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Intervening Crime and Liability for Negligence

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INTERVENING CRIME AND LIABILITY FOR NEGLIGENCE†

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"Among the mighty store of wonderful chains that are ever forging, day and night, in the vast ironworks of time and circumstance."
—CHARLES DICKENS, *"The Mystery of Edwin Drood."*

IN 1918 in the case of *Brower v. New York Central Ry. Co.*, the New Jersey court of errors and appeals held that the owner of goods stolen from his wagon by persons unknown, while the driver was unconscious, as a result of a grade crossing collision, which also killed the horse and demolished the wagon, could recover the value of the stolen goods from the railroad company whose train negligently struck the plaintiff's vehicle. The court said, "We are clear that the questions of negligence and contributory negligence were for the jury. . . . The only question that has caused us difficulty is that of the extent of the defendant's liability." The complaint in this action alleged that the goods in question were destroyed, and the appellate court, having before it the question raised by the defendant's objection to proof of their value under this allegation, said, "We think that if they were taken by thieves they were destroyed as far as was important to the case."[1]

As might be expected, there follows a discussion of proximate cause which includes a number of the usual trite and time-worn expressions always exhibited in opinions wherein courts articulate and explain their decision as to how far they are willing to let a jury go in imposing liability on a negligent defendant. In the easy cases, which from time immemorial would have been considered within the scope of trespass, this is a simple matter, but when a case

†For a supplementary discussion and analysis of cases, see NOTES, p. 666.

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[1](1918) 91 N. J. L. 190, 103 Atl. 166, 1 A. L. R. 737; Contra, Whitcomb v. New York, N. H. & H. Ry. (1913) 215 Mass. 440, 102 N. E. 663; Hillis v. C. R. I. & P. Ry., (1887) 72 Ia. 228, 33 N. W. 643. Both of these are cases in which a passenger lost money in the course of a railway accident. There was no showing in either case as to whether it was stolen. Both are made to turn on the duty of the carrier as bailee of personal property of the passenger and hold that no such duty is owed as to property retained by the passenger in his own care without a showing of gross negligence on the part of the carrier.

involves the more extended responsibilities imposed upon wrongdoers under the action on the case and its modern application in negligence cases the problem becomes more difficult. My readers will remember the old illustration that if one throws a log over the fence or wall or hedge and it strikes a person who happens to be passing on the highway an action of trespass would lie for the resulting injury, but if the log merely fell in the highway and a traveller coming along thereafter fell over it without fault on his own part, the proper action was case.

What I want to suggest by this ancient history is this: As soon as the action on the case was established by the statute of Westminster II in 1285 and the common law recognized the possibility of responsibility for any thing less direct than a knockout blow by a defendant, the battle was on as to how far responsibility should go. Discussions of this problem usually take one back to the *Squibb Case*. Although the issue there was primarily whether the action should be trespass or case there was necessarily involved the question of remoteness since the choice of writs depended upon this. Is it unreasonable to wonder to what extent the trouble the courts have had in determining how far responsibility for negligence should go, is due to the fact that they were formerly steeped in the traditions as to forms of action and the habit of thinking in terms of the distinction between trespass and case?

An interesting feature of *Brower v. New York Central Ry. Co.*[2] is that the opinion said the question of when an original wrongdoer should be exempted from damage due to intervening cause is ordinarily a jury question. But, as you see, this court, like every other court faced with that problem, handled it and properly so by sending the case to the jury with authority to fix damages. That was the very issue which brought this particular case to the court of errors and appeals. In other words, the issue formally posed on appeal was whether the jury might allow the plaintiff damages for the stolen goods. The problem behind this issue was whether the original wrongdoer ought to be subjected to the risk of thievery and it is this question which we find articulated in terms of proximate cause. The authorities cited by the court seem to be rather beside the point. So much has been written about causation, proximate cause, legal cause, intervening cause and the like that I hesitate to say anything about it lest I add to the existing confusion which has, to some degree, in the minds of some of the

[2](1918) 91 N. J. L. 190, 103 Atl. 166, 1 A. L R. 737 .

legal fraternity, been lessened in recent years. I shall therefore avoid talking proximate cause except insofar as it seems to be necessary in order to present and discuss the type of situation suggested by my title. In general I shall endeavor to stick pretty close to the particular problem presented to the court in the *Brower Case*. It seems to me that problem is this: Shall one who by his negligence has set a stage upon which a third person commits a crime be responsible to the person suffering loss or injury from the crime?[3]

May I first say, however, that those who have read the various law review articles of recent years dealing with the causation problem should find it less fearsome than in the earlier days when writers and judges, as well as law students, were still vainly groping for a universal formula which would reconcile all past cases and automatically decide all future ones. For the readers of recent years the term, proximate cause, has come to have an intelligible meaning inasmuch as the recent writers have made it plain that one word is as good as another and have shown that what is involved is a sort of legal phenomenon, viz., the application of the judicial process to the problem of determining the extent of tort liability. If you go back to Bingham and Jeremiah Smith and read right through Bohlen, Beale, Edgerton, McLaughlin, Green, Harper, Prosser, and Gregory,[4] not neglecting the Restatement,[5] you will be able to study an opinion involving this problem

[3]Prof. F. H. Bohlen rather recently wrote: "The earlier of two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff's injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act which realized the harmful potentialities of the situation created by the defendant was itself foreseeable." Bohlen, Fifty Years of Torts (1937) 50 Harv. L. Rev. 1225, 1229.

[4]The articles referred to are familiar to students of tort law who have followed the legal periodicals. They are all referred to in the footnotes in two recent ones in the MINNESOTA LAW REVIEW, viz., Prosser, Proximate Cause in the Minnesota Court, (1936) 21 MINNESOTA LAW REVIEW 19; Cowan, The Riddle of the Palsgraf Case (1938) 23 MINNESOTA LAW REVIEW 46.

[5]2 Restatement, Torts ch. 16. "Title C. Superseding Cause" Sections 440 to 453. See especially section 448. "Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded By Actor's Negligence. The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such tort or crime, unless the actor at the time of this negligent conduct should have realized the likelihood that such a situation might be created thereby and that a third person might avail himself of the opportunity to commit such tort or crime."

The illustration given in the comment on this section is a statement of

or an undecided case involving it and make sense of it, even though you might not be able to predict how it would be or should have been decided, by what some like to call "The better rule," or, indeed, even in a particular state with whose previous decisions you are familiar. By this I do not mean that you will take from any one of these writers, or from the combination, a formula which will solve the question of whether a defendant should be held responsible in a particular situation, but you will be able to study your particular case in an atmosphere from which some of the fog has been burned away and which is less bedimmed by the haze of words cast over the whole landscape by judges and earlier writers in their efforts, which you will now realize as futile, to reduce to definite and certain rules and formulas the process of judgment.

No more helpful and useful expression of the idea that the liability for the consequences of negligence should be kept within the bounds of common sense is to be found than the words of Mr. Justice Paxton of Pennsylvania in the familiar case of *Hoag v. Lake Shore Ry.*[6] where he said, "A man's responsibility for his negligence and that of his servants must end somewhere." One may or may not agree with the decision in the particular case that the verdict should have been directed for the defendant. Indeed, it is beside the point that in this case was laid down what has been frequently referred to as the Pennsylvania or the "natural and probable consequences" rule of proximate cause.[7] The interesting thing about the case is its revelation of the working of the judicial process as indicated by the above statement and again in the same opinion by the judge's admission that the rule as he sees it is easy to state but difficult to apply. The sad thing about this opinion as about so many dealing with the limitation of negligence responsibility is that the rule is *too* easy to state and that because of tradition the judge feels obliged to state a rule which when stated will conform to what Jerome Frank would call his totem or Thurman Arnold his folkways.

Innumerable other cases have made the same observation as to this difficulty and have then stated their rules and then applied

the facts of the Brower case. I have the temerity to suggest that had I been on the bench in the Brower case, familiar with the Restatement and desirous of following and applying it in my decision, I would most certainly have sustained a demurrer to Brower's complaint or at least have directed a verdict for the defendant railway.

[6](1877) 85 Pa. St. 293, 27 Am. Rep. 653.

[7]See Bohlen, The Probable or Natural Consequence as the Test of Liability in Negligence, (1901) 47 Am. L. Reg. 79, 148; Bohlen, Studies in Torts (1926) 1.

them or at least stated that they were doing so, but difficulty or no difficulty, they have reached the conclusions which no doubt seemed to them right in the cases at hand.[8]

Judge Andrews in his dissent in the famous *Palsgraf Case* has explained what is his view of the nature of this problem of deciding when to draw the line. He says it is a question of practical politics.[9]

The theme of this paper is not proximate cause but liability for the consequences of intervening criminal acts for which the opportunity was at least afforded by the circumstances arising out of an original act of negligence. Notions about proximate cause have however been the rationale of most of the decisions involving our present problems and therefore like King Charles' head in Mr. Dick's petition, they will get into whatever we say about damage in negligence cases. It is my hope that my readers will refresh themselves on the general subject by at least reading Mr. Gregory's article.[10] It is at least one of the latest and is perhaps the best that has been written. Mr. Gregory, along with Dean Green and a number of others, have at least emphasized the point that the problem of proximate cause is that of determining the limits of responsibility and one who keeps that clearly in mind in dealing with the cases need not be bothered by the unfortunate connotations of the word "proximate." This word would have done enough harm if it had only been responsible for the "last wrongdoer" rule,[11] now happily seldom met in current opinions, not to mention its other results.

Out of the great number of decisions involving problems of

[8]See particularly Judge Andrews' dissent in Saugerties Bank v. Del. & Hudson Co., (1923) 236 N. Y. 425, 141 N. E. 904. Case holding railroad not liable for loss of money loaned on fraudulently altered bills of lading where railroad had negligently delivered the goods without taking up the bills of lading. Judge Andrews' dissent said, "The mere intervention of a crime does not break the sequence of cause and effect if the crime might reasonably have been foreseen when the original default occurred." Cardozo and Crane concurred in the dissent.

See Benenson v. Nat'l Surety Co. note in 17 MINNESOTA LAW REVIEW 671.

[9]Palsgraf v. Long Island Ry. Co., (1928) 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. "What we do mean by the word proximate is that, because of convenience, of public policy, or 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."

[10]Proximate Cause in Negligence: A Retreat from Rationalization (1938) 6 U. of Chicago L. Rev. 36.

[11]The rule which imposes the liability, if any, on the last wrongful human actor in a chain of sequences and excuses all prior actors whose conduct has contributed to the chain of sequences culminating in the harm.

cause and the extent of tort liability, although of course they could not be reconciled even if there were any useful purpose to be accomplished in making the attempt, there are at least here and there indications of a trend towards a realization that the "last human wrongdoer" rule, so largely responsible for cutting off liability of original wrongdoers in the event of intervening crime, is losing ground. The *Brower Case* seems to me to break away from the traditional attitude in dealing with intervening crime and to indicate that the majority in the New Jersey court believed that former rules were too narrow for modern law. There are many evidences in various types of negligence cases that judges feel that modern conditions call for an extension of responsibility in tort cases, and a recognition of the inadequacy of the "last human wrongdoer rule." As stated by the Ohio court in holding that an intervening human act did not bar the responsibility of the defendant as original wrongdoer:[12]

"A marked change in economic conditions during the past two decades has presented difficult problems in proximate causation. The ever increasing number of motor trucks and automobiles has overcrowded our streets and highways and rendered more probable unpredictable accidents caused by careless and negligent drivers. To meet these conditions it seems essential to extend the liability of the wrongful actor beyond the confines of former rules, which, while possibly suitable at the time of their inception are too narrow for modern law."

When one talks about former rules in the field of negligence being too narrow for modern law, he invariably means that the responsibility of wrongdoers in the type of case he is talking about should be extended. He may even be recognizing as a wrong that which has not traditionally been so treated in the courts, or, as it is more likely to be rationalized today, a new duty has been imposed. Neverthless, even those who believe that some former rules are too narrow for modern law, also believe that responsibility should stop somewhere. Mr. Justice Cardozo in *McPherson v. Buick Motor Co.*[13] indicated that former rules about privity as a basis for manufacturers' liability were too narrow for modern law, but there is no better illustration in the law of torts that responsibility must stop somewhere than Judge Cardozo's opinion in the *Palsgraf Case*. Judge Andrews, whose dissent in that case has attracted almost as much attention and who was willing to go further in the particular instance, also indicated in clearest

[12]Szabo v. Tabor Ice Cream Co., (1930) 37 Oh. App. 421, 174 N. E. 18.
[13](1916) 217 N. Y. 382, 111 N. E. 1050.

terms his recognition that responsibility must be limited by the courts. As Mr. Gregory pointed out, Andrews would not go as far as the English cases appear to.[14]

I believe I have already hinted that the *Brower Case* was unusually liberal in allowing the plaintiff to collect damages for the consequences of an intervening crime. I have not yet said what rules, if any, are usually employed in the intervening crime cases. A good, simple, workable rule for limiting responsibility, and one which would answer for the result in many of the intervening crime cases I have read, would be the "last human wrongdoer" rule. If one wishes to eliminate the futile efforts to justify the use of such a rule in terms of proximate cause and be direct and simple about it, this rule is a good, workable rule of thumb for those who like it. Of course it is arbitrary, and if applied to all the intervening crime cases, will produce results shocking to the conscience of any court. However, this in effect is the position taken by the dissenting judges in the *Brower Case*. The dissenting opinion says:

"The collision afforded an opportunity for theft of which a thief took advantage, but I cannot agree that the collision was therefore the [proximate] cause of loss of the stolen articles. Proximate cause imports an unbroken continuity between cause and effect, which, both in law and logic is broken by the active intervention of the criminal actor. This established rule of law is defeated if proximate cause is confounded with mere opportunity for crime. . . . This clear distinction is not met by saying that criminal intervention should be foreseen, for this implies that crime is to be presumed, and the law is directly otherwise."

The trouble with this statement, like all statements in the law which purport to be universals, is that not everyone will accept them. Hence they are not capable of being universals after all. This seems to me to be a good illustration that even those judges professing their loyalty and adherence to general rules, and despite their efforts to rationalize their decisions in harmony with such rules are nevertheless very humanly stubborn in their determination to decide cases as such, as they think those cases should be decided.

A great many of the intervening crime cases have exonerated the defendant from responsibility but they have not for the most part taken the strong stand of the above quoted dissent, par-

[14] (1938) 6 U. of Chicago L. Rev. 36, 41-42. See particularly Smith v. London & S. W. Ry. Co. (1870) L. R. 6 C. P. 14; In re Polemis and Furness Withy & Co. [1921] 3 K. B. 560.

ticularly the more recent ones. They have hedged in that they have said that the original negligent wrongdoer is not responsible for the consequence of intervening crime unless intervening crime was foreseeable. Of this I shall have more to say.

Professor Bohlen, in discussing the problem of "What is an independent intervening agent such as will be held to break the chain of causation between wrong and injury," says this as to intervening crimes:

"It is true that if the intervening act be intentional, the defendant is usually not liable, because there is normally no reason to anticipate willful wrongdoing of others. In exceptional situations even willfully wrongful acts of others are normal and expectable."[15]

The more one considers this question of responsibility for intervening crime and the more cases one reads involving it, the more evident it becomes that in every such case the basic question is one of policy. To restate it: "Is it the policy of this court that a negligent person shall bear the risk that a third person will take advantage of the opportunity afforded by such negligence to commit a crime?" Some courts answer this in the negative for the reason that crime is not foreseeable or expectable, or whatever other term serves to express the same idea. Too often this is put in terms of proximate cause, as, for example, that the negligent act is not the proximate cause of the result complained of, or that the consequence is too remote. May I say again, at the risk of seeming repetitious, or of harping too much upon what may seem elementary, that there is no question of causation involved here and that when liability is denied, the decision usually has no relation to remoteness either of time or space in the particular case. Other courts say that whether the crime in the particular instance constitutes a superseding cause depends upon whether

[15]Bohlen, Studies in Torts (1926) 505 (footnote). Mr. Bohlen in this footnote continues: "The liability of a negligent defendant is carried to a great length in the recent case of De La Bare v. Pearson, [1907] 1 K. B. 483, where a newspaper proprietor is held liable to a subscriber whose money has been stolen by a broker, an undischarged bankrupt, to whom it had been entrusted by the subscriber for investment on the recommendation of the financial editor, who had taken no pains to ascertain the true character of the broker, of which however he did not actually know. While this is the tendency of modern cases, the rule of Vicars v. Wilcocks, (1806), 8 East 1, still occasionally crops up as a refuge to a court wishing in a hard case to relieve some unfortunate rather than morally wrongful delinquent from the extreme burden of full liability for all the actually proximate results."

Note how Mr. Bohlen here uses the word "proximate" not as a term of a formula for limiting liability but as a description of any consequence to which an actor's wrongful conduct may have contributed.

it was reasonably foreseeable. Assuming you have a jurisdiction which admits the possible existence of cases wherein intervening crime may be foreseeable, then the real trouble begins. Is the foreseeability of crime a question for the court or for the jury, or is it a mixed question of law and fact, or sometimes one and sometimes the other, and, if and when it may call for a jury determination, under what sort of instructions is it to be submitted? Here we encounter as in every negligence case the whole gamut of techniques employed in the process of the division of labor, power, and responsibility under the jury system.

I have tried out the layman's idea as to what is fair and just in these cases by putting to a number of people both individually and in groups a number of the fact-situations in the intervening crime cases, and I found that on the whole there seems to be a pretty definite tendency at the first reaction to feel that the first wrongdoer should not be held liable for what the criminal does. Then upon trying out their reaction to the foreseeability idea by a few questions as to the reasons for the everyday precautions against theft, such as locks, burglary insurance, and to go further, fidelity bonds, check protectors and other precautions against dishonesty, I seemed to be getting a reaction which tended to distinguish as to foreseeability between crimes of misappropriation of property and crimes of violence against the person. I also discovered that if your guinea pig is a thoughtful one, and if you put to him a mere skeleton situation, he soon begins to ask questions as to additional facts which soon results in throwing the duty problem in your lap.

When will the law require the negligent actor to foresee the possibility of crime? Where does duty come in here? The foreseeability of harm being the recognized test of negligence, it may well be that in some cases the recognition that the conduct of the defendant in creating a situation where, as a reasonable man, he should foresee the possibility and/or probability of such opportunity being taken advantage of for the commission of a crime, foreseeability may become the basis of liability irrespective of any question of legal or proximate cause.[16]

The Torts' Restatement[17] provides for this aspect of our problem in the following statement:

[16]In other words the problem is again, or still, the practical one of adopting a policy as to limiting responsibility, viz, Judge Andrews' "practical politics" previously referred to.

[17]Section 449.

"If the realizable likelihood that a third person may act in a particular manner is the hazard which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious or criminal, does not prevent the actor from being liable for harm caused thereby."

This section taken by itself is helpful but the comment, particularly the illustrations which are taken from cases familiar to any one who has read the intervening crime cases, seems to indicate a separation between the cases covered by sec. 448 and those coming under sec. 449 which is more apparent than real. It is impossible to tell from the cases themselves which impose liability—whether such liability is imposed because it was the expectability of crime which made defendant's conduct negligent and when it was done because the consquences of the intervening crime were within the limits of responsibility of the defendant for his negligent acts. We are not told in many of the cases which impose liability why the defendant was negligent. However, in a later section[18] the Restatement does tie these matters together again by saying, "The rules stated in sections 430 to 453 as determining the causal relation necessary to liability are as fully applicable to establish the extent of liability as to establish its existence." This is the sort of vain thing which has done so much to bring the Torts Restatement into disrepute and which has a tendency to destroy the benefit of the recent and rather good writing about proximate cause which has already been referred to. Taking the whole title on superseding cause as it appears in the Restatement, the reader is left in greater confusion than if he had not read it.

For two reasons this paper will not undertake to contribute anything original on this aspect of the subject under discussion. The first reason is the article, The Duty to Control the Conduct of Another, by Messrs. Harper and Kime[19] and the second is Mr. Eldredge's article on Culpable Intervention as Superseding Cause.[20]

Many of the cases which do impose liability on a negligent defendant for the consequences of crime for which his negligence created an opportunity, may be explained on the basis of the thesis of the Harper & Kime article. However, that article is not confined to a discussion of the intervening crime cases. The points made in the Harper & Kime article are: First, there are relation-

[18]Section 454.

[19](1934) 43 Yale L. J. 886.

[20](1937) 86 U. of Pa. L. Rev. 121.

ships between parties which impose upon one of such parties a duty to act or to take precautions *to prevent* the other party to the relation from engaging in *acts* or omissions *which will injure third parties.* (Note this is exclusive of the ordinary respondeat superior situation.) Second, there are relations which impose upon one of the parties the duty to protect the other party to the relation *against harms by third persons.* By relationship between parties, as treated in this paper, is meant something more specific and less tenuous than the general concept of a right duty relation as based upon the foreseeability of harm.[21] I mean that concept which found one of its early and classic expressions in that oft quoted passage from *Heaven v. Pender.*[22]

"Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury of the person or property of another, a duty arises to use ordinary care and skill to avoid such danger."

To be sure, this formula includes the particular relationships which Harper and Kime discuss, but, as it has ordinarily been interpreted, it means more. It is taken usually as a definition of negligence. However, these writers, as I understand them, find that the cases within the scope of their investigation, notwithstanding the more particular relations involved, really do raise a duty because the party upon whom the liability is imposed was in a situation where, as a reasonable person, he could foresee harm to one person through this failure to control another and has failed to use reasonable care to exercise such control.[23] The article includes reference to a great many of the leading inter-

[21]The subheadings in the above mentioned article which indicate the "special relations" there considered are as follows; "Another use of Defendant's Chattel in his presence." "Relationship of Parent and Child," "Other Cases Where Defendant Has Special Ability to Exercise Control over Another." "Persons under Special Protection of Defendant," "Carrier and Passenger," "Use of Land by Business Visitors."

At page 905 Messrs. Harper and Kime say: "Human beings by their activities have all sorts of dealings with each other and come into all sorts of relations. Some of them are tenuous, and to them the law attaches no special obligations. Others are regarded as of sufficient importance to require for a sound and stable social order, certain assurances of safety to persons and property on the part of parties thereto. The social policies which determine what relations require such special assurances and what ones are sufficiently unimportant not to require them are so incredibly complicated as almost to defy analysis."

[22](1883) L. R. 11 Q. B. Div. 503.

[23]See note 21 supra, Messrs. Harper and Kime Subheadings.

vening crime cases but is primarily concerned with the problem of duty to control one person and so to protect another from the consequence of acts of the former, whether criminal or not.

This duty of control based upon special relationship is best explained by illustration as the writers state at page 897:

"An obvious application of the principle would appear to be situations where the defendant has control over another who is by reason of some social or mental maladjustment a dangerous person. Thus those in charge of penitentiaries or insane asylums would seems clearly to come within this rule."[24]

The second of the articles mentioned above, by Mr. Eldredge, deals more directly with the general topic of this paper; however, Mr. Eldredge has aimed at a broader target in that he is concerned with the liability of an original negligent wrongdoer for the consequences of all kinds of subsequent culpable interventions. Mr. Eldredge has made it unnecessary for me to say much of what I should otherwise have wanted to mention in this paper. In the first place he has traced the history of the legal thinking (or writing) which documented the extensive prejudice against imposing liability in situations like the *Brower Case*. He has presented the vicious doctrine of *Vicars v. Wilcocks*,[25] the "last human wrongdoer" rule in all its meanness and has shown that in general the American courts today are at least showing an increasing willingness to impose liability on a negligent defendant for the consequences of human intervention whether innocent or criminal, if such intervention is foreseeable. Mr. Eldredge has also shown very clearly, giving his reasons, which are acceptable, but which I shall not extend this paper by repeating, that the problem of *causal relation in fact* is in these cases, as in most

[24]The most frequently cited case illustrative of this is Austin Jones Co. v. Maine, (1923) 122 Me. 214. 119 Atl. 577 in which the state was held liable in an action of tort when the head of a state institution for the treatment and custody of the insane negligently released a patient who thereafter set fire to the plaintiff's building (under a consent statute).

Contra: Cappel v. Pierson, (1931) 15 La. App. 524, 132 So. 391 which refused to impose liability upon the superintendent of an insane hospital who negligently released an incurable homicidal maniac who shortly killed plaintiff's husband. Noted 45 Harv. L. Rev. 192 and in accord with this latter case see Henderson v. Dade Coal Co., (1897) 100 Ga. 568, 28 S. E. 251, 40 L. R. A. 95, which refused to hold the contract employer of convict labor when such employer negligently allowed a known rapist to escape and who thereafter raped the plaintiff (the convict, not the contractor, raped the plaintiff). Also accord with last case and on similar facts. Tennessee v. Ward and Briggs, (1871) 9 Heisk, (Tenn.) 100.

[25](1806) 8 East 1. Defendant's slander caused plaintiff's employer to discharge him. Held: the intervening act of the employer after the act of defendant relieved the defendant of liability. See comments on this case by Mr. Bohlen in the essay referred to in note 15 supra.

negligence cases, very simple. Only doubtful questions of fact can be thrown to the jury under instructions embodying the substantial factor rule, as first stated by Jeremiah Smith, reiterated and employed in recent years in a great number of decisions and finally included in the Restatement of Torts. Jurisdictions not liking the "Substantial Factor" formula may readily substitute some other as found in their own previous decisions.

As always when the ritual of proximate cause is performed the real problem is that of determining the limits of responsibility, or, as Mr. Eldredge put it, "That of determining how far shall society go in making the defendant pay for consequences when his conduct has been a substantial factor in producing the plaintiff's loss or injury."

Mr. Eldredge's argument is essentially this:

"We are dealing with a man who is admittedly a wrongdoer, a man whose breach of duty the plaintiff has found to be a substantial factor in causing plaintiff's harm. Normally the plaintiff is entitled to have such a man pay for it. Under such circumstances the intervening conduct should be extraordinary indeed before the defendant is permitted to escape liability. Opinions will differ as to what sort of intervening negligence [from the context I am sure he means here to include crimes and other intentional human interventions as well] is extraordinary and unexpectable."[26]

Much as I like what Mr. Eldredge has to say, in the main, I find his argument unsatisfactory in that he would predicate the more extended responsibility of defendants on breach of duty to the plaintiff. It seems to me that this is begging the question. The problem of the "intervening human act" cases, like all the negligence cases which we so frequently find stated in terms of cause, is that of defining duty and remains as indefinite and as illusive as ever.[27] Let us start, as probably most authorities would approve, with the generalization that a negligent wrongdoer is responsible for the consequences of intervening crime wherever such crime is reasonably foreseeable. The difficulty is that this does not alone solve the cases. If we attempt to be more specific the rule becomes dangerously narrow, and if we take out the requirement of reasonable foreseeability it becomes too broad.

[26](1937) 86 U. of Pa. L. Rev. 121, 134.

[27]Here again we are obliged to face the problem of what is negligence and, secondly what are the limits of responsibility? The "foreseeability of harm" test of negligence is so inextricably mixed up with the problem of fixing limits of responsibility that the courts all too frequently fall into the pitfall of defining the latter (which does not need to be defined but only decided in each particular case), in terms of the former.

The problem at this point then becomes one of administration, of allocating the relative functions of judge and jury.

At this point I should like to tell the reader what I think I have said so far:

1. Talking about proximate cause will not properly decide cases involving the liability of the negligent man for crimes committed by others in the fields of opportunity therefor which his negligence has opened.

2. There is nothing in the general concepts of the law of negligence which would forbid a court from imposing liability in such cases.

3. The foreseeability idea, while accepted as a test of the existence of negligence, has to a large degree been abandoned as a test for determining the limitations of responsibility for negligence.[28]

4. But in connection with intentional intervening acts of third persons, most courts profess to limit the original wrongdoer's responsibility to cases where such intervention was expectable and some are even more strict on the theory that crime is never expectable.

5. It cannot fairly be said as a matter of law, and should not be categorically laid down, that crime is entirely unexpectable in any situation where the stage set by the original wrongdoer's negligence affords an opportunity for crime to any person with criminal impulse who may happen to appear on the scene.

6. On the other hand, the probabilities of crime intervening in every case of negligence are not so great that the negligent man should invariably be burdened with this risk.

7. Special relations such as those discussed by Messrs. Harper and Kime are another story, and cases involving them must be solved and decided in the light of special duty factors there present.

8. A court desiring in a particular instance to give the jury a free hand to award or refuse damages in such instances may do so by framing its instructions on the basis of foreseeability of the possibility of crime under the circumstances.

[28]If the court, applying the danger or foreseeability test, believes that there is evidence upon which reasonable minds might differ, etc., and lets the jury have the case it has indicated its belief that the harm alleged is the sort of harm which is within the scope of the risk to liability which the defendant has assumed by his dangerous conduct and has further indicated that consequences complained of are within its policy as limits of responsibility.

9. Finally, the court cannot and does not escape the responsibility of determining the existence of such a relation between plaintiff and defendant as may be called a duty but which in any event recognizes a policy casting upon the defendant the risk of criminal intervention.[29]

The court has obviously undertaken the entire burden when there is a directed verdict or other disposition taking the whole matter out of the hands of the jury.

Equally so the court has decided questions of duty and policy when it sends the cases to the jury under instructions in whatever form involving the essential questions: (a) Was the defendant's conduct a substantial factor in causing plaintiff's harm (by creating any opportunity for intervening crime)? (b) Was the foreseeability or expectability of such crime as was committed sufficiently real so that the defendant should be burdened with the risk? (This last seems to leave the duty problem to the jury but it does not even where the jury has the opportunity to bring in a general verdict.)

In framing the issue for the jury in such cases it makes no difference whether the word "duty" is used or not. Duty is a lawyer's word in these circumstances and will be of little help to the jury. By electing to turn over to the jury the final decision of damages or no damages the court has assumed the existence of what lawyers call "duty and proximate cause." On the other hand, if the court disposes of the case, it is the inescapable inference that it did not see such a duty, or to put it another way, did not recognize it as a policy of the law that such risks should be imposed as one of the penalties of negligence.

Always there is the possibility that the evidence may be so clear that, as we lawyers put it, "reasonable minds cannot differ," then the court takes the same responsibility with perhaps only the added one of damages, although this is usually referred to a jury or settled by agreement between the parties.

The final guide which courts will always have in mind, whether expressed or not and in spite of more elaborate formulas, will be the reasonable conservatism of Mr. Justice Paxton's sobering caution: "A man's responsibility for his negligence and that of his servants must end somewhere."[30]

[29]Torts Restatement section 453: "It is the exclusive function of the court to declare the existence or non-existence of rules which restrict the actor's responsibility short of making him liable for harm which his negligent conduct is a substantial factor in bringing about and to determine the circumstances to which such rules are applicable."

[30]Hoag v. Lake Shore Ry., (1877) 85 Pa. St. 293, 27 Am. Rev. 653.

It should be noted in a great many of the automobile accident cases, where the question arises as to liability as between two or more defendants and also where the question involves contributory negligence, that one or both of the parties were violating a traffic regulation of some sort and therefore subject to criminal prosecution. In civil actions in tort, however, the question presented is almost always whether the party whose negligent conduct is alleged to have broken a chain of causation was negligent. The fact that he may have been acting in violation of an ordinance or statute is usually treated as significant only for the purpose of determining whether his conduct was or was not negligence per se. It does not seem to be taken account of, as are intentional intervening acts, whether criminal or not. The discussion of negligent intervening acts even though they violate statutes or ordinances is not within the scope of this paper.