may have some validity it has been abandoned in several occasions. By the weight of authority a defendant who negligently exposes property to theft does not escape liability even though he is not the last wrongdoer.[11] The last wrongdoer is not always responsible. He may be relieved because his negligence did not extend to the particular risk; the earlier actor may be held responsible if he was under an obligation to protect the plaintiff against the latter's wrongful conduct, as in the cases where the defendant is required to anticipate and safeguard the plaintiff against the negligent, or even criminal conduct of others.

The substantial-factor-in-producing-the-harm test is another of the generalizations formulated.[12] Applied to the fact of causation alone, the test is of considerable assistance, and perhaps no better guide can be found. But when the "substantial factor" is made to include all of the ill-defined considerations of policy which go to limit liability, even when causation in fact is found, it has no more definite meaning than "proximate cause" and it becomes a hindrance rather than a help. This standard can be criticized for the insubstantial nature of the word "substantial". Another early standard proposed as a better test is that of the "justly attachable cause." The question is whether the harm which has been suffered is "justly attachable" to the defendant's conduct.[13] But justice is something which involves value judgment. It is no more than a conclusion, a standard is needed precisely to determine which result is just.

Professor Beale suggests as a standard for proximate cause that 1) the defendant must have acted (or failed to act in violation of a duty); and 2) the force thus created must (a) have remained active itself or created another force which remained active until it directly caused the result or (b) have created a new active risk of being acted upon by the active force that caused the result.[14] Many courts have sought to distinguish between the active "cause" of the harm and the existing "conditions" upon

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[11] E.g., Moon v. First National Bank, 287 Pa. 398, 135 Atl. 114 (1926).
[12] Smith, *Legal Cause in Actions of Torts*, 25 HARV. L. REV. 303 (1911).
[13] Ergerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924).
[14] Beale, *The Proximate Cause of an Act*, 33 HARV. L. REV. 633, 658 (1920).

which made the damage possible. But so far as the fact of causation is concerned, in the sense of necessary antecedents, it is impossible to distinguish between the passive situations and active forces. If the defendant spills gasoline about the premises, he creates a "condition", but his act may be culpable because of the danger of fire. When a spark ignites the gasoline the condition has done quite as much to bring about the fire as the spark. And since that is the very risk which the defendant has created, he will not escape responsibility.

Professor Bingham apparently would eliminate all proximate cause problems through carefully defining concrete duties. This test of causation is to be distinguished from the foreseeability standard used by many courts in finding the initial wrong. There, the question is: Does defendant's conduct create a foreseeable risk of harm to plaintiff? This foreseeability test has been criticized by some writers on the ground that since foreseeability has already been employed to determine negligence, it should not be used a second time to determine causation. Causation, the foreseeability of the class of harm, is used as a means of limiting the defendant's liability for the already established negligence. This foreseeability test possesses a certain amount of definiteness and fairness. Courts and writers alike have considered foreseeability with respect to many types of intervening forces — independent, dependent, animate, inaminate, criminal, intentional, negligent, and a combination of such forces.[15] And there seems to be no injustice in holding a defendant liable for that harm which could have been expected to occur.

A device of rather recent development is the risk theory. It not only explains the majority of cases past, but may provide a valuable basis for future decisions. A most effective statement of the theory has been drafted by Professor Warren A. Seavey, one of its foremost proponents:

> "Obviously, the terms " proximate", "direct", "remote", give only results and not reasons. Analyzing situations, it seems reasonably clear that the courts have thought that, in general, it would be unfair to impose liability where the ultimate harmful consequence is one that could not have been in the contemplation of one in the position of a wrongdoer, or where the risk of the event happening was not increased by the wrongdoer's action. In other words, analysis of the decisions indicates that a wrongdoer, in most cases at least, is liable for those results which are within the risk and is not responsible for those which are beyond the risk. It is of importance to the acceptance of this psychological analysis to note the fact that thus stated the rule is one which courts can use with some degree of consistency in determining when there is not liability. It is quite true that even

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[15] Green, *Are Negligence and "Proximate" Cause Determinable by the Same Test?; Texas Decisions Analyzed*, 1 TEX. L. REV. 243, 247 (1923).

> this does not always give a definite result; there are still many doubtful cases. But except in the abnormal and seldom recurring situations it is possible to predict with some degree of accuracy the limits of liability."[16]

Under this theory, the test of negligence and the test of proximate causation become one and the same. The scope of the actor's liability is determined by the same considerations as the culpability of his act. He is not liable if the harm which has occurred was not reasonably foreseeable. In *Carey v. Pure Distributing Corporation*,[17] on an August evening, Walter Carey and his wife, Lillie, were camping in the right of way of a public highway at a point about twenty feet from the main road. Lillie was lying on a bed inside their house car, Walter was lying on a cot under an awning just outside the house car, and the two were conversing through an open window. Into this scene of domestic tranquility intruded defendant's truckdriver having ten-gallon cans of oil with knowledge that a fastener on the truck was insecure. The fastener came loose as the truck passed near Camp Carey, and a can fell off. As the can struck the ground, the top blasted off and flew through the air, striking Carey and causing a severe head wound. Lillie heard the commotion, saw something flying through the air, and heard her husband cry out something to the effect that his head has caved in. Thinking he was under attack, she rushed out with pistol in hand and saw his bleeding head. She was then three months pregnant. A miscarriage followed. The Court allowed recovery for the injury to the husband and denied recovery for the injury to the wife. The theory of the Court was that defendants should have foreseen the risk that a can might fall, that the top might be blasted off, and that someone using the roadway might be injured by either the can or the top. It was too much, however, to expect foresight of injuries such as Mrs. Carey received. The court pointedly noted that they resulted alone from fright, in the manner and way, and under the circumstances above detailed.

Dean Prosser believes that each of these tests is unsatisfactory as a universal formula in determining proximate cause. He opines that proximate cause involves a series of distinct problems more or less unrelated, which should be determined upon different considerations as:

a) the problem of causation in fact: What part has the defendant's conduct played in bringing about the result?

b) the problem of apportionment of damages among causes.

c) the problem of liability for unforeseeable consequences: To what

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[16] Webb, *Proximate Cause: A Checkered Landscape in Tennessee*, 23 TENN. L. REV. 1015, 1018 (1955) citing SEAVEY, COGITATIONS ON TORTS 34 (1954).

[17] 133 Tex. 31, 124 S.W. 2d 847 (1939).

extent should the defendant be liable for results which he could not reasonably have been expected to foresee?

d) the problem of intervening cause: Should the defendant be relieved of liability by some new cause of external origin coming into operation at a time subsequent to his conduct and superseding his responsibility?

e) the problem of shifting responsibility: Is there another person to whom the defendant was free to leave the duty of protecting the plaintiff?[18]

## PROBLEM OF CAUSATION IN FACT

Causation in fact is a prerequisite to liability in any case. Proximate cause comes into play only after cause in fact has been established. Causation is a fact.[19] It is a matter of what has in fact occurred. A cause is a necessary antecedent: in a very practical sense the term embraces all things which have so far contributed to the result that without them it would not have occurred. The causal relation issue does not initiate an explanatory search for all the causes that contributed to the victim's injury. It does not initiate or search for the why of the defendant's conduct, i.e., search for the reason, impulse or other accounting in the defendant's conduct. Nor does it initiate a search for all the causes or the proximate or legal cause. It is well to understand that it is not important to the causal relation issue that defendant's conduct in whole or in part was unlawful, lawful, intentional, unintentional, negligent, or non-negligent. The moment some moral consideration is introduced into the inquiry, the issue is no longer one of causal relation. Causal relation is a neutral issue, blind to right or wrong.[20] It is so easy to think and speak of defendant's negligence as the cause of a victim's hurt that it is frequently overlooked that causal relation is the beginning point of liability. It must be established or tentatively assumed before issues involving duty, negligence, damages, and the defensive issues can be determined. In *Lilius v. Manila Railroad Co.*,[21] Lilius, accompanied by his wife and daughter, was driving his car heading towards Pagsanjan, Laguna. At about 7 or 8 meters from the railroad crossing at Dayap, he saw a truck parked on the left side of the road with several people who have alighted from the truck walking on the opposite side. He slowed down to about 12 miles an hour and sounded his horn for the people to get out of the way. While his attention was thus occupied, he heard two short whistles and immediately thereafter his car was hit by a passing train dragging it at a distance of about 10 meters. The train was not able to stop until about 70 meters from the crossing. The approach of the train could

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[18] W. PROSSER, *supra*, at 257 (1955 ed.).
[19] *Id.* at 219.
[20] Green, *supra*, note 15.
[21] 59 Phil. 758 (1934).

not be noted because there were houses, shrubs and trees along the road. Lilius, his wife and daughter were injured and action was instituted to recover damages for such injuries. The Supreme Court held that "after consideration of the circumstances of the case, this Court is of the opinion that the accident was due to negligence on the part of the defendant company, for not having had on that occasion any semaphore at the crossing at Dayap, to serve as a warning to passers-by of its existence in order that they might take the necessary precautions before crossing the railroad; and, on the part of the employees — the flagman and switchman, for not having remained at his post at the crossing in question to warn passers-by of the approaching train; the station master for failure to send the said flagman and switchman, to their post on time; and the engineer, for not having taken the necessary precautions to avoid an accident, in view of the absence of such flagman and switchman, by slackening his speed and continuously ringing the bell and blowing the whistle before arriving at the crossing." In this case, the negligence of the railroad company and of its employees was the necessary antecedent to its liability to the injured spouses. The determination of the existence of negligence was a question of fact which the court had to determine considering the circumstances of the case.

On the other hand, an act or omission is not regarded as a cause of an event if the particular event would have occurred without it. In *Manila Electric Co. v. Bemoquillo,*[22] Efren Magno went to repair a "media agua" of the house of his brother-in-law on Rodriguez Lanuza Street, Manila. While making the repair, a galvanized iron roofing which he was holding came into contact with the electric wire of the petitioner Manila Electric Co. strung parallel to the edge of the "media agua" and 2-1/2 feet from it. He was electrocuted and died as a result thereof. The electric wire was already at the premises at the time the house was built. The distance of 2--1/2 feet of the "media agua" from the electric wire was not in accordance with city regulations which required a distance of 3 feet but somehow or another the owner of the building was able to have the construction approved. In an action for damages, the Supreme Court held:

> "But even assuming for a moment that under the facts of the case the defendant electric company could be considered negligent in installing its electric wires so close to the house and 'media agua' in question, and in failing to properly insulate those wires, nevertheless, to hold the defendant liable in damages for the death of Magno, such supposed negligence of the company must have been the proximate cause of the accident, because if the act of Magno in turning around and swinging the galvanized iron sheet with his hand was the proximate cause of the electrocution, then his heirs may not recover. To us it is clear that the principal and proximate cause of the electrocution was not the electric wire, evidently a remote

[22] 99 Phil. 117 (1956).

> cause, but rather the reckless and negligent act of Magno in turning around and swinging the galvanized iron sheet, considering the latter's length of 6 feet."

The "but for" or *"sine qua non"* rule although it is frequently stated to be a formula for determining proximate cause is phrased primarily in terms of causation in fact. Restricted to the question of causation alone, and regarded merely as a rule of exclusion, the "but for" rule serves to explain the greater number of cases.[23] But there is one type of situation where it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed. Two motorcycles simultaneously pass the plaintiff's horse, which is frightened and runs away — either one alone would have caused the fright. A stabs C with a knife, and B fractures C's skull with a rock; either wound would be fatal, and C dies from the effects of both. In these cases, it is clear that neither can be absolved from responsibility upon the ground that the harm would have occurred without it, or there would be no liability at all. The Minnesota court in disposing a case of this type applied a broader rule which has found general acceptance. The defendant's conduct is a cause of the event if it is such a substantial factor, a material element in bring it about. Whether it is such a substantial factor is for the judge to determine, unless the issue is so clear that reasonable men could not differ.[24] Such a test is clearly an improvement over the "but for" rule. It disposes of the cases mentioned above, and likewise of the difficulties presented by the type of case where a similar, but not identical result would have followed without the defendant's act. But in the great majority of cases, it amounts to the same thing. Except as indicated, no case has been found where the defendant's act could be called a substantial factor when the event occurred without it. In the same way we can say that seldom will cases arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.

## Problem of Apportionment of Damages

The presence of factual causation may provide an adequate foundation for deciding the average negligence case with but one actor performing a single act which produces a single indivisible result. The problem becomes difficult when any one of these factors becomes plural. Assume for example, that there are two concurring causes which either in itself would be sufficient to produce the particular result. If the plaintiff himself has performed one of the concurring acts, he is, of course, barred from recovery

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[23] W. Prosser, *supra,* note 4 at 220 (1955 ed.)
[24] Walton v. Blauert, 256 Wis. 125, 40 N.W. 2d 545 (1949).

by his "proximate" contributory negligence. In *Bernardo v. Legaspi,*[25] the automobiles of the plaintiff and the defendant collided. The collision was due to the negligence of the drivers of both cars. In dismissing both the plaintiff's complaint and the defendant's cross-claim, our Supreme Court held: "Where the plaintiff in a negligence action, by his own carelessness contributes to the principal occurrence, that is, to the accident, as one of the determining causes thereof he cannot recover. This is equally true of the defendant; and as both of them, by their negligent acts, contributed to the determining cause of the accident, neither can recover." If the two actors are both defendants, then in the usual situation they are held as joint tortfeasors for the plaintiff's entire damage, since apportionment of a particular part of the injury to each defendant is practically impossible.[26] Where two causes concur to bring about the plaintiff's damage, for one of which no one is responsible, the defendant will be held liable for the entire injury. So that, in *Columbia & Big Bigby Turnpike Co. v. English,*[27] where the plaintiff's horses, frightened at the sight of a covered wagon which had gone off on the other side of the road, pulled his buggy through a negligently unfenced space on the shoulder of a bridge approach, the bridge company was held liable for all the resulting injuries.

In general, apportionment of damages is not made:

a) among tortfeasors who have acted in concert.

b) in cases of vicarious liability.

c) where two or more defendants have violated a common duty.

Apportionment is commonly made:

a) where some logical basis can be found for distributing damages of the same kind among different causes, whether they be simultaneous or successive.

b) where potential damage to be expected from an innocent cause has reduced the value of the loss inflicted by the wrongdoer.

Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation but of the feasibility and practical convenience of splitting the total harm into separate parts which may be attributed to each of two or more causes. Where a logical basis can be found for some rough practical apportionment which has in fact caused, it may be

[25] 29 Phil. 12 (1914).

[26] Webb, *supra,* note 16 at 1025 citing the case of Tenn. Cent. R. Co. v. Vanhoy, 143 Tenn. 312, 226 S.W. 225 (1917).

[27] 139 Tenn. 631, 202 S.W. 925 (1918).

expected that the division must be purely arbitrary. There is no practical course except to hold the defendant liable for the entire loss, notwithstanding the fact that other causes have contributed. The distinction is one between injuries which are reasonably capable of being divided, and injuries which can not. If two defendants struggling for a single gun succeed in shooting the plaintiff there is no reasonable basis for dividing the injury and each will be liable for all of it. If they shoot him independently, with separate guns and he dies, there can still be no division for death cannot be apportioned except by an arbitrary rule. If they merely inflict separate wounds, and he survives, a basis for division exists, because it is possible to regard the two wounds as separate injuries. There will be obvious difficulties of proof as to the apportionment of certain elements of damages such as physical and mental suffering and medical expenses, but such are not insuperable. It is better to attempt some rough division than to hold one defendant for the wound inflicted by the other. Upon the same basis, if two defendants each pollute a stream with oil, it is possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages. It is not, however, possible if the oil is ignited, and burns the plaintiff's barn. In general, it may be said that entire liability will be imposed only where there is no reasonable alternative.[28] Each must turn upon its own particular facts. Some classifications of the more common types of situations will be discussed separately. These are:

a) *Concerted action.*

Where two or more persons act in concert, it is well established both in criminal and civil cases that each will be liable for the entire result. Such concerted wrongdoers were considered joint-tortfeasors" by the early common law. In legal contemplation there is a joint enterprise and a mutual agency, so that the act of one is the act of all, and liability for all that is done must be vested upon each. It follows that there is no logical basis upon which the court may be permitted to apportion the damages.[29]

b) *Vicarious liability.*

The liability of a master for the acts of his servant or that of a principal for those of his agent, within the scope of the employment or agency stands upon much the same footing. When an injury is caused by the negligence of an employee, there instantly arises a presumption that the employer has been negligent either in the selection of

[28] W. PROSSER, *supra*, note 4 at 327-328 (1941 ed.).
[29] *Id.* at 329.

his employees (*culpa eligiendo*) or in the supervision over their acts (*culpa in viliganda*). This presumption is, however, only a disputable presumption and not a conclusive one. Consequently, such presumption of negligence may be rebutted. This is provided in the last paragraph of article 2180 of the New Civil Code which reads: "The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage." In *Walter Smith & Co. v. Cadwallader Gibson Lumber Co.*,[80] the steamer Helen C, belonging to defendant, in the course of its maneuvers to moor at the plaintiff's wharf in the port of Olutanga, Zamboanga, struck said wharf, partially demolishing it and throwing the timber piled thereon into the water. The wharf was an old one and at the time of the accident was heavily loaded with timber belonging to the plaintiff. Plaintiff brought an action for damages against the defendant for the damage to the wharf and the loss of the timber piled thereon. The court held: "The defendant contends that the captain and all the officers of the steamer Helen C were duly licensed and authorized to hold their respective positions at the time when the wharf in question collapsed and that said captain, officers, and all the members of the crew of the steamer had been chosen for their reputed skill in directing and navigating the steamer safely, carefully and efficiently. The evidence shows that Captain Lasa at the time the plaintiff's wharf collapsed was a duly licensed captain, authorized to navigate and direct a vessel of any tonnage, and that the appellee contracted his services because of his reputation as a captain, according to Cadwallader. This being so, the Court held that the presumption of liability against the defendant has been overcome by the exercise of the care and diligence of a good father of a family in selecting Captain Lasa.

However, in case the fault or negligence of the employee results in a breach of contract, the defense of due diligence in the selection of his employee and in the supervision over his acts, is not available.[81] Such fact however, will give the Court discretion to mitigate the employer's liability according to the circumstances of the case in accordance with Article 1172 which provides: "Responsibility arising from negligence in the performance of every kind of obligation is also demandable, but such liability may be regulated by the courts, according to the circumstances." In *Del Prado v. Manila Electric Co.*,[82] the plaintiff attempted to board a streetcar belonging to the defendant at

[80] 55 Phil. 517 (1930).
[81] H. JARENCIO, TORTS AND DAMAGES IN PHILIPPINE LAW 57 (1968 ed.).
[82] 52 Phil. 900 (1929).

a point not intended for stopping. He raised his hand as an indication to the motorman of his desire to board the car and in response to which the motorman eased up a little without stopping. The plaintiff held the handpost with his left hand and placed his left foot upon the platform. Before the plaintiff could be secured in his position, the motorman applied the power and the car gave a slight lurch forward. The sudden impulse to the car caused the plaintiff's foot to slip and he fell to the ground with the result that his right foot was caught and crushed by the moving car. The Court held that the motorman was negligent in accelerating the speed of the streetcar before the position of the intending passenger in the car had become secure. The relation between the carrier of passengers for hire and its patrons is of a contractual nature and breach of safety is a breach of obligation under Article 1101 and related provisions. The defense indicated in the last paragraph of Article 1903 of the Civil Code is not available to the master when his servant is guilty of a breach of duty under Article 1101 and related provisions of said Code.

c) *Common duty*

Two defendants may be under a precisely similar duty to exercise care to prevent a particular occurrence. The most obvious illustration is the case of the fall of a party wall which each of two adjoining landowners was required to maintain. Likewise, two or more defendants may each be under an obligation to keep a railway track or a highway in repair. When both defendants fail to perform their obligation and harm results, each will be liable for the event, and here likewise there is no reasonable basis for any division of damages.[33]

d) *Single indivisible result*

Certain results by their very nature are incapable of any practical division. Death is such a result, and so is a broken leg, a sinking ship and a burned house. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss. In this case each may be charged with all of it. Here again, the typical case is that of two vehicles which collide and injure a third person. The duties which are owed to the plaintiff by the defendants are separate and may not be identical in character and scope. The entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made.

[33] W. PROSSER, *supra*, note 4 at 329 (1941 ed.).

Such entire liability is imposed where both acts were essential to the injury, as in the vehicle collision suggested above and in case of merging fires which burn a building. It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the harm. One may leave combustible material, and the other set it afire. Or one may leave a hole in the street and the other drive into it. Liability in such a case is not a matter of causation but of the effect of the intervening agency upon culpability. If the defendant is liable at all, he will be liable for all the damage caused.[34]

Certain other results, by their nature are easily divisible. If two defendants independently shoot the plaintiff at the same time and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital but it is possible as a practical matter to regard the two wounds as separate wrongs. Mere coincidence in time does not make the two one tort, nor does similarity of design or conduct, without concert.[35] Evidence may be lacking upon which to apportion the medical expenses or the plaintiff's sufferings. But this does not mean that one defendant should be liable for the damage inflicted by the other.

### PROBLEM OF INTERVENING FORCES

Where an independent unforeseen cause intervenes between the original default and the final result is sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other, remote cause. However, if the intervening cause is incidental merely, the law looks to the original wrongful act which caused the wrong.[36]

It has been said that in order to constitute a superseding act which will relieve the first actor from liability, the second event must be "conscious", "efficient" or "independent."[37] All of this can mean little more than that the interposition of an intervening force will not operate to discharge the author of the original act unless it appears that his conduct has been rendered insignificant and insubstantial, on account of other factors in producing the plaintiff's injury.

In considering intervening causes, it is convenient to classify cases ac-

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[34] *Id.* at 330.

[35] Dickson v. Yabes, 194 Iowa 910, 188 N.W. 948, 27 A.L.R. 533 (1922).

[36] 86 C.J.S. *Torts*, Sec. 28(a) (1954) citing Johnston v. Union Furniture Co., 31 Cal. App. 2d 234, 87 P. 2d 917 (1939) and Cavanagh v. Centerville Block Coal Co., 131 Iowa 700, 109 N.W. 303, 7 L.R.A. (N.S.) 907 (1906).

[37] Webb, *supra*, note 16 at 1026-27 citing Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W. 2d 840 (1946).

cording to the foreseeability of the intervening force and the foreseeability of the result. It cannot be reiterated too often that any such classification of the cases is possibly useful only to focus attention upon the problems involved. No mechanical solution is possible and the matter cannot be reduced to a set of rules.

a) *Foreseeable intervening force*

If the intervening force is one which in ordinary human experience is reasonable to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent because he failed to guard against it. In *Astudillo v. Manila Electric Co.*,[38] there was located an electric light pole in one of the gates of Intramuros, known as the Santa Lucia Gate. This place had become a public place where persons came to stroll, to rest, and enjoy themselves. The pole was located close enough to this public place that a person by reaching his arm out the full length, would be able to take hold of one of the wires. At about 6 o'clock in the evening, a group of boys went to the place. One of the boys, for some unknown reason, placed one foot on a projection, reached out and grasped a charged electric wire. Death resulted almost instantly. The Court here held that

> "...considering that electricity is an agency, subtle and deadly, the measure of care required of electric companies must be commensurate with or proportionate to the danger. The duty of exercising this high degree of diligence and care extends to every place where persons have a right to be. The poles must be so erected and the wires and appliances must be so located that persons rightfully near the place will not be injured. Particularly must there be proper insulation of the wires and appliances in places where there is likelihood of human contact therewith."

The risk created by the defendant does not include the intervention of the foreseeable negligence of others. The standard of reasonable conduct may require the defendant to protect the plaintiff against that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated. One of the circumstances of the particular case may indicate the danger of unusual negligence as when children are in the vicinity and conduct is to be expected of them which would not be foreseen on the part of the adult.

b) *Normal intervening force*

The reasonable attempt of an individual threatened with harm is to escape it, as by leaping from a vehicle to avoid a collision, will not relieve the original wrongdoer of liability, whether the act be instinctive or after time for reflection. This is true also whether the actor hurts himself or another of

[38] 55 Phil. 427 (1930).

his rights or privileges.[39]

Upon the same basis efforts to protect the personal safety or even the property of another will not supersede the defendant's liability. "The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man."[40] A similar group of cases hold the defendant liable for the results of medical treatment of the injured victim. Even where such treatment is itself negligent because of lack of proper skill or care, recovery for its consequences is permitted. It would be an undue compliment to the medical profession to say that bad surgery is not part of the risk of a broken leg.[41] So long as the plaintiff himself has exercised reasonable care in his selection of a physician, the defendant will be liable for all ordinary forms of professional negligence, although not for such unusual misconduct as the infliction of an intentional injury or the performance of an entirely different operation. If the injury renders him peculiarly susceptible to the disease as where an open wound becomes infected, there is little difficulty in holding the defendant for the consequences of the disease and its treatment. On the other hand, when the disease is one such as smallpox, which appears equally likely to attack a person in good health, it is not considered a normal incident of the risk, even though its effects are more serious because of the lowered vitality. Some difficulty arises in cases where the injured person becomes insane and commits suicide. Although, there are cases to the contrary,[42] it seems the better view that when his insanity prevents him from realizing the nature of his act or controlling his conduct, his suicide is to be regarded either as a direct result and no intervening force at all, or as a normal incident of the risk for which the defendant will be liable.[43] If however, suicide is committed during a lucid interval but his life has become unendurable to him, it is agreed that his voluntary choice is an abnormal thing, which supersedes the defendant's liability.

c) *Unforeseeable results of foreseeable forces*

The limitation of liability to cover only those intervening forces which lie within the scope of the foreseeable risk is based upon the fact that the independent forces which may intervene to change the situation created by the defendant be infinite. As a practical matter responsibility cannot be

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[39] W. PROSSER, *supra*, note 4 at 271 (1955 ed.).

[40] Mr. Justice Cardozo in Wagner v. International Ry. Co., 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1 (1921).

[41] Pullman Palace Car Co. v. Bluhm, 109 Ill. 201, 50 Am. Rep. 601 (1884) where the Court held that: "The liability to mistakes in curing is incident to a broken arm," and where such mistakes occur (the injured party using ordinary care), the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm.

[42] Scheffer v. Washington City, Virginia Midland & G.S.R. Co., 105 U.S. 249, 26 L. Ed. 1070 (1881); 4 Ky. Law Rep. 106; Salsedo v. Palmer, 278 F. 92, 23 A.L.R. 1262 (1921).

[43] Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 P. 436 (1930).

carried to such lengths as storms, floods, etc. The more unusual extraordinary forces of negligent conduct of adults against which the defendant was under no obligation to take precaution, have been held to be superseding causes: the reckless or unusual driving of vehicles, tampering with dangerous articles, with stationary vehicles, or other articles left unguarded, the unreasonable stampede of a crowd of frightened men.[44] In *Gaita v. Dy Pac & Co.*,[45] defendant was a corporation dealing in lumber. One of its delivery trucks loaded with lumber was parked by its driver who went to look for a telephone in order to inquire from the defendant what to do with said lumber as the person who ordered the lumber did not like to pay ₱141 for it but only ₱41 since he had already paid the defendant ₱100. During the absence of the driver, two persons, whose identity had never been ascertained, started and drove the loaded truck into the plaintiff's store causing damage to the amount of ₱250. In deciding the case, the Court held that the defendant was not negligent. The Court said:

> "It is claimed by the plaintiff that the source of the defendant's liability is the negligence of its employee; the chauffeur who left the truck parked along Velasquez street when he went to talk by telephone to the defendant corporation, and the negligence is said to consist of the failure on the part of the chauffeur to take along with him the key to the ignition switch, a lack of precaution which made it possible for other persons to start and drive the truck into the plaintiff's store. Assuming, that such failure or lack of precaution constitutes negligence, nevertheless, in order that the responsibility contemplated in Article 1903 (now Article 2180) of the Civil Code invoked by the plaintiff may arise, damages resulting from such negligence must be those foreseen, and there should be direct and proximate connection of cause and effect between the negligence and the resulting damages, or the negligence should be the proximate cause of such damages. It cannot be said that a chauffeur who leaves the key to the ignition switch of a motor car, expects that someone will turn the ignition switch on, start the motor, and drive it into the premises of another."

Almost invariably, this case presents no issue of causation in fact since the defendant has created a situation acted upon by another force to bring about the result. To deal with cases like this in terms of proximate cause is only to avoid the real issue. It is generally held that extraordinary unforseeable forces of nature operate as supervening causes.[46] Though the force be extraordinary, the actor is not relieved from liability for the consequences of his negligence if nature has operated merely to increase or accelerate the harm which otherwise would have resulted from his act. If the intervening force is not extraordinary it definitely is considered to be foreseeable and does not affect the defendant's liability.

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[44] W. PROSSER, *supra*, note 4 at 275 (1955 ed.).
[45] G.R. No. 44605, October 23, 1937, 37 O.G. 2517 (1939).
[46] W. PROSSER, *supra*, note 4 at 275 (1955 ed.).

Where the act of a third person is done under the direction of the defendant ordinarily it will not be regarded as superseding cause. Illustrative of this is where the second actor, under the negligent direction of a golf course starter, carelessly drives a golf ball into the plaintiff's eyes. Likewise, the defendant will be held liable for the plaintiff's entire injuries even though a part of them may be allocable to the negligence of the physician treating the injuries immediately inflicted by the defendant's act provided that the negligence of the physician is of a foreseeable character. In *Act-O-Lane Gas Service Co. v. Hall,*[47] the defendant gas company had contracted to furnish the plaintiff's home with clean dry heat. The propane heaters installed produced grossly excessive moisture which damaged the plaintiff's house and furniture and caused his wife to contract pneumonia. Damage to the house itself and perhaps the causation of some illness to the occupants was foreseeable. The death of the homeowner's wife, however, was hardly to be expected, yet damages were awarded to both for the property damage and the wife's death.

Where the type, rather than the extent or manner of harm is unforeseeable, the defendant may be relieved from liability even though his culpability has been established.[48] For example, in Tennessee, and many other states the violation of a statute or ordinance, often is negligence per se, but recovery may still be denied if the harm which has occurred was not a foreseeable result of the breach of statutory duty.[49] In other words, the violation of the statute or ordinance is not found to be the proximate cause of the injury if it is not one of the type which the statute or ordinance was designed to prevent. In *Larrimore v. American National Ins. Co.,*[50] there was a statutory prohibition of the setting out of poison "except in a safe place." In violation of that statute, a rodent eradicator was supplied by a hotel keeper to his tenant who operated a coffee shop in the hotel. The poison, which contained phosphorous, was placed near a coffee burner and was ignited when the plaintiff, a waitress in the coffee shop, lighted the burner. The waitress was denied recovery, since the statute was framed to prevent children or animals from taking the poison internally.

d) *Foreseeable results of unforeseeable forces*

Suppose that the defendant is negligent because his conduct threatens a result of a particular kind which will injure the plaintiff and an intervening force which could not be anticipated changes the situation but ultimately produces the same result— what would be the liability of the defendant?

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[47] 35 Tenn. App. 500, 248 S.W. 2d 398 (1951).
[48] MORRIS, TORTS, 179-187 (1953).
[49] Kingsul Theatres, Inc. v. Quillen, 29 Tenn. App. 248, 196 S.W. 2d 316 (1946); see Webb, *supra,* note 16.
[50] 184 Okl. 614, 89 P. 2d 340 (1939).

The problem is well illustrated by a case where the defendant failed to clean the residue out of an oil barge, tied to a dock, leaving it full of explosive gas.[51] This was of course negligence, since fire or explosion resulting in harm to any person in the vicinity, was to be anticipated from any one of several possible sources. A bolt of lightning struck the barge, exploded the gas, and injured workmen on the premises. The defendant was held liable. If it be assumed that the lightning was an unforeseeable intervening force still the result itself was to be anticipated and the risk of it imposed upon the defendant the original duty to use proper care. Many cases have held the defendant liable where the result which was to be foreseen was brought about by forces that were unforeseeable: a ladder left standing in the street blown down by an unforeseeable wind; an obstruction in the highway with which a runaway horse collides.[52]

Yet there are other cases in which it seems equally clear that the defendant should not be liable. What if A knocks B down and leaves him lying unconscious in the street where he may be run over by negligently driven automobiles and C, a personal enemy of B, discovers him there and intentionally runs him down? When the defendant excavates a hole in the sidewalk into which someone might fall, he may be held liable if the plaintiff is negligently pushed into it by stranger, but what if he is pushed deliberately?

The difference between the two group of cases is that in the latter type of situation the defendant, even if he had been forewarned of the intervening act would have been free to shift the responsibility to the actor. He might say as a reasonable man that malicious or criminal acts, or misconduct after another has fully discovered the danger, were not his concern, whereas, he might still be responsible for inadvertent or ignorant blunders if he could foresee them. Where he would be relieved of responsibility even if the act were to be anticipated he should be no less relieved when it was unforeseeable even though the result is part of the result of the risk he has created.

### Problem of Foreseeability

A few courts have intimated that once the defendant is shown to be negligent he is liable for all the consequences of his acts, regardless of whether they were to be reasonably anticipated or not. This minimizes the foreseeability factor when considering liability for remote consequences. In general, however, the social desirability of limiting the extent of the liability for a negligent act has been recognized. No matter how stated, whether in terms of natural and probable consequences, proximate cause, foreseeability or duty — the test is the same. Was the result within the risk? Was the injury to someone foreseeable? If the answer is that no harm was

[51] Johnson v. Kosmos Portland Cement Co., 64 F. 2d 193 (1933).
[52] W. Prosser, *supra*, note 4 at 279 (1955 ed.).

to be reasonably anticipated to anyone, the inquiry need go no further. The defendant was not negligent. If the answer is in the affirmative, the defendant may be held liable for the results of his acts, regardless of how unforeseeable or surprising they may be. Where boundaries to liability behind a certain point have been erected two questions remain to be answered even after the defendant's negligence toward someone has been established. 1) Was injury to this particular plaintiff foreseeable? 2) Were the consequences sufficiently foreseeable?[53]

a) *The unforeseeable plaintiff*

In *Palsgraf v. Long Island R.R. Co.*,[54] the plaintiff, Helen was standing on a depot platform when two men, one carrying a small package attempted to board a train already moving away from the station. The package-bearing passenger jumped aboard the car, but appeared unsteady as if about to fall. A guard aboard the car came to his assistance and another guard on the platform pushed him from behind. The package, which concealed fireworks, was dislodged. The fireworks exploded causing a scale at the other end of the platform to fall, striking Mrs. Palsgraf. The court found no liability on the part of the railroad. To be sure its employees may have been negligent but they were negligent only toward the passenger boarding the train, and not towards Mrs. Palsgraf who was standing on the platform some feet away. The dissenting justice felt that duty was not simply a matter of relation between the actor and the injured party, but that "everyone owes a duty to the world at large, the duty of refraining from those acts which may unreasonably threaten the safety of others". Any limitation on liability, he believes must be one of "proximate cause" and the remoteness of the consequences and that this limitation was not to be solved by any one consideration and not by foreseeability alone.

b) *Unforeseeable consequences*

It has been said that the prevailing rule is that, once negligent, the wrongdoer is liable for all the direct consequences of his act, regardless of how unforeseeable the extent of harm or the manner in which it has occurred might be.[55] This might appear to the inconsistent with the risk theory and several writers have used this apparent conflict in attacking the *Palsgraf* case. However, the two actually harmonize and work to form a useful rule for determining liability. This rule is that if some harm to the particular plaintiff was foreseeable then the defendant is liable for whatever harm has in fact directly occurred, so long as that harm is of the type which might reasonably be expected to occur, regardless of the extent of harm. Thus formulated, the principle evolved insulates the actor from liability for highly

[53] SALMOND, LAW OF TORTS 137 (8th ed., 1934).
[54] *Supra*, note 3.
[55] Webb, *supra*, note 16.

unusual consequences, although it may impose responsibility in rare cases for damages of an extraordinarily large amount. The qualification that the harm must be direct protects the defendant from liability where intervening forces have superseded the original conduct in producing the harm.

From the discussion above it appears that it is not required that the wrongdoer foresee with great particularity the manner in which his conduct will operate to produce harm but merely that some harm be foreseeable to a reasonable man.

Foreseeability is considered an important element in deciding if the defendant owed the plaintiff a duty. In an appreciable number of jurisdictions it is also an element in deciding if the defendant's conduct was the proximate cause of the plaintiff's injuries.[56] In the latter type of jurisdiction an opinion written in terms of foreseeability is ambiguous unless the court by the use of precise and consistent terminology, makes it clear whether the court is dealing with the concept of duty or of proximate cause. Failure to do this makes it difficult to discover the decisive factor in the court's decision. The question of whether a duty exists is always a question of law, and sometimes a mixed question of fact and law.

Realizing the inherent difficulties which can arise from the use of the same criterion to determine the existence of both duty and proximate cause, prominent legal scholars have vigorously criticized the requirement of foreseeability as an element of proximate cause.[57] It has also been rejected by the Restatement of Torts which recommends the analysis of such problems in terms of duty.[58] Indicating a trend towards this view is a recent Pennsylvania case which stated: "We are in accord with the doctrine that foreseeability has no place where we are considering proximate or legal cause. Foreseeability however, is an element as above indicated, when the question of negligence is being considered.[59]

The *Williams* case[60] would seem to make it apparent that despite this current of opinion New York still regards foreseeability of harm as an element of proximate cause whenever another force has joined with the negligence of the defendant in producing the plaintiff's injuries. That the court can point to well-established and respected authority in taking this position is not to be doubted. Justice Cardozo, indicates in *Bird v. St. Paul Fire & Marine Ins. Co.*,[61] that he too accepted foreseeability of harm as a test, for both the element of duty and the element of proximate cause represents senseless duplication of effort. The basis for this objection, is that when the court determines the extent of the defendant's liability in terms of proximate cause

[56] Lynch, *supra*, note 7.
[57] *Ibid.*
[58] Dahlstrom v. Shrum, 368 P. 423, 84 A. 2d 289 (1951).
[59] *Ibid.*
[60] Williams v. State, 308 N.Y. 548, 127 N.E. 2d 545 (1955).
[61] 224 N.Y. 47, 120 N.E. 86 (1918).

and makes foreseeability of harm the test of that proximate cause, it in effect decides if the defendant owed the plaintiff a duty. It would be easier, therefore, for the court to treat the problem as a duty issue and to limit the concept of foreseeability of harm to the question of the existence of duty.

More recent cases have rejected "direct" and accepted "foreseeability" for the injuries as the measure of damages.[62] The Privy Council has rejected the formula to damage which runs in these terms: "If a real risk can properly be described as remote it must then he held to be not reasonably foreseeable." Instead it postulated its formula in this way: "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched and if the criterion is to be what that reasonable man would have done in the circumstances then surely he would not neglect such a risk if action to eliminate it presented the difficulty involved no disadvantage and required no expense."

It is suggested that a combination of the direct result test, narrowly defined, and the foreseeability test would be a useful tool in solving causation problems in intentional torts. A court would first determine if the harm was a direct result of the defendant's conduct. If the court finds that the harm was direct, liability will attach. Only if this finding cannot be made need the court undertake the difficult process of determining whether the intervening force was foreseeable, and here it has at hand analogy to the negligence case.[63]

The workings of the proposed standard can be illustrated by applying it to the following case. A finds himself lost while hunting, stumbles upon B's dilapidated cabin, enters and non-negligently lights a fire in the fireplace. Because of a defective flue, the cabin catches fire. B at this moment, entering the area, sees the fire and runs towards it, falls, and breaks his leg. A rescues B and in B's car starts for town to obtain medical assistance. Though carefully driving, B is involved in an accident with reckless driver C. Eventually an ambulance delivers B to the hospital where a doctor mistaking him for D amputates his right arm. A literal reading of many tresspass cases would suggest that A would be liable for the initial tresspass and the damage to the cabin. The damage is a direct result of A's conduct for the defective flue, as an existing condition, cannot be considered an intervening force. All other harm is the product of intervening forces and must be judged by the foreseeability standard. Since the cabin has an isolated location, it is unforeseeable that B or anyone else would run forward to light the fire. The chain of causation is therefore cut, and since A has committed no other tort,

[62] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., Ltd., 1 All E.R. 404, 413 (1961).

[63] Comment, *The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences*, 14 STANFORD L. REV. 362 (1962).

cannot be made liable.[64]

The causation problems in the emotional distress area can be settled in this manner. If A intentionally inflicts emotional distress on B and B miscarries, A is liable for the harm as a direct result. The physical change within B is not an intervening force for it was set in motion by A's conduct. If B instead commits suicide liability will hinge upon whether such a reaction is foreseeable. B's conduct is an intervening force, even if B is insane at death, under the narrow definition of direct result. The foreseeability of B's suicide would depend upon the degree of outrageousness of A's initial conduct, the apparent mental stability of B at the time of the shock, and the like.[65]

This direct result-foreseeability standard is not an answer to all causation problems in intentional torts. A court may still, in a case where the harm is directly caused, wish to cut off liability for policy reasons. This is particularly true in emotional distress situations, where the defendant's misconduct under today's more relaxed standards is sufficient to constitute tort, produces physical and mental damages in an unstable plaintiff out of all proportion to the wrong inflicted. On the other hand, there may be cases where the intervening force, is unforeseeable but the public good dictates that defendant be held liable. The court should have a moderately feasible standard available in place of the omnipresent dictum that an intentional tortfeasor must pay for all the harm he actually causes.

### Problem of Shifting Responsibility

May the defendant be required to take precautions for the plaintiff's safety when he is free to assume that someone else will do it or will be fully responsible in case he does not? This is the type of question that comes up in a large number of negligence cases that have turned on the problem of what might be called shifting responsibility. Thus, a common laborer, hired to dig a ditch in the street, may ordinarily leave it to his superiors to set out a red lantern to warn traffic,[66] and one who deposits cotton in a warehouse is not required to keep anyone from coming near the pile of bales.[67] A surgeon may leave routine duties following an operation to competent hospital attendants,[68] and an automobile driver may of course have his car overhauled by a reliable garage rather than do it himself.[69] In the same way, a landlord who leases premises without a covenant to keep them in repair is not

[64] *Ibid.*
[65] *Ibid.*
[66] Jessup v. Sloneker, 142 P. 527, 21 A. 988 (1891).
[67] W. Prosser, *supra*, note 4 at 250 (1941 ed.) citing Murphy v. Caralli, 3 H. & C. 461 (1864).
[68] Harris v. Fall, 177 F. 79, 27 L.R.A. (N.S.) 1174 (1910).
[69] Phillips v. Britannia Hygienic Laundry Co., 1 K.B. 539, aff'd, 2 K.B. 832 (1923).

responsible for injuries due to defects unknown to him at the time,[70] and one who employs an independent contractor to do work on his premises may leave all responsibility to him, and is not liable for his negligence.[71]

The above-mentioned cases may not be absolutely applicable where the risk is unduly great and it would not be reasonable care to rely upon the responsibility of others. In which case, therefore, the defendant is not relieved, by his reliance upon another, of responsibility of a risk he has created. Thus, the operating surgeon may be required to keep an eye on the count of sponges himself, rather than leave it to the nurse.[72] If the premises are leased in such condition that they are unreasonably dangerous to those outside of them, or to the general public who are known to be about to be admitted to them, the landlord is not free to rely upon the tenant, and even the tenant's agreement to repair will not relieve him, if injury is to be anticipated before the repairs will be made.[73] The employer of an independent contractor may be required to take precautions against his negligence if the work to be done is such that unreasonably dangerous conditions are likely to arise.[74] In much the same way, a carrier who turns over a defective car may not leave it to the shipper or connecting carrier to inspect it for the benefit of employees who may be hurt.[75]

To prescribe a hard and fast rule to govern cases of this nature would be arbitrary. As in all other negligence cases, the circumstances of each particular case must be taken into account. In this connection, the competence and reliability of the person upon whom reliance is placed, his understanding of the situation, the seriousness of the danger and the length of time elapsed, and above all the likelihood that proper care will not be used, and the ease with which the actor himself may take precautions, are factors that must be taken into account.[76]

Reference to a standard may be necessary, in which case the following generalization may be useful: When the defendant is under a duty to act reasonably for the protection of the plaintiff, and may anticipate that a third person may fail to use proper care if the responsibility is transfered to him, and that serious harm will follow if he does not, it is not reasonable care to place reliance upon him.[77]

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[70] Harpel v. Fall, 63 Minn. 520, 65 N.W. 913 (1896).
[71] Engel v. Eureka Club, 137 N.Y. 100, 32 N.E. 1052, 33 Am. St. Rep. 629 (1893).
[72] Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518, 60 A.L.R. 128 (1928).
[73] Swords v. Edgar, 59 N.Y. 28, 17 Am. Rep. 295 (1894).
[74] Besner v. Central Trust Co. of N.Y., 230 N.Y. 357, 130 N.E. 577, 23 A.L.R. 1081 (1923).
[75] Johnson v. Spear, 76 Mich. 139, 42 N.W. 1092, 15 Am. St. Rep. 298 (1889).
[76] W. PROSSER, *supra*, note 4 at 144 (1955 ed.).
[77] *Ibid.*

## CONCLUSION

Cases that have arisen in this jurisdiction may not be as varied and as complicated as those of other jurisdictions as to invite our courts to engage in more reflective thinking on the matter. It was only in the case of *Bataclan v. Medina*[78] where the ingenuity of our courts have been put to test, but still the deliberation was not exhaustive. In this case, plaintiff's predecessor-in-interest Juan Bataclan was a passenger in a truck owned by the defendant. While the bus was running in Imus, Cavite, one of the front tires burst and the truck began to zigzag until it fell into a canal on the right side of the road and turned turtle. Most of the passengers could not get out of the truck. Calls or shouts for help were made and after about half an hour ten men came. One of them was carrying a lighted torch made of bamboo with a wick on one end, evidently fueled with petroleum. The men approached the overturned bus, and almost immediately, a fierce fire started and burned the bus including the four passengers trapped inside. Action was instituted by the heirs of Bataclan against the owner of the truck to recover damages for his death. The lower court found that the overturning of the truck was due to the negligence of the driver who was driving very fast at the time of the blow of the tire. The lower court held that the proximate cause of the death of Bataclan was not the overturning of the bus, but rather, the fire that burned the bus. The lower court awarded damages only for Bataclan's injuries but not for his death. Both parties appealed. The Supreme Court disagreed with the decision of the lower court. In deciding the case the Court held:

> "It may be that ordinarily, when a passenger bus overturns, and pins down a passenger, nearly causing him physical injuries if through some event, unexpected and extraordinary, the overturned bus is set on fire, say, by lightning, or if some highwaymen after looting the vehicle sets it on fire, and the passenger is burned to death, one might still contend that the proximate cause of his death was the fire and not the overturning of the bus. But in the present case and under the circumstances obtaining in the same, we do not hesitate to hold that the proximate cause of the death of Bataclan was the overturning of the bus, this for the reason that when the vehicle turned not only on its side but completely on its back, the leaking of the gasoline from the tank was not unnatural or unexpected; that the coming of the men with a lighted torch was in response to the call for help, made not only the passengers, themselves and most probably by the driver and the conductor, and that because it was very dark, the rescuers had to carry a light with them; and coming as they did from a rural area where lanterns and flashlights were not available, they had to use a torch, the most handy and available; and what was more natural than that said rescuers should innocently approach the overturned vehicle to extend the aid and effect the rescue requested from them. In other words, the coming of the men with the torch was to be expected and was a natural sequence of the overturning of the bus, the trapping of some of its passengers and the call for outside help . . .

[78] *Supra*, note 7.

> the driver should and must have known that in the position in which the overturned bus was, gasoline could and must have leaked from the gasoline tank and soaked the area in and around the bus, this aside from the fact that gasoline when spilled specially over a large area, can be smelled and detected even from a distance, and yet neither the driver nor the conductor would appear to have cautioned or taken steps to warn the rescuers not to bring the lighted torch too near the bus."

The lower court made a distinction between the injuries caused by the overturning of the bus and the death that resulted from its burning. The proximate cause of the overturning of the bus was the negligence of the driver, while the proximate cause of the death was the fire that burned the bus, which was not an act of the driver nor of the conductor. The necessary antecedent to the defendant's liability was the negligence of its driver. Any injury or damage that was caused not by such negligence would not be attributable to the defendant.

Undoubtedly, the court here made use of the direct result test where liability follows from the defendant's conduct without the assistance of any force not set in motion by the defendant. But the court must not stop there. The court must undertake to determine whether the death that ensued was due to an intervening force that was forseeable or not. The intervention of a supervening cause will not end defendant's liability if it was foreseeable.

The Supreme Court, on the other hand, held that the proximate cause of the death was the overturning of the bus. It singled out from the sequence of events the overturning of the bus as the cause of the death of the plaintiff but failed to connect it with the negligence of the driver, whose conduct was the reason for the overturning of the bus. Had the overturning of the bus been due to fortuitous event would the decision of the Court be the same? Or would we rather say that the negligence of the driver was the proximate cause, the overturning of the bus a natural consequence of the negligence (over-speeding) and the burning of the bus a foreseeable consequence of the overturning? Of course, the court made mention of the negligence of the driver and conductor in failing to warn the torch-bearing barrio folk of the inflammable nature of gasoline.

The need for enlightening jurisprudence on the subject of proximate cause may propel our courts to refer to foreign jurisprudence. It need not be said that foreign jurisprudence on the subject of proximate cause is just as confused and unsettled as ours. This is not only because we are not dealing with mathematical figures but because we are dealing with, as Fleming would put it, "questions of policy, not of logic; (their) resolution lies in the realm of values, and 'what you choose depends on what you want.' "[79]

[79] Fleming, *The Passing of Polemics*, 39 CAN. B. REV. 489 502 (1961).