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RECENTLY, in the case of Peterson v. Fulton,¹ the supreme court of Minnesota, speaking through Mr. Chief Justice Devaney, made an attempt to reduce to a single formula all of the perplexing problems which commonly are dealt with in connection with the term "proximate cause." Said the court:

"The best manner in which to determine whether a given act is the proximate cause of a given result is to determine whether that act is a material element or a substantial factor in the happening of that result."

The test here proposed was advocated by the writer of a note in a recent volume of the MINNESOTA LAW REVIEW,² who derived it from the opinion of the court in Anderson v. Minneapolis, St. P. & S. S. M. Ry.³ The court in that case affirmed an instruction to the jury given by Judge Dancer of Duluth, who may perhaps in turn have been persuaded by the views set forth in a noted article in the Harvard Law Review by Jeremiah Smith.⁴ The "substantial factor" test is approved by the Restatement of Torts,⁵ with important qualifications,⁶ and it is accepted by Dean Green,⁷ but only as applied to the fact of causation, as distinct from further questions of legal responsibility. It is the purpose of this article to inquire how far the test proposed may be successful as a general formula for the solution of the problems encountered in this field.

¹(1934) 192 Minn. 360, 256 N. W. 901. The same test is repeated in Guile v. Greenberg, (1934) 192 Minn. 548, 257 N. W. 649. See also Wedel v. Johnson, (Minn. 1936) 264 N. W. 689.
²(1932) 16 MINNESOTA LAW REVIEW 829. This note is cited with approval in Peterson v. Fulton, (1934) 192 Minn. 360, 256 N. W. 901.
³(1920) 146 Minn. 430, 179 N. W. 45.
⁵Restatement, Torts, sec. 431: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." The Tentative Draft of this section is cited by the court in Peterson v. Fulton, (1934) 192 Minn. 360, 256 N. W. 901.
⁶Sec. 433 lists considerations which are important in determining whether negligent conduct is a substantial factor in bringing about harm to another. Secs. 440 to 452 deal with intervening factors which do or do not relieve the actor from responsibility for harm to another, even though his negligence is a substantial factor in bringing it about.
⁷Green, Rationale of Proximate Cause, ch. 5, pp. 136-141.
“Proximate cause” presents questions of extraordinary difficulty; most writers have concluded that they cannot be reduced to definite rules. One may well share the reluctance of Mr. Justice Stone to add to the already excessive literature on the subject. It is usually a matter of nothing more than common sense, to be applied in the form of instructions to the jury. It is “always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. . . . The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.”

It has been said that the question is essentially one of the protection to be afforded the plaintiff’s interest against the risk involved in the defendant’s conduct, which must be determined upon the facts of each case without resort to any formula. Nevertheless, any effort on the part of the court to suggest even a general guide or approach to a problem which has arisen in more than two hundred and fifty Minnesota cases, and which never has ceased to call forth confusion and contradictory language, must be received with appreciation by the bar. An examination of the application

8“With no regret we decline the invitation of the case to add to the already excessive literature of the law dealing, or attempting to deal, with the doctrine of proximate cause, much of which both ‘in case and commentary is mystifying and futile.’” Stone, J., in Brown v. Murphy Transfer & Storage Co., (1933) 190 Minn. 81, 251 N. W. 5.

9See generally Green, Rationale of Proximate Cause; Bohlen, The Probable or the Natural Consequence as the Test of Liability in Negligence, (1901) 47 Am. L. Reg. 79, 148; Bingham, Some Suggestions Concerning “Legal Cause” at Common Law, (1909) 9 Col. L. Rev. 13, 136; Smith, Legal Cause in Actions of Tort, (1912) 25 Harv. L. Rev. 103, 223, 303; Terry, Proximate Consequences in the Law of Tort, (1914) 28 Harv. L. Rev. 10; Beale, The Proximate Consequences of an Act, (1920) 33 Harv. L. Rev. 633; Edgerton, Legal Cause, (1926) 72 U. Pa. L. Rev. 211, 343; Levitt, Cause, Legal Cause and Proximate Cause, (1922) 21 Mich. L. Rev. 34, 160; McLaughlin, Proximate Cause, (1925) 39 Harv. L. Rev. 149; Carpenter, Workable Rules for Determining Proximate Cause, (1932) 20 Cal. L. Rev. 229, 396, 471. Dean Green seems to have been most successful in stating the essential nature of the problem, Carpenter in reducing the cases to more or less definite principles.

10“The question of proximate cause of an injury is often obscured by technical learning, but in its last analysis it is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence in each particular case.” Healy v. Hoy, (1911) 115 Minn. 321, 132 N. W. 208. See also Schumaker v. St. Paul & Duluth R. R., (1891) 46 Minn. 39, 48 N. W. 559. But see Green, Rationale of Proximate Cause 122, pointing out that the court too frequently throws upon the jury the difficult legal question of determining whether the plaintiff’s interest is entitled to legal protection against the risk.

11Street, Foundations of Legal Liability 110, quoted in Wiles v. Great Northern Ry., (1914) 125 Minn. 348, 147 N. W. 427.

12Green, Rationale of Proximate Cause 126-127.
of the "material element and substantial factor" test to the cases is not in any sense in criticism of the attempt.

A study of any substantial number of the decisions will make it apparent that "proximate cause" is not a single problem, but rather a group of five or six different problems; and that at least part of the confusion may result from the fact that language appropriate to the solution of one is carried over into discussions of others, where it not only is of no assistance, but tends to obscure the issue. A separation of these issues may serve to explain much that the Minnesota court has done, and to throw some light upon questions which remain unsettled. It would appear that a consideration of "proximate cause" must necessarily involve:

1. The problem of the fact of causation.
2. The problem of responsibility for events which could not reasonably be foreseen or anticipated.
3. The problem of liability to persons to whom no harm could reasonably be anticipated.
4. The problem of intervening forces.
5. The problem of the amount of damages.
6. The problem of shifting responsibility to others.

The list is by no means exclusive, and "proximate cause" has been used in connection with many other issues; but it will serve to include all but a few of the questions which have arisen in Minnesota.

14For example, in insurance cases, where the essential question would seem to be whether the risk is covered—a matter of construction of the policy. Ermentrout v. Girard Fire & Marine Ins. Co., (1895) 63 Minn. 305, 65 N. W. 635; Russell v. German Fire Ins. Co., (1907) 100 Minn. 528, 111 N. W. 400.

Again, as to damages for breach of contract generally, the question is whether the damages were within the contemplation of the defendant at the time the contract was made. McCormick, The Contemplation Rule as a Limitation Upon Damages for Breach of Contract, (1935) 19 Minnesota Law Review 497; Beaupré v. Pacific & Atlantic Tel. Co., (1874) 21 Minn. 155; Wilson v. Reedy, (1884) 32 Minn. 256; D. M. Osborne Co. v. Poket, (1884) 33 Minn. 10 ("proximate consequences"); Sargent v. Mason, (1907) 101 Minn. 319, 112 N. W. 255; Independent Groc. Co. v. Sun Ins. Co., (1920) 146 Minn. 214, 178 N. W. 582. Cf. Loudy v. Clarke, (1891) 48 Minn. 477, 48 N. W. 25.

Still another question is found in cases involving violation of statutes, namely, whether the legislature intended to protect the plaintiff against the particular injury. See note, (1935) 19 Minnesota Law Review 666, 673; cf. Frisch v. Chicago Great Western Ry., (1905) 95 Minn. 398, 104 N. W. 228; Nelson v. Chicago, M. & St. P. Ry., (1882) 30 Minn. 74.
I. CAUSATION

The simplest and most obvious problem of "proximate cause" is that of causation. Of all the questions involved, it is perhaps easiest to give an answer to that which traditionally is regarded as most difficult: has the defendant's conduct caused the plaintiff's loss? This is a question of fact, and one on which any layman is quite as competent to sit in judgment as the court. It is peculiarly a question for the jury. Causation is a fact. A cause is a necessary antecedent; the term includes all things which have so far contributed to the result that without them it would not have occurred.15 In a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America; but any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."16 As a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy; and the attempt to state it in terms of causation can lead to nothing but confusion.17 If the defendant excavates a hole by the side of the road, and the plaintiff's runaway horse falls into it,18 it can scarcely be pretended that the hole was not a cause of the accident, and an extremely important one. The defendant must escape liability, if at all, because the law imposes upon him no duty to safeguard the plaintiff against such a risk; if there was no such duty, there was no wrongful act. On the same basis, if defendant drives through St. Paul at sixty miles an hour, and arrives in Minneapolis in time to be struck by a falling tree,19 his speed is clearly a cause of the accident, since without it he would not have been there when the tree fell; if he is not liable to his passenger, it is because

15"In a comprehensive sense, all the circumstances (powers, occasions, actions and conditions) necessary to an event and necessarily followed by it; the entire antecedent of an event; the fundamental and philosophical conception of cause; in general, whatever in reality stands in relations analogous to those between a necessitated conclusion and its antecedent grounds." Funk & Wagnalls, New Standard Dictionary (1923).
17Green, Rationale of Proximate Cause, p. 122.
his negligence did not extend to such a risk. The term "proximate" is applied to these more or less undefined considerations which determine liability, even where the fact of causation is clearly established.

So far as the simple problem of causation is concerned, the courts of other jurisdictions have arrived at a rule, which is commonly known as the "but for" or sine qua non rule, which may be stated as follows: The defendant's conduct is not a cause of the accident, if the accident would have occurred without it.20 This rule seems nowhere to have been stated in Minnesota, but there are cases consistent with it.21 At most it is a rule of exclusion; if the injury would not have occurred but for defendant's negligence, it still does not follow that there is liability. Other considerations, which remain to be discussed, may prevent recovery.

As 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, but there is one situation in which it fails. If two causes concur to produce an injury, and either one of them, operating alone, would have been sufficient to cause the identical result, obviously some further test is needed. Two motorcycles simultaneously pass plaintiff's horse, which is frightened and runs away; either one alone would have caused the fright.22 B stabs A with a knife, and C fractures A's skull with a rock; either wound would be fatal, and A dies from the effects of both.23 Defendant sets a fire, which combines with a fire set by another; the combined fires burn plaintiff's property, but either one would have done it alone.24 Obviously, in these cases, the result would


24Anderson v. Minneapolis, St. P. & S. S. M. Ry., (1920) 146 Minn. 430, 179 N. W. 45; Borsheim v. Great Northern Ry., (1921) 149 Minn. 210, 183 N. W. 519.
have been the same in the absence of either one of the causes; it is equally obvious that responsibility must be attached to both.

It was in a case of this type\(^2\) that the Minnesota court evolved the "material element and substantial factor" test, holding each cause responsible if it materially contributed to the result. The test is clearly an improvement over the "but for" rule, and meets the difficulties of the cases suggested; but in the greater number of situations it amounts to the same thing. Except where two causes concur and either one alone would be sufficient to produce the result, no case has been found in which the defendant's conduct has been regarded as a "material element and substantial factor," or has led to liability, if the same accident would have happened without it.\(^2\)

If defendant's negligence is a substantial factor in causing the plaintiff's loss, it follows that he will not be absolved from liability merely because other causes, such as the negligence of other persons, have contributed to the result.\(^2\) A familiar illustration is the case where two automobiles collide and injure a bystander, or a passenger in one of them. The law of joint tort-feasors, at least in Minnesota, rests very largely upon recognition of the fact that each of two causes may be charged with a result.\(^2\)

Most of the Minnesota cases dealing with the problem of causa-

\(^2\) Anderson v. Minneapolis, St. P. & S. S. M. Ry., (1920) 146 Minn. 430, 179 N. W. 45.

\(^2\) An interesting question is raised in cases where two causes concur to produce a result similar in kind to that which would have followed from either cause alone, but greater in extent because of the combination of the two. For example, Willie v. Minnesota Power & Light Co., (1933) 190 Minn. 95, 230 N. W. 5, where water from defendant's dam combined with water from other sources to flood plaintiff's land. Apparently defendant was held liable for all the damages. This is consistent with the result in Elder v. Lykens Valley Coal Co., (1893) 157 Pa. St. 490, 27 Atl. 545, 37 Am. St. Rep. 742, which was approved by the Restatement, Torts, sec. 450. The practical justification of the result is the difficulty of separating the damages and assigning them to the causes.


\(^2\) See (1933) 17 MINNESOTA LAW REVIEW 109.
tion itself have turned upon the sufficiency of the evidence to establish the fact. The burden of proof is on the plaintiff, and he must sustain it by more than mere speculation or conjecture. He must furnish at least the basis for a reasonable inference that the injury was due to defendant’s conduct, and it is not enough if he leaves the probabilities evenly balanced. But he need not negative entirely the possibility of other adequate causes, and circumstantial evidence or the opinions of experts may be sufficient, if


“...the burden is on plaintiff to show that it is more probable that the harm resulted in consequence of something for which the defendant was responsible than in consequence of something for which he was not responsible. If the facts furnish no sufficient basis for inferring which of several possible causes produced the injury, a defendant who is responsible for only one of such possible causes cannot be held liable.” Alling v. Northwestern Bell Tel. Co., (1923) 156 Minn. 60, 194 N. W. 313.

30McNamee v. Hines, (1921) 150 Minn. 97, 184 N. W. 675. “To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes.” Robertson v. Chicago, R. I. & P. Ry., (1929) 177 Minn. 303, 225 N. W. 160.


31It is, of course, not necessary to establish the connection between cause and effect with absolute certainty, for this is often impossible. Evidence furnishing a reasonable basis for satisfying the minds of the jury that the clogging of the netting, through the negligence of the engineer in the management of the engine, was the proximate and operating cause of plaintiff’s injury, would have been sufficient. But this conclusion must not rest upon mere conjecture. It is not even enough that the evidence leaves the matter in equilibrio as to whether the injury was produced by a cause for which the defendant was responsible, or by one for which it was not responsible; and a fortiori no recovery can be had if it is more probable that it was produced by the latter.” Mitchell, J., in Orth v. St. Paul, Minneapolis & Manitoba Ry., (1891) 47 Minn. 384, 56 N. W. 363.


they make it appear more probable that the injury was caused by defendant than that it was not.

Causation alone does not determine liability. It cannot be repeated too often that other considerations remain. But it is a necessary condition of liability; and as to causation alone the "material element and substantial factor" test seems the most satisfactory solution. It takes away from the jury the mysterious words "proximate cause," and provides them instead with a guide sufficiently clear to the layman to enable them to perform their functions.\textsuperscript{45} No better test of causation has yet been devised.

II. UNFORESEEABLE CONSEQUENCES

A second problem which confronts the court, once the fact of causation is established, is that of the extent to which the defendant may be held liable for consequences of his acts which he could not reasonably have foreseen or anticipated. A typical case may serve as an illustration. Defendant railway company maintains a station platform with a hole in it. A passenger, alighting from a train, steps into the hole and sprains her ankle. The sprain


\textsuperscript{45}The Restatement has abandoned the use of the term "proximate cause," and has substituted "legal cause" and "substantial factor." Restatement, Torts, sec. 431; cf. Tentative Draft No. 8, Explanatory Notes to sec. 304, pp. 96-99. Two reasons are given; first, that "proximate" has connotations of nearness in time or space, which it is desirable to avoid; and second, that the fact question of causation should be distinguished from the legal problem of liability, and the use of "proximate cause" has only confused the issue. Cf. Green, Rationale of Proximate Cause, ch. 5.

Compare the statement of the court in Ray's Adm'r v. Standard Oil Co., (1933) 250 Ky. 111, 61 S. W. (2d) 1067, that the jury should not be given any definition of "proximate cause" because the term has no definite meaning.
develops into inflammatory rheumatism, which becomes endocar-
ditis, and the woman dies. Is defendant liable for her death?264

The defendant could reasonably foresee or anticipate that the
hole in its platform might cause some injury to passengers descend-
ing from trains. Upon no ordinary basis of human experience
could it foresee that it would cause death from inflammation of
the heart. The question is not one of causation, for the causal
connection is clear and direct,265 without intervening forces of any
kind. It is rather one of policy, as to whether defendant’s respon-
sibility for its admitted fault is to be extended to such results.

Negligence consists of conduct which “falls below the standard
established by law for the protection of others against unreason-
able risk.”266 It necessarily involves a foreseeable risk, a threaten-
ed danger of injury, and conduct unreasonable in proportion to
the danger.267 If the defendant could not reasonably foresee any
injury as the result of his acts, or if his conduct was reasonable
in the light of what he could anticipate, there is no negligence, and
no liability.268 What if he does unreasonably fail to guard against
foreseeable harm to the plaintiff, and consequences which could
not have been foreseen in fact result?

The Minnesota court had held quite consistently that a defen-
dant is liable for all direct results of his original negligence, even
though they could not have been anticipated. The leading case is
Christianson v. Chicago, St. P. M. & O. Ry.,269 in which Mr.

264The case is Keegan v. Minneapolis & St. Louis R. R., (1899) 76
Minn. 90, 78 N. W. 965.
265“Direct” is sometimes used in a general sense as equivalent to
“proximate.” McLean v. Burbank, (1865) 11 Minn. 277 (Gil. 189); cf.
Hamilton v. Vare, (1931) 184 Minn. 580, 239 N. W. 659. In the text, it is
used to indicate a causal connection in which no active forces of external
origin intervene between the defendant’s conduct and the result. An analogy
might be suggested to knocking over the first of a row of blocks, after which
all the rest fall down without the assistance of any other force. Here the
sprain caused the rheumatism, the rheumatism caused inflammation of the
heart, the inflammation caused the death. Nothing intervened.
266Restatement, Torts, sec. 282.
267Harper, Law of Torts, sec. 72, p. 163.
1026; Briglia v. City of St. Paul, (1916) 134 Minn. 97, 158 N. W. 794;
Kieffer v. Wisconsin Ry. Light & Power Co., (1917) 137 Minn. 112, 162
N. W. 1065; Spiering v. City of Hutchinson, (1921) 150 Minn. 305, 185
N. W. 375; Kruchowski v. St. Paul City Ry., (1934) 191 Minn. 454, 254
N. W. 587; Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241
N. W. 390.
269(1896) 67 Minn. 94, 69 N. W. 640. The case is sometimes referred
to as the “three telegraph poles case.” Plaintiff was riding on a handcar
on defendant’s railroad. A second handcar followed sixty feet behind, in
violation of a company rule requiring handcars to keep “three telegraph poles
apart,” or 540 feet. Plaintiff fell off and was injured by the second hand-
Justice Mitchell made a statement of the rule which has been much quoted since:

"What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of the injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

Upon this basis, the court has held the defendant liable for physical events which could not possibly have been foreseen, and for results which have occurred in an unforeseeable manner.

In Baker v. Great Northern Ry., (1901) 83 Minn. 184, 86 N. W. 82, the defendant allowed its roadbed to become soft and springy, permitted stone and gravel to accumulate on the track, and ran an engine with a loose pilot. The pilot struck into the gravel, and a stone was thrown against the cab window, breaking the glass and injuring plaintiff's eye. The defendant was held liable, even if it was not foreseeable that the window would be broken. "It does not appear that there was any intervening cause."

In Kommerstad v. Great Northern Ry., (1913) 120 Minn. 376, 139 N. W. 713, aff'd (1915) 128 Minn. 505, 151 N. W. 177, defendant ran a train without giving warning signals, and apparently without keeping a proper lookout. The train struck a horse on the track, and threw it 195 feet; it struck the plaintiff, who was thirty feet from the track, and injured him. The court left all questions to the jury, and affirmed a verdict for the plaintiff.

In Foss v. Chicago, B. & Q. R. R., (1922) 151 Minn. 506, 187 N. W. 609, one of defendant's employees was driving a pin out of a fluting iron, using a hammer and a driving-pin which was too short. The driving-pin flew from his hand and injured the plaintiff. A verdict for plaintiff was affirmed. "The particular injury which resulted need not be anticipated in order that actionable negligence be found. It is enough that some injury was reasonably to be anticipated and that which comes results proximately."

Cf. Hansen v. St. Paul Gaslight Co., (1900) 82 Minn. 84, 84 N. W. 727, as to damages recoverable where gas from defendant's mains killed part of the stock of plaintiff's florist establishment. The court regards the loss in value of the remainder of the stock as foreseeable.

Krippner v. Biebl, (1881) 28 Minn. 139, 9 N. W. 671 (fire set by defendant was apparently put out; it sprang up again and burned plaintiff's
The plaintiff is permitted to recover for unusual and unexpected consequences of personal injuries: for paralysis, tuberculosis, blood poisoning, baldness, endocarditis, nephritis, pneumonia. The defendant is liable where his negligence operates upon an existing physical condition, such as pregnancy, or a latent disease or susceptibility to disease, to produce consequences which could not have been foreseen.

No Minnesota case has been found which limits liability upon the basis of foreseeability of the ultimate result. There is occasional language, particularly in the earlier cases, which suggests property: Hyatt v. Murray, (1907) 101 Minn. 507, 112 N. W. 881 (log skid left projecting into roadway; a sleigh ran against the end of the skid, throwing the other end around and injuring plaintiff); Johnson v. Oakes, (1910) 110 Minn. 94, 124 N. W. 633 (defendant's pile driver was pulling caps off of piles in a trestle; one pile pulled out of the ground and fell against the engine, injuring plaintiff); Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577, 33 L. R. A. (N.S.) 449 (“brush” discharge from uninsulated wire); Prendergast v. Chicago, B. & O. R. R., (1917) 138 Minn. 298, 164 N. W. 923 (plaintiff struck in the face by wires sticking out of moving train; he jumped back, striking his back against other cars).

46Carr v. Minneapolis, St. P. & S. S. M. Ry., (1918) 140 Minn. 91, 167 N. W. 299.
48Keegan v. Minneapolis & St. Louis R. R., (1899) 76 Minn. 90, 78 N. W. 965.
49Turner v. Minneapolis Street Ry., (1918) 140 Minn. 248, 167 N. W. 1041.
50State v. James, (1913) 123 Minn. 487, 144 N. W. 216 (defendant stabbed one Miller in the lung with a knife; Miller developed pneumonia and died; defendant held guilty of murder). Cf. Anderson v. Anderson, (1933) 188 Minn. 602, 248 N. W. 35; but cf. Honer v. Nicholson, (Minn. 1936) 188 N. W. 852.
54Such language is found in Locke v. First Division, St. Paul & Pac. R. R., (1870) 15 Minn. 350 (Gil. 283, 300) (dictum); Nelson v. Chicago, M. & St. P. Ry., (1882) 30 Minn. 74, 14 N. W. 360 (a statute violation case; the subsequent language of Mitchell, J. in Christianson v. Chicago, St. P. M. & O. Ry., (1896) 67 Minn. 94, 69 N. W. 640, quoted in the text, makes it clear that he must have been speaking of the negligence issue here).
a limitation to consequences which are foreseeable, or "natural and probable," but such statements appear to be dictum, or to be addressed to other problems. The court apparently does not approve the limitation suggested by the New York cases as to remoteness of the result in time or space, and has cited with approval a federal case where ten years elapsed between cause and effect. The only hint of any boundary to liability for consequences directly caused is found in the language in Wallin v. Eastern Ry., to the effect that

"A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced person, fully acquainted with all the circumstances which in fact existed, whether they could have been anticipated by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to his mind." It is difficult to say just what this means; a person gifted with omniscience as to all existing circumstances would of course foresee all consequences which might possibly follow. Perhaps there is some notion of the limitation suggested by the Restatement,

Maher v. Winona & St. Peter R. R., (1884) 31 Minn. 401, 18 N. W. 105 (defendant liable if jury find accident reasonably to be anticipated; it is difficult to see how any reasonable man could find anything of the sort); Ransier v. Minneapolis & St. Louis Ry., (1884) 32 Minn. 331, 20 N. W. 332 (liable "at least" for foreseeable consequences); Hansen v. St. Paul Gaslight Co., (1900) 82 Minn. 84, 84 N. W. 727 (liable for foreseeable consequences); La Londe v. Peake, (1901) 82 Minn. 124, 84 N. W. 726 (an intervening force case; the court's language apparently is addressed to the issue of negligence); Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307 (liable "at least" for foreseeable consequences); Board of County Comm'rs v. Sullivan, (1905) 94 Minn. 201, 102 N. W. 723 (dictum); Boyd v. City of Duluth, (1914) 126 Minn. 33, 147 N. W. 710 (considers the duty problem, discussed in text, part III); Strobeck v. Bren, (1904) 93 Minn. 428, 101 N. W. 795 (intervening force case). Much of this language seems to be traceable to Milwaukee & St. Paul Ry. v. Kellogg, (1876) 94 U. S. 469, 24 L. Ed. 256.


(1901) 83 Minn. 149, 158, 86 N. W. 76, 54 L. R. A. 481. The statement is taken from 1 Shearman & Redfield, Negligence, 6th ed., sec. 29, p. 58. It has been repeated in the later cases of Baker v. Great Northern Ry., (1901) 83 Minn. 184, 86 N. W. 82; Kommerstad v. Great Northern Ry., (1913) 120 Minn. 376, 139 N. W. 713, aff'd (1915) 128 Minn. 505, 151 N. W. 177; Fox v. Chicago, St. P. M. & O. Ry., (1913) 121 Minn. 511, 141 N. W. 845. Restatement, Torts, sec. 433: "The following considerations are in
that the defendant should not be liable for consequences which, looking backward after the event, and with full knowledge of all the facts, appear "highly extraordinary." This test has been criticized,\(^5\) and seems not to be borne out by cases which the Restatement itself approves.\(^6\) In any case, it seems unlikely that a court which imposes liability where a handcar is derailed because a following handcar is short a handle,\(^6\) where a horse struck by a train is thrown 195 feet through the air and hits the plaintiff,\(^6\) and where a woman loses her hair from fright,\(^6\) would absolve a defendant because the event is remarkable.

The "material element and substantial factor" test is of no aid in determining these questions. But once it is determined that a defendant is liable for unforeseeable consequences directly caused, that test remains as a test of causation.

### III. The Unforeseeable Plaintiff

An entirely different problem arises where the negligence of the defendant results in injury to a person to whom no harm could reasonably be anticipated. Suppose that the defendant could foresee injury to A if he did not exercise proper care; he fails to use due care, and there follows an injury to B, who was entirely outside of the area of any apparent danger.\(^6\) The issue was presented in striking fashion to the New York court in the much


\(^{61}\) Wallin v. Eastern Ry., (1901) 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481.

\(^{63}\) Kommerstad v. Great Northern Ry., (1913) 120 Minn. 376, 139 N. W. 713, aff'd (1915) 128 Minn. 505, 151 N. W. 177.

\(^{64}\) Ominsky v. Charles Weinragen & Co., (1911) 113 Minn. 422, 129 N. W. 845.

\(^{64}\) Cf. Ramsey v. Carolina-Tennessee Power Co., (1928) 195 N. C. 788, 143 S. E. 861, where defendant's negligence in shunting cars onto a spur track resulted in the electrocution of a man running a laundry machine, apparently some miles away.
debated case of *Palsgraf v. Long Island R. R.* A passenger was running to catch one of the defendant's trains. The defendant's servants, assisting him to board it, dislodged a package from his arms, and it fell upon the rails. The package contained fireworks, which exploded with some violence. The concussion broke some scales, many feet away at the other end of the platform, and they fell upon the plaintiff and injured her. The defendant's servants could have foreseen harm to the package, or at most to the passenger boarding the train; no injury to the plaintiff could possibly have been anticipated.

The traditional approach to such a case would have been to say that defendant was negligent, and its negligence directly caused the result, therefore the defendant must be liable. This was the decision in the Appellate Division. In the Court of Appeals, the case fell into the hands of Mr. Justice Cardozo, who proceeded upon a different tack. Defendant was not liable, he said, because there was no negligence toward the plaintiff. Negligence is a matter of relation between individuals; it involves a duty to use care, which must be founded upon the foreseeability of harm to the person in fact injured. "Negligence in the air, so to speak, will not do." If defendant could not reasonably foresee any injury to the plaintiff, its conduct did not become a wrong toward her merely because it was negligence toward somebody else. "The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."

Three judges dissented in the *Palsgraf Case*. Judge Andrews, in a vigorous opinion, contended that "due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone. . . . Every one owes to the world at large the duty of refraining from those acts which unreasonably threaten the safety of others. . . . Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone."

The controversy is one of long standing, which has occupied many legal writers. The Restatement has adopted Cardozo's

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67 The history of this controversy is reviewed in Goodhart, The Unforeseeable Consequences of a Negligent Act, (1930) 39 Yale L. J. 449.
position. Its merits are obvious, and simplicity is not the least of them. It falls readily into line with the terms used by the courts, and the concept of negligence as a matter of relation. But persuasive arguments may be advanced in favor of the opposing view. As between an entirely innocent plaintiff and a defendant who admittedly has departed from a social standard of conduct, if only toward one individual, who should bear the loss? The plaintiff is powerless to avert the accident, the defendant could at least avoid it by ordinary care. He is liable for unforeseeable consequences to those within the zone of apparent danger; extension of liability to those outside it would impose no new obligation of conduct. There is an essential inconsistency in holding a defendant who can foresee danger to A liable for unforeseeable injuries to A, and refusing to hold him for unforeseeable injuries to B. It is no answer to say that duty is a matter of relation between individuals. The concept of "duty" is an artificial one, which came late in the law of negligence, as a rationalization of what was already there. The assumption begs the question; if liability is to be imposed, it is quite as easy to say, with Andrews, that there is a duty to all the world. The essential question is liability, and "duty" is one of the words with which we state our conclusion. The problem is really one of social policy: whether the defendants in these cases, who in large measure are railroads, governmental bodies, automobile owners and others who by insurance, rates or taxes are in a position to distribute the risk to the general public, shall bear the losses of a complex civilization rather than the individual plaintiff. Perhaps different answers might well be given in different communities; but the issue is not to be determined by a statement of the conclusion.

68 Restatement, Torts, sec. 281 (b), Comment c. Compare the rule as to liability based on intent, Restatement, Torts, sec. 16 (2) and Comment b. The illustration given is based on Talmage v. Smith, (1894) 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414.
69 Note, (1929) 29 Col. L. Rev. 53.
71 A count of 279 Minnesota cases on "proximate cause," cited in the footnotes of this article, revealed the following list of defendants: railroads and street railways 129, other public utilities 24, manufacturers, industrial concerns and public stores 54, municipal corporations 19, automobile drivers 20, other defendants (including physicians, individual employers, charitable corporations, and others who might well have carried insurance) 33.
73 Compare the restricted view of liability sometimes found in the larger industrial states, as in Ryan v. New York Central R. R., (1866) 35
The question cannot be said to have been determined definitely in Minnesota. There are two cases in which the court has held definitely that there is no duty to those to whom no harm can be anticipated. In Renner v. Canfield, defendant wrongfully shot a dog in the street, and a pregnant woman, 175 feet away and out of sight, was frightened, and her health affected. The court held there was no liability because there was no tort against the woman. In view of a later decision that there may be recovery for fright without physical impact, the case seems clearly to support Cardozo's position. A more emphatic statement is found in Boyd v. City of Duluth, where a loose timber fell from defendant's bridge while an automobile was passing over it, and struck a child playing below, where no child could be anticipated. It was held that any duty to travellers passing over the bridge did not extend to the child.

There are other cases which perhaps confirm Cardozo's view, but might be distinguished. There is no liability for the violation of a statute, unless the plaintiff is a member of a class intended to be protected by the statute; but the effect of a statute is a


"The act, in itself, was not a tort of any kind against plaintiff, as the dog was not his property. The injury to the woman would have been presumably the same whether the killing of the dog was lawful or unlawful, and whether the defendant had fired at the dog, or at a bird in the air. If the acts of defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise." Renner v. Canfield, (1886) 36 Minn. 90, 30 N. W. 435.

"If the conduct complained of be not wilful, it must constitute negligence, and the legal concept of the latter is composite and correlative, involving not only conduct with respect to some subject matter but also a duty to the person injured, or some class to which he belongs, of which the conduct constitutes a violation; and such duty, furthermore, when not specifically defined, is not to guard against all possible consequences of the conduct, but only against those which may reasonably be anticipated." Apparently to the same effect is McGillivray v. Great Northern Ry., (1920) 145 Minn. 51, 176 N. W. 200.

Akers v. Chicago, St. P. M. & O. Ry., (1894) 58 Minn. 540, 60 N. W.
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matter of presumed legislative intent, and statutes are to be construed strictly. A contract gives no right of action to one not a party to it; but contract obligations are voluntarily assumed, and are more limited in their scope than tort duties. The duties of a landowner to those rightfully upon the premises do not extend to trespassers; but a trespasser, when he enters where he has no legal right, assumes the risk of what he may encounter, and the landowner is relieved of the responsibility of looking out for him. It has been held that there can be no recovery for the effects of fright at the peril of another; but the reluctance of the courts to permit recovery for "mental anguish" suggests that it may be the character of plaintiff's injury which prevents recovery. It is difficult to generalize upon the basis of such decisions.

On the other hand, there are cases in which the court has sus-


81See Wickenburg v. Minneapolis, St. P. & S. S. M. Ry., (1905) 94 Minn. 276: "If a recovery may be had by a person occupying the position plaintiff did—riding upon the steps of the Omaha train without the knowledge or consent of the company—then the individual known to the world as the 'tramp,' riding upon the brake beams under the car, would be equally entitled to recover; and the courts would hesitate long, in an extreme case of that kind, to declare that he was entitled to recognition." Cf. Trask v. Shotwell, (1889) 41 Minn. 66, 42 N. W. 699.

82Bucknam v. Great Northern Ry., (1899) 76 Minn. 373; Sanderson v. Northern Pac. Ry., (1902) 88 Minn. 162, 92 N. W. 542; see Keyes v. Minneapolis & St. Louis Ry., (1886) 36 Minn. 290; (1933) 19 MINNESOTA LAW REVIEW 806.

83The outstanding case is Kommerstad v. Great Northern Ry., (1913) 120 Minn. 376, 139 N. W. 713, aff'd (1915) 128 Minn. 505, 151 N. W. 177, where plaintiff, working thirty feet from a railroad track, and apparently in a position of safety, was struck by a horse thrown 195 feet through the air. The court said the questions of negligence and causation were for the jury. Accord, Alabama Great Southern Ry. v. Chapman, (1885) 80 Ala. 615, 2 So. 738. Contra, Wood v. Pennsylvania R. R., (1896) 177 Pa. St. 306, 35 Atl. 699.

In Wallin v. Eastern Ry., (1901) 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481, plaintiff was riding on a handcar, which was derailed when struck by a following handcar, on which one front handle was missing. The court said that it might be conceded that it could not be anticipated that the absence of a handle from one handcar would derail another, but that the
tained recovery on the part of a plaintiff to whom no injury was reasonably to be foreseen. These cases, upon their facts, apparently are opposed to the Palsgraf Case. It is possible to dispose of them upon the ground that the question of the unforeseeable plaintiff never was raised, and the court never saw the point. They proceed, however, upon the theory that the defendant was originally at fault, and his negligence "proximately caused the result.” The law in Minnesota seems still to await a careful consideration of the problem, and a definite decision.

The Restatement has gone beyond the holding of the Palsgraf Case, and requires that the defendant foresee a risk of harm to the particular interest of the plaintiff which is in fact invaded. Thus defendant was negligent, since it might be anticipated that the absence of the handle might occasion delay in removing the defective handcar from the track, and so cause injury. In other words, plaintiff is permitted to recover because injury was foreseeable to employees on the second handcar, or to persons on trains.

In Baker v. Great Northern Ry., (1901) 83 Minn. 184, 86 N. W. 82, the plaintiff, riding in an engine cab, was injured when the pilot, running over a springy roadbed on which gravel had been allowed to accumulate, threw a stone against the cab window. Apparently the court assumed that no injury to a person in the cab could be anticipated. Defendant was held liable for the "direct result of its negligent acts.”

Compare also Hyatt v. Murphy, (1907) 101 Minn. 507, 112 N. W. 881 (plaintiff injured when a sleigh ran into one end of a log-skid left projecting into the roadway, and threw the other end against him); Butler-Ryan Co. v. Williams, (1901) 84 Minn. 447, 88 N. W. 3 (defendant negligently handled a tow passing through a canal; a steamer was compelled to turn out, and ran into plaintiff’s piling); Dugan v. St. Paul & Duluth R. R., (1889) 40 Minn. 544, 42 N. W. 538, aff’d (1890) 43 Minn. 414, 45 N. W. 851 defendant blew a whistle, in violation of an ordinance, and frightened a team of horses standing in the street, who ran away and struck the plaintiff). It is not clear in these cases whether the court considered that injury to the plaintiff was foreseeable. See also Draves v. Minneapolis & St. Paul Suburban R. R., (1919) 142 Minn. 321, 172 N. W. 128 and the discussion of the rescue cases in the note, (1929) 29 Col. L. Rev. 53, 58.

It is assumed, of course, that the foreseeable risk may extend to a very large class of persons. Thus a power company which is negligent in handling its wires may foresee injury to any person using electric appliances, or within the range of possible contact. Gilbert v. Duluth General Elec. Co., (1904) 93 Minn. 99, 100 N. W. 653; Bardon v. Northwestern Tel. Exch. Co., (1904) 93 Minn. 421, 101 N. W. 1132; Drimel v. Union Power Co., (1918) 139 Minn. 122, 165 N. W. 1058; Anderson v. Eastern Minn. Power Co., (Minn. 1936) 266 N. W. 702. Such cases apparently do not present the problem of the unforeseeable plaintiff.

Restatement, Torts, sec. 281, Comment g, Illustration 3. This seems to be based on Cardozo’s intimation in Palsgraf v. Long Island R. R., (1928) 248 N. Y. 339, 346, 162 N. E. 99, that “There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in a unforeseeable invasion of an interest of another order, as, e.g., one of bodily security.”

Compare the comment of Goodhart, The Unforeseeable Consequences
if injury is to be anticipated only to plaintiff's property, he cannot recover for personal injuries which result. Apart from the statute cases, which again may be referred to legislative intent, there is no hint of any such limitation in Minnesota, and the contrary result seems to have been reached in *Lesch v. Great Northern Ry.*, where plaintiff recovered for mental anguish resulting from invasion of her property.

It should be obvious that the "material and substantial factor" test throws no light on these problems, and tends only to obscure the issue. Causation is not involved, and the real question is the extent of the defendant's original obligation.

**IV. Intervening Forces**

Thus far it has been assumed that the causal connection is direct, without the intervention of any external forces between defendant's conduct and the result. Intervening forces introduce a further problem, as to whether defendant is to be relieved from liability for an injury to which he has in fact contributed, by a superseding cause for which he is not responsible. "Intervening force" is a term easier of comprehension than of exact definition. An intervening force is one which comes into active operation in producing the result, after the defendant's negligence. "Intervening" is used in a time sense; it refers to later events. Conditions existing and forces already in operation at the time of defendant's conduct are not included within the term. If defendant sets a fire, with a strong wind blowing at the time, which carries...
the fire to plaintiff's property, the wind does not intervene, since it was already in operation; but if the fire is set first, and the wind springs up later, it is then an intervening force. Neither are forces caused or set in motion by the defendant himself to be considered as intervening, since they proceed directly from the defendant's conduct, and he is to be charged with their results. The distinction is doubtless an academic one, but it is useful in dealing with the type of case where a new and independent cause acts upon a situation created by the defendant.

It must be conceded that "intervening force" is a highly unsatisfactory term, since we are dealing with problems of responsibility, and not physics. It is used in default of a better. It should be understood in the very general sense of concurring causes of either natural or human origin, which come into active operation at a later time to change a situation once created by the defendant.

In considering intervening forces, it is convenient to classify the cases according to the foreseeability of the force which intervenes, and the foreseeability of the ultimate result.

A. Foreseeable Intervening Forces. If the intervening force

89Compare Johnson v. Chicago, M. & St. P. Ry., (1883) 31 Minn. 57, 16 N. W. 488, with Russell v. German Fire Ins. Co., (1907) 100 Minn. 528, 111 N. W. 400.
90"The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result." Purcell v. St. Paul City Ry., (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203. Thus if defendant stabs plaintiff with a knife, and pneumonia germs enter plaintiff's lungs on the blade of the knife, there is no intervening force, for defendant has directly caused the pneumonia. State v. James, (1913) 123 Minn. 487, 144 N. W. 216. But if defendant's act causes only a weakened condition, and pneumonia germs thereafter enter plaintiff's body from another source, there is an intervening force. Cf. Anderson v. Anderson, (1933) 188 Minn. 602, 248 N. W. 35. Both cases may result in liability, but different problems are involved.

91Intervening forces are considered in some detail in Beale, The Proximate Consequences of an Act, (1920) 33 Harv. L. Rev. 633; McLaughlin, Proximate Cause, (1925) 39 Harv. L. Rev. 149; Carpenter, Workable Rules for Determining Proximate Cause, (1932) 20 Cal. L. Rev. 229, 396, 471, at pp. 476-539. See also the Note, (1925) 9 MINNESOTA LAW REVIEW 273.
92To avoid confusion as to "concurring causes" and "intervening forces," it should be stated, in the text, all causes, intervening or otherwise, which materially contribute to the result are referred to as "concurring," while only those which come into active operation later in point of time are called "intervening." It is, of course, entirely possible that each of two concurring causes may be an intervening force as to the other. For example, suppose that each of two defendants leaves an automobile at the top of a hill without setting the brakes. The two cars run down hill and collide at the bottom, and one of them is deflected so that it injures the plaintiff. Each car has intervened after the original negligence connected with the other; both are concurring causes.
is one which in ordinary human experience is reasonably to be anticipated, the defendant may be negligent because he failed to guard against it. One who sets a fire may foresee that an ordinary, usual and customary wind will spread it beyond his own property.\textsuperscript{93} One who allows dry grass to accumulate upon a railroad right of way may foresee that sparks from an engine will set it on fire.\textsuperscript{94} One who leaves uninsulated wires where people may come in contact with them may anticipate that they will do so as a result of their own acts.\textsuperscript{95} One who negligently drives an automobile may anticipate that other vehicles will be driven so as to collide with him.\textsuperscript{96} A defendant who has a hole in his floor may expect that some person walking by will catch his heel in it.\textsuperscript{97} An unguarded elevator shaft involves the risk that others may fall into it;\textsuperscript{98} unprotected dangerous machinery means that someone may be caught in it.\textsuperscript{99} If a gun is entrusted to a minor, it may be foreseen that he will shoot himself or another.\textsuperscript{100} In all of these cases there is an intervening force concurring with the defendant's conduct to cause the result; and in each case the defendant's negligence consists in failure to protect the plaintiff against that very risk.

Obviously a defendant cannot be relieved from liability by the materialization of the risk to which he has subjected the plaintiff. Foreseeable intervening forces are within the scope of defendant's original fault. The Minnesota court has held with a fair degree of consistency that a defendant is liable for the effects

\textsuperscript{93}Cf. Krippner v. Biebl, (1881) 28 Minn. 139, 9 N. W. 621; Russell v. German Fire Ins. Co., (1907) 100 Minn. 828, 111 N. W. 400.
\textsuperscript{94}Heron v. St. Paul, Minneapolis & Manitoba Ry., (1897) 68 Minn. 542, 71 N. W. 506; cf. Patry v. Northern Pacific R. R., (1911) 114 Minn. 375, 131 N. W. 462.
\textsuperscript{96}Rappaport v. Stockdale, (1924) 160 Minn. 78, 199 N. W. 513.
\textsuperscript{97}Hastings v. F. W. Woolworth Co., (1933) 189 Minn. 523, 250 N. W. 362.
\textsuperscript{98}Landy v. Olson & Serley Sash & Door Co., (1927) 171 Minn. 440, 214 N. W. 659.
\textsuperscript{100}Anderson v. Settergren, (1907) 100 Minn. 294, 111 N. W. 279; Kunda v. Briarcombe Farm Co., (1921) 149 Minn. 206, 183 N. W. 134.
of such forces upon the situation he has created; or, in the words
of Mr. Justice Loring:101

"The rule seems to be well established that if the occurrence
of the intervening cause might reasonably have been anticipated,
such intervening cause will not interrupt the causation between
the original cause and the injury."

It is not always easy to trace this principle through the cases,
and occasionally it would appear that "foreseeable" must be inter-
preted in a rather liberal sense to bring the case within any such
rule. Considering only the conclusions reached, we may agree
that a defendant should anticipate ordinary forces of nature, such
as wind and rain;102 that one who leaves an obstruction on a
road103 or a railroad track104 may foresee that a vehicle or a train
will run into it; that if defective goods are sold to a dealer, he may
be expected to resell them;105 that if a train is run without warn-
ing signals, it is to be foreseen that an automobile will drive onto
the crossing ahead of it;106 that workmen who are furnished with
a defective appliance may be expected to try to make it work;107

101Ferraro v. Taylor, (Minn. 1936) 265 N. W. 829. To the same effect
is the language in Tozer v. Michigan Central R. R., (1917) 195 Mich. 662,
162 N. W. 213, quoted in Rothenberger v. Powers Fuel, Feed, Transfer &
Storage Co., (1921) 148 Minn. 209, 181 N. W. 641, and again in Pattock v.
St. Cloud Public Service Co., (1922) 152 Minn. 69, 187 N. W. 969: "If a
man does an act and he knows, or by the exercise of reasonable foresight
should have known, that in the event of a subsequent occurrence, which is
not unlikely to happen, injury may result from his act, and such subsequent
occurrence does happen and injury does result, the act committed is negli-

gent, and will be deemed to be the proximate cause of the injury."

102Krippner v. Biebl, (1881) 28 Minn. 139, 9 N. W. 671; Russell v. German
Fire Ins. Co., (1907) 100 Minn. 528, 111 N. W. 400; Willie v. Minnesota
Power & Light Co., (1933) 190 Minn. 95, 250 N. W. 5.

103Hyatt v. Murray, (1907) 101 Minn. 507, 112 N. W. 881.

104Martin v. North Star Iron Works, (1884) 31 Minn. 407, 18 N. W.
109. "If the material was so piled as to create a danger, such as an ordi-
narily prudent person might foresee, that the material would be caught and
pushed along in a dangerous manner, so piling it was an act of negligence
as to all who might usually be within the reach of the consequences that
might be apprehended."

105Meshbesher v. Channellene Oil & Mfg. Co., (1909) 107 Minn. 104,
119 N. W. 428. Cf. Ellis v. Lindmark, (1929) 177 Minn. 390, 225 N. W.
395.

106Setosky v. Duluth, S. S. & A. Ry., (1927) 173 Minn. 7, 216 N. W.
245.

789, the defendant furnished an ore car with a defective brake. Plaintiff,
was ordered to stop the car, and tried to do so with a pinch bar, not having been warned of the danger. It was held that the defendant's negligence was the proximate cause of his injuries.

In Liberty Mut. Ins. Co. v. Great Northern Ry., (1928) 174 Minn. 466,
219 N. W. 755, defendant supplied a hopper-bottom car with a ratchet device
missing, to be unloaded by employees. Plaintiff's insured tried to unroll
the shaft with a wrench. The doors dropped, causing the shaft to revolve
that if defendant publishes a libel, it is foreseeable that somebody will mail it to the plaintiff’s friends; that someone is likely to try to move a piano, and to be injured if it has a defective caster.

Such cases offer no great difficulty. Perhaps also it is not unreasonable to say that when a train is run with defective brakes, it may be expected to break in two, and that when the forward part is stopped, the rear end will run into it; or, in communities where houses occasionally are moved about the streets, that workmen on such a house might be expected to come into contact with elevated electric wires. And when children are in the vicini-

rapidly; the wrench was jerked out of his hands and fractured his skull. The court said: “Where the situation resulting from the original negligence is the inducing cause of the intervening act, such intervening act will not break the causal connection between the original negligence and the injury, nor absolve the original tort-feasor from liability if in the exercise of reasonable foresight he could have anticipated that the situation so created might lead to an act likely to result in harm to someone. . . . Whether defendant ought to have anticipated that when the employees of the foundry company found this device missing they might attempt to dump the load in the usual manner by using some other instrumentality to roll the shaft from beneath the doors was, we think, a question for the jury and should have been submitted to them.”

Other cases which might be listed as reasonably clear are Jacobson v. Great Northern Ry., (1912) 120 Minn. 12, 139 N. W. 142 (defendant furnished plaintiff with a defective lantern, and he fell off a ladder in the dark); Gowen v. McAdoo, (1919) 143 Minn. 227, 173 N. W. 440 (defendant maintained planking at a crossing below the required level; the runners of a sleigh driven over the rails were stuck and the driver was hit by a train); Greenwood v. Jack, (1928) 175 Minn. 216, 220 N. W. 565 (defendant repaired the timing gear on plaintiff’s Ford; he left out a cotter key, as a result of which, when plaintiff cranked the car it backfired and broke his arm); Evans v. Chicago & N. W. Ry., (1909) 109 Minn. 64, 122 N. W. 876, 22 L. R. A. (N.S.) 278 (defendant transported a horse into the state without inspection for glanders in violation of statute; plaintiff bought the horse from the owner, and it was killed by state authorities); Wickham v. Chicago, St. P. M. & O. Ry., (1910) 110 Minn. 74, 124 N. W. 639 (defendant ordered an inexperienced laborer to repair a floor under a car propped up for repairs, without warning the car repair crew to look out for him; they dropped car sills on him, and he was killed); Gillespie v. Great Northern Ry., (1913) 124 Minn. 1, 144 N. W. 466 (defendant failed to warn an employee working on a semaphore pole of blasting operations in his neighborhood); Seewald v. Schmidt, (1914) 127 Minn. 375, 149 N. W. 655 (defendant operated a gasoline concrete mixer without muffling the exhaust; the noise frightened a horse, which ran away and injured plaintiff’s horse); Dugan v. St. Paul & Duluth R. R., (1899) 40 Minn. 544, 42 N. W. 538, aff’d (1899) 43 Minn. 414, 45 N. W. 851 (defendant blew a whistle, in violation of an ordinance, frightening a team of horses in the street, who ran away and injured plaintiff).

Ransier v. Minneapolis & St. Louis Ry., (1884) 32 Minn. 331, 20 N. W. 332.

much might be expected of them which could not be anticipated on the part of adults.\textsuperscript{112} The “attractive nuisance” cases rest primarily upon the foreseeability of intervening acts of children who are too ignorant to protect themselves against a risk obvious to the defendant.\textsuperscript{118}

Co., (1933) 188 Minn. 514, 247 N. W. 680. Compare Bunten v. Eastern Minn. Power Co., (1929) 178 Minn. 604, 228 N. W. 332, where defendant maintained an uninsulated power line at a height of 25 1/2 feet above a spur track, and a workman on the boom of a road building machine 20 feet high was injured by coming in contact with it. The court held that defendant was not negligent, since it could not anticipate any injury.

Other cases where, although there is room for argument, the intervening force seems foreseeable, are Taylor v. Northern States Power Co., (1935) 196 Minn. 22, 264 N. W. 139 (defendant maintained a waxed linoleum floor, not dangerous in itself; customers tracked snow in upon it and made it slippery, and plaintiff slipped and was injured); Anderson v. Anderson, (1933) 188 Minn. 602, 248 N. W. 35 (plaintiff was injured in an automobile accident through defendant's negligence; there was medical testimony that she was so weakened as to be especially susceptible to pneumonia, which caused her death). This last case is in accord with Restatement, Torts, sec. 458, which distinguishes between diseases especially likely to be contracted by those with lowered vitality, and diseases equally likely to attack healthy persons. But cf. Honer v. Nicholson, (Minn. 1936) 268 N. W. 852.

112In Vils v. City of Cloquet, (1912) 119 Minn. 277, 138 N. W. 33, defendant left dynamite fuse caps in an unused tool house, with a hole in the foundation, where boys were known occasionally to play. Two boys entered through the hole, took out some caps, and threw them at a companion. Two days later plaintiff's six-year old son found one of the caps and hammered it with a stone to “flatten it out.” It exploded and injured his eye. The court said: “We think the evidence fully justified the jury in finding that defendant ought to have anticipated that children might enter the shed, get into the box of caps left exposed on the shelf, leave some of them around where they might be found by other children, and that injury might result. In other words, the finding that defendant was negligent is sustained by the evidence.”

In Rothenberger v. Powers Fuel, Feed, Transfer & Storage Co., (1921) 148 Minn. 209, 181 N. W. 641, defendant left a skid in an alley where children were accustomed to play. Plaintiff's child got on top of the skid, and it toppled over and injured him. Defendant's negligence was held to be a question for the jury.

In Bergman v. Williams, (1927) 173 Minn. 250, 217 N. W. 127, defendant left an automobile on a down grade with the brake set and the wheel turned against the curb, but with a three-year-old child on the sidewalk. The child climbed into the car and succeeded in starting it down the hill, and it injured plaintiff's child. Judgment upon a verdict for defendant was affirmed; the court approved an instruction that defendant was not liable unless they found that she should have anticipated that the child was likely to climb into the car, and by playing with the wheel release it so that it would run down the hill.

But it certainly is going rather far to say that the defendant should anticipate a runaway horse which he has done nothing to frighten;\textsuperscript{114} or that one who leaves an empty paint drum capable of generating explosive gas should foresee that somebody will try to cut out the head of it with a chisel.\textsuperscript{115}

Other cases which seem to call for at least a broad definition of "foreseeability" involve the voluntary defensive efforts of the plaintiff and others to avert a danger or remedy a situation created by the defendant. If defendant sets a fire which threatens plaintiff's property, the reasonable attempts of the plaintiff to put it out do not break the causal connection in case he is injured.\textsuperscript{116} So where a steamboat is turned into piling to avoid a collision,\textsuperscript{117} where plaintiff jumps from a train to avoid threatened injury,\textsuperscript{118} and where a workman to whom defendant has failed to furnish transportation walks nine miles in cold and dangerous weather to find shelter.\textsuperscript{119} Attempts on the part of strangers to rescue per-

\textsuperscript{114}Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307; McDowell v. City of Preston, (1908) 104 Minn. 263, 116 N. W. 470; Klasen v. Village of Kasota, (1914) 128 Minn. 47, 150 N. W. 221. Compare the cases where the horse might reasonably be expected to take fright at defendant's train. Maher v. Winona & St. Peter R. R., (1884) 31 Minn. 401, 18 N. W. 105; Savage v. Chicago, M. & St. P. Ry., (1884) 31 Minn. 419, 18 N. W. 272; Campbell v. City of Stillwater, (1884) 32 Minn. 308, 20 N. W. 320, 50 Am. St. Rep. 567. Even these cases seem to strain "foreseeability" to the breaking point.

\textsuperscript{115}Reichert v. Minnesota Northern Natural Gas Co., (1935) 195 Minn. 387, 263 N. W. 297. Perhaps this case and those cited in footnote 114 may be explained on the basis of foreseeability of the ultimate result, rather than of the intervening force. See the discussion below in part C, p. 53.

Another case which is very difficult to explain is Clapper v. Dickinson, (1917) 137 Minn. 415, 163 N. W. 732, where defendant left a car with a defective coupler upon a grade, with the wheels blocked, but without setting the brakes. A second car was switched against it, the coupler failed to operate, and the blocks were knocked out. The second car started down the grade; plaintiff, the switching foreman, believed it to have defective brakes from the actions of a switchman on top, and tried to block the front wheels. The first car, also running down grade, struck the second one, and ran it over plaintiff's leg. The jury's finding that the defective coupler was the "proximate cause" of the injury was affirmed. It can scarcely be suggested that such intervening forces were to be foreseen. The case must be supported, if at all, on the ground that the Safety Appliance Act was intended to protect against all injuries resulting from defective couplers, and there was causation in fact. But cf. Wiles v. Great Northern Ry., (1914) 125 Minn. 348, 147 N. W. 427, reversed (1916) 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732.

\textsuperscript{116}Berg v. Great Northern Ry., (1897) 70 Minn. 272, 73 N. W. 648 (dictum; a finding of contributory negligence was sustained by the evidence).

\textsuperscript{117}Butler-Ryan Co. v. Williams, (1901) 84 Minn. 447, 88 N. W. 3.

\textsuperscript{118}Smith v. St. Paul, Minneapolis & Manitoba Ry., (1883) 30 Minn. 169, 14 N. W. 797.

\textsuperscript{119}Schumaker v. St. Paul & Duluth R. R., (1891) 46 Minn. 39, 48 N. W.
sons or property from peril created by the defendant fall into
the same
category.\textsuperscript{120} Again, it is commonly held that if defendant
inflicts injuries upon the plaintiff, he is liable for the results of
negligent treatment by a physician, provided that the plaintiff
himself was not at fault in the choice of the physician.\textsuperscript{121}

It must be conceded that such cases call for more of an imagi-
nation to anticipate the intervening force than the ordinary "risk
of injury" which is the basis of negligence actions. At the same
time, such events cannot be classed as definitely unforeseeable,

\textsuperscript{559} Cf. Bergquist v. Kreidler, (1924) 158 Minn. 127, 196 N. W. 264
(litigation to protect supposed legal rights).

\textsuperscript{120} In Griggs v. Fleckenstein, (1869) 14 Minn. 81 (Gil. 62), defendant
left his horses unhitched in the street. They ran away, and a crowd of
persons tried to stop them by yelling and waving their hats. They swerved
and ran into plaintiff's horse. The court said: "All the consequences which
actually resulted in this case from the running away of defendant's team
might, we think, reasonably have been expected to occur by the running
away of the team, under similar circumstances, in the principal business
street of a town...."

321, 172 N. W. 128, defendant ran its car too fast without proper warning
signals. Plaintiff's companion, an elderly, heavy woman, with some infirmity
affecting her walk, was crossing the tracks; plaintiff, who had crossed and
was in a position of safety, stepped back to rescue her, and was struck by
the car. It was held, without discussion, that defendant's negligence was
the proximate cause of the injury.

Accord, Eckert v. Long Island Ry., (1871) 43 N. Y. 502; Corbin v.
Philadelphia, (1900) 195 Pa. St. 461, 45 Atl. 1070; Sherman v. United
Ass'n, (1926) 120 Or. 286, 249 Pac. 627; Hutton v. Link Oil Co., (1921)
108 Kan. 197, 194 Pac. 925; Liming v. Illinois Central R. R., (1890) 81

See the language of Cardozo, J., in Wagner v. International Ry., (1921)
232 N. Y. 176, 180, 133 N. E. 437: "Danger invites rescue. The cry of dis-
tress is the summons to relief. The law does not ignore these reactions
of the mind in tracing conduct to its consequences. It recognizes them as
normal. It places their effects within the range of the natural and probable.
The wrong that imperils life is a wrong to the imperilled victim; it is a
wrong also to his rescuer.... The risk of rescue, if only it be not wanton,
is born of the occasion. The emergency begets the man. The wrongdoer
may not have foreseen the coming of a deliverer. He is accountable as if
he had."

\textsuperscript{121} Goss v. Goss, (1907) 102 Minn. 346, 113 N. W. 690; Fields v. Man-
mato Elec. Traction Co., (1911) 116 Minn. 218, 133 N. W. 577. See Restate-
ment, Torts, sec. 457, distinguishing between risks normally recognized as
ordinarily incident to medical treatment, and unusual misconduct of
physicians and hospital attendants.

A related problem is involved in cases where the plaintiff's physical
condition causes a later accident. Thus in Hyvonen v. Hector Iron Co.,
(1908) 103 Minn. 331, 115 N. W. 167, plaintiff's leg was broken by the fall
of a skip in defendant's mine. Several weeks afterward plaintiff fell while
walking on crutches from his boarding house to the hospital, and broke his
leg again in the same place. "It was for the jury to say whether the second
break was a direct result of the first." Cf. Sporna v. Kalina, (1931) 184
Minn. 89, 237 N. W. 541, 76 A. L. R. 1280, where the second fall was due
to plaintiff's own negligence. See Restatement, Torts, sec. 460.
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since they are within ordinary experience, and so closely connected with the original risk as to be considered a part of it. It is cases of this type which have led Professor Bohlen and the Restatement to say that the intervening force need not be "foreseeable" to the defendant, but that it is sufficient if, looking back at the event, it is to be regarded as "normal," or "not extraordinary." The distinction is a subtle one, and seems to be a matter of definition. Perhaps it would be less confusing to retain the word "foreseeable," which has been used consistently by the courts, but with the understanding that it includes all risks and results normally incident to a dangerous situation created by the defendant.

Where the intervening force is the negligent act of a third person, it will not break the causal connection if it should have been "foreseen" within this definition. Nothing is better settled in Minnesota than that the defendant's fault may consist in exposing the plaintiff to the risk of injury through the negligence of others. The boy who mishandles a gun, the train run without a proper lookout, the employee who brings fire in contact with dynamite, the negligently driven automobile upon the highway, and many other forms of negligence all have been held to be foreseeable, and part of the original risk. Defendant is required to anticipate the ordinary, common failure of others to use

123Restatement, Torts, secs. 442 (b), 443-447, 451.
124Anderson v. Settergren, (1907) 100 Minn. 294, 111 N. W. 279; Kunda v. Briarcombe Farm, (1921) 149 Minn. 206, 183 N. W. 134.
126Anderson v. Smith, (1908) 104 Minn. 40, 115 N. W. 743; Froebel v. Smith, (1908) 106 Minn. 72, 118 N. W. 57.
128Meshbesher v. Channellene Oil & Mfg. Co., (1909) 107 Minn. 104, 119 N. W. 428 (dealer reselling defective goods); Ellis v. Lindmark, (1929) 177 Minn. 390, 225 N. W. 395 (same); Johnson v. Northwestern Tel. Exch. Co., (1929) 182 Minn. 435, 51 N. W. 225 (defendant notified that a third party intended to cut the guy wires of its pole); Gillespie v. Great Northern Ry., (1913) 124 Minn. 1, 144 N. W. 466 (blasting); Wickham v. Chicago, St. P. M. & O. Ry., (1910) 110 Minn. 74, 124 N. W. 639 (workmen dropping car sills); Fox v. Chicago, St. P. M. & O. Ry., (1913) 121 Minn. 511, 141 N. W. 845 (child getting off of train when station was called and train stopped too soon); Holz v. Chicago, M. & St. P. R. R., (1929) 176 Minn. 575, 224 N. W. 241 (employee going between cars when coupler would not open).
due care, which experience indicates as not unlikely to follow in the situation created.129 “It is not due care to depend upon the exercise of care by another when such reliance is accompanied by obvious danger.”130 A defendant may even be required to protect the plaintiff against the intentional or even criminal acts of a third party, in situations where the risk of such conduct should be foreseen.131 Few such cases have arisen in Minnesota,132 but the principle seems to be clear. All such cases may involve the problem of shifting responsibility, which is considered below.

Professor Beale133 has pointed out that, even though the intervening force may be foreseeable, defendant should not be liable for its effects unless his conduct has increased the risk of injury through its intervention. A wind may be expected to blow at any time, and it might injure the plaintiff in a hundred different ways; but defendant is not liable for its effects unless he sets a fire or does some other act which increases the foreseeable danger that the wind will do harm. If defendant leaves a piece of tin lying on the ground, and a wind later blows it into plaintiff’s eye, the wind may be foreseeable, but there is no liability unless the position of the tin has appreciably increased the foreseeable risk that the wind would cause injury.134 Railway trainmen are subject to a constant risk of falling off of trains, but the company is not liable for such an injury unless its negligence has increased the danger.135 The principle never has been stated expressly by the

130Dragonis v. Kennedy, (1933) 190 Minn. 128, 250 N. W. 804.
132In Garceau v. Engel, (1926) 169 Minn. 62, 210 N. W. 608, defendant left a key in the door of a shop in which plaintiff’s goods were stored, and the goods were stolen. Apparently it was assumed that the intervening force did not relieve defendant of liability.
In Mastad v. Swedish Brethren, (1901) 83 Minn. 40, 85 N. W. 913, defendant, holding a picnic, was held liable for failure to protect a business invitee against assault by an intoxicated person. Cf. Johnson v. Northwestern Tel. Exch. Co., (1892) 48 Minn. 433, 51 N. W. 225, aff’d (1893) 54 Minn. 37, 55 N. W. 829. See (1933) 17 MINNESOTA LAW REVIEW 671.
135In Goneau v. Minneapolis, St. P. & S. S. M. Ry., (1922) 154 Minn. 1, 191 N. W. 279, defendant ran a train with a defective coupler, in violation of the Safety Appliance Act. Plaintiff fell from a bridge, either while engaged in making the coupling, or afterward. It was held that the jury should have been instructed that plaintiff could recover only if he fell while
Minnesota court, but there are cases which apparently are to be explained on this basis.

B. Unforeseeable Force, Unforeseeable Result. If the defendant can foresee neither any danger of direct injury, nor any risk from an intervening force, he is simply not negligent. Negligence cannot be predicated upon a failure to anticipate that lightning will strike a tree and enter a house over telephone wires, that extraordinary and unprecedented rainfall will flood the streets,

making the coupling. The court said that the fall was "direct" and "foreseeable" if it occurred while making the coupling, but not otherwise. It seems clear that the decision must be justified on the ground that defendant's negligence did not increase the risk, if not on the ground that the statute was intended to give protection only against injuries received while making couplings.

A similar case is Bohm v. Chicago, M. & St. P. Ry., (1924) 161 Minn. 74, 200 N. W. 804, where a brakeman, on his way to release a defective brake, stepped off a ladder at the side of the car in the dark, and fell through a bridge. The court cited the Goneau Case, and said: "While the defect furnished the occasion for him to go along the top of the cars, it did not produce the condition, nor bring into operation a force, which caused him to fall. . . . If plaintiff had alighted in the same manner at the same place for the purpose of boarding the caboose, as it passed, or for any other purpose, the result would have been the same."

Contrast the cases of Otos v. Great Northern Ry., (1915) 128 Minn. 283, 150 N. W. 922, and Schendel v. Chicago Great Western R. R., (1924) 159 Minn. 166, 198 N. W. 450, 199 N. W. 111, where an employee going between the cars because of a defective coupler was injured by a movement of the cars. In such a case, it is obvious that the risk of injury through the intervening force has been increased.

In Denson v. McDonald, (1919) 144 Minn. 252, 175 N. W. 108, defendant parked his car within 20 feet of a hydrant, in violation of an ordinance, and it was struck by defendant's negligently driven truck and pushed into the hydrant. The court said that the place of parking "was the occasion but not in the legal sense a contributory cause of the injury. . . . If the plaintiff's auto had been injured by a fire truck coming to the hydrant for water service, the result might have been different."

In Geizen v. Luce, (1932) 185 Minn. 479, 242 N. W. 8, defendant parked a disabled vehicle on the highway. One car tried to pass it, and a second car tried to pass the first, and was compelled to turn into the ditch on meeting an oncoming car. It was held that the defendant's act was not the proximate cause. "The act of passing the [parked] car involved nothing not incidental to passing it while moving except that he would normally be able to pass a standing car more quickly than if it were moving." See also the cases cited in footnote 135.

Alling v. Northwestern Bell Tel. Co., (1923) 156 Minn. 60, 194 N. W. 313 (the court rejected the contention that the wire might have been expected to get into somebody's eye, or scratch him and cause blood-poisoning); cf. Parmelee v. Tri-State Tel. & Tel. Co., (1908) 103 Minn. 536, 115 N. W. 135.

that workmen will find a gun and shoot themselves,\(^{139}\) that a child will pick up a plank with a nail in it and drop it on his foot,\(^{140}\) or similar unusual and improbable occurrences.\(^{141}\) Negligence is a failure to use due care in view of the foreseeable risk.\(^{142}\) But

\(^{139}\) Larson v. Duluth, Missabe & Northern Ry., (1919) 142 Minn. 366, 172 N. W. 763.

\(^{140}\) Spiering v. City of Hutchinson, (1921) 150 Minn. 305, 185 N. W. 375.

\(^{141}\) Freeberg v. St. Paul Plow-Works, (1892) 48 Minn. 99, 50 N. W. 1025 (flying object knocked belt out of machine); Johnson v. Howells, (1893) 55 Minn. 61, 56 N. W. 460 (playful colt injured on sharp post); La Londe v. Peake, (1901) 82 Minn. 124, 84 N. W. 725 (frightened horse backing into depression); Frisk v. Cannon, (1910) 110 Minn. 438, 126 N. W. 67 (dissenting opinion of Jaggard, J., where plaintiff was burned by an apparently safe electrostatic machine); Simek v. Kobel, (1911) 114 Minn. 533, 131 N. W. 1134 (defendant held a ribbon across the street to stop a wedding procession, and one carriage ran into another); Briglia v. City of St. Paul, (1916) 134 Minn. 97, 158 N. W. 794 (automobile backed over cliff on wide highway); Kieffer v. Wisconsin Ry., Light & Power Co., (1917) 137 Minn. 112, 162 N. W. 1065 ( uninsulated wires on top of two-story building where presence of people could not be anticipated); O'Keefe v. Dietz, (1919) 142 Minn. 448, 172 N. W. 696 (stone projecting ½ inch over sidewalk); Fitzpatrick v. Rose Donahue Realty Co., (1922) 151 Minn. 128, 186 N. W. 141 (child getting slammed into her eye); McDonnell v. St. Paul Union Depot Co., (1923) 157 Minn. 66, 195 N. W. 538 (plaintiff tripped on slight defect in temporary stairway); Kennedy v. Heiberg, (1924) 159 Minn. 76, 198 N. W. 302 (defendant parked his car with the motor running, and a companion who could not drive it attempted to move it; the opinion goes off on "causation," but it seems clear that there was no negligence); Sullivan v. Minneapolis Street Ry., (1924) 161 Minn. 45, 200 N. W. 922 (truck started up ahead of defendant's street car, necessitating sudden emergency stop); Bunten v. Eastern Minnesota Power Co., (1929) 178 Minn. 604, 228 N. W. 332 ( uninsulated power line 25 feet above a spur track; a workman on the boom of a road building machine 20 feet high came in contact with it); Shepley v. Minneapolis Motor Bus Terminal Co., (1930) 180 Minn. 84, 230 N. W. 264 (plaintiff pushed off of bus platform by crowd); Kruchowski v. St. Paul City Ry., (1934) 191 Minn. 454, 254 N. W. 587 (plaintiff forced into path of street car by negligent motorist; cf. Winchell v. St. Paul City Ry., (1902) 86 Minn. 445, 90 N. W. 1050).

Compare the cases holding that there is no "attractive nuisance" where children cannot reasonably be expected to interfere, or should appreciate the danger. Stendal v. Boyd, (1898) 73 Minn. 53, 75 N. W. 725; Ericson v. Great Northern Ry., (1900) 80 Minn. 60, 84 N. W. 462; Dahl v. Valley Dredging Co., (1914) 125 Minn. 90, 145 N. W. 766; Brown v. City of Minneapolis, (1917) 136 Minn. 177, 161 N. W. 503; Erickson v. Minneapolis St. P. & S. S. M. Ry., (1925) 165 Minn. 106, 206 N. W. 889. Cf. Twist v. Winona & St. Peter R. R., (1888) 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626.

In cases involving a violation of statute, there may be no negligence, although the intervening force is foreseeable, because the statute was not intended to give protection against the particular risk. Frisch v. Chicago Great Western Ry., (1905) 95 Minn. 398, 104 N. W. 228.

\(^{142}\) In Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390, the defendant maintained a bridge with a 17 foot driveway and a 7 inch curb. Plaintiff's automobile collided with another, and went over the curb and off of the bridge. The defendant was held not to be negligent: "Accidents of this character are of such remote and improbable occurrence that negligence cannot be founded upon failure to maintain a barrier to adequately
once the defendant’s negligence is established, because injury of some kind was to be anticipated, intervening forces which could not reasonably be foreseen may cause results of an entirely different kind. The problem then becomes one of whether the defendant is to be relieved of liability by an independent cause which was in no way within the scope of his original fault.

The Minnesota court has had more difficulty with this problem than with any other, and it seems impossible to harmonize the decisions. So far as the numerical weight of the cases is concerned, the court has taken the position that the defendant is not liable for the consequences of such intervening forces. It is not reasonably to be anticipated that a cow on an unfenced right of way will knock the plaintiff under a train;¹⁴³ that boys on the same right of way will start cars down a grade;¹⁴⁴ that a boy will get past the flagman at a crossing, and try to climb on a moving train;¹⁴⁵ that workmen will violate express orders;¹⁴⁶ that an injured man will attempt to go down cellar steps on crutches¹⁴⁷ or take a trip to California for his health;¹⁴⁸ that an irrational patient in a hospital will climb out the top of a window, the lower half of which is barred;¹⁴⁹ that unmarked logs will be lost in a flood negligently released from a dam.¹⁵⁰ These and other unforeseeable intervening forces¹⁵¹ have been held to “break the causal connection.”

resist the applied force.” The court went further and held that there was no proximate causation. It would seem that the better ground would be that defendant used due care in view of the foreseeable risk. Cf. Briglia v. City of St. Paul, (1916) 134 Minn. 97, 158 N. W. 794.

¹⁴³Schreiner v. Great Northern Ry., (1902) 86 Minn. 245, 90 N. W. 400. The court held that plaintiff was not protected by the fencing statute, but said that even if he were an invitee, the defendant could not be required to anticipate “so unusual and peculiar a combination of circumstances.”

¹⁴⁴Paquin v. Wisconsin Central Ry., (1906) 99 Minn. 170, 105 N. W. 882.


¹⁴⁸Benoe v. Duluth Street Ry., (1917) 138 Minn. 155, 164 N. W. 662 (on the showing made, such expenses held not “the natural and proximate consequences of the wrongful act complained of.”)

¹⁴⁹Mesedahl v. St. Luke’s Hospital Ass’n, (1935) 194 Minn. 198, 259 N. W. 819. Cf. Mulliner v. Evangelischer Diakonissenverein, (1920) 144 Minn. 392, 175 N. W. 699, where the patient’s jump out of the window was held to be foreseeable.


¹⁵¹Swinfin v. Lowry, (1887) 37 Minn. 345, 34 N. W. 22 (assault committed by a minor, to whom defendant gave liquor); Carsten v. Northern Pac. R. R., (1890) 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St.
The justification of these decisions seems to rest upon an instinctive feeling that it would be unfair to hold the defendant responsible. A defendant who acts upon a set stage may be expected to take existing conditions as he finds them, and to be held liable for all consequences directly produced by his acts, whether or not he could anticipate them. It is another matter to charge him with subsequent changes in the situation, brought about by an independent force, of later origin, in no way to be attributed to his negligence. The boundaries of direct causation are relatively simple, and limited, not by foreseeability, but by the conditions existing at the time of the defendant's act; the possibilities of unforeseeable intervening forces are virtually unlimited.

Nevertheless, there are cases in Minnesot which have held the defendant liable for the results of an unforeseeable intervening force. Chief among these is Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Ry. Defendant carrier negligently failed

Rep. 589 (plaintiff was wrongfully put off of defendant's train, and lost possible employment); Weisel v. Eastern Ry., (1900) 79 Minn. 245, 82 N. W. 576 (railway workman on engine tender dislodged a lump of coal; probably the case holds that there was no negligence); Howley v. Scott, (1913) 123 Minn. 159, 143 N. W. 257 (plaintiff's land was sold for taxes; defendant failed to list it as sold and plaintiff did not redeem because of lack of notice; plaintiff's failure to pay the taxes held not the proximate cause); Swaney v. Crawley, (1916) 133 Minn. 57, 157 N. W. 910 (interference with contract; bonus paid to obtain the benefits of the contract held not recoverable); Kennedy v. Hedberg, (1924) 159 Minn. 76, 198 N. W. 302 (third party starting car left with engine running; the court discusses "causation," but apparently there was no negligence); Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390 (see footnote 142); Hamilton v. Vare, (1931) 184 Minn. 580, 239 N. W. 659 (defendant obstructed the highway, and two automobiles passing the obstruction collided when one turned in the wrong direction; "the question of intervening cause need not be discussed"). See also Northern States Contracting Co. v. Oakes, (1934) 191 Minn. 88, 253 N. W. 371, discussed in (1934) 18 MINNESOTA LAW REVIEW 877 (increased liability insurance premiums resulting from killing plaintiff's employee). Cf. Texas Gulf Sulphur Co. v. Portland Gas Light Co., (C.C.A. 1st Cir. 1932) 57 F. (2d) 801. See also Cochrane v. Quackenbush, (1882) 29 Minn. 376, 13 N. W. 154, and O'Neill v. Johnson, (1893) 53 Minn. 439, 55 N. W. 601 (financial loss following malicious attachment or garnishment).

An interesting case is North v. Johnson, (1894) 58 Minn. 242, 59 N. W. 1012, where defendant made fraudulent representations that he was authorized to employ plaintiffs at a distance, and sent them there. It was held that damages caused by privation and discomfort resulting from the fact that plaintiffs had no money to buy food and pay their fare home, and so had to walk, were not proximately caused. The court said that if plaintiffs had been sent out into an uninhabited wilderness, where it would be impossible to obtain food or shelter, or if defendant had known that they had no money and would be unable to find other work, the damages would have been the "natural and proximate consequence of his wrongful act." Cf. Schumaker v. St. Paul & Duluth R. R., (1891) 46 Minn. 39, 48 N. W. 559.

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to turn over a carload of broom corn, consigned to Minneapolis, to a connecting carrier. While the shipment was delayed in defendant's yards at Kansas City, it was damaged by a flood, which was conceded to be unprecedented, and beyond the reasonable anticipation of the most prudent residents of the vicinity. It was held that defendant was liable, because "its neglect concurred and mingled with an act of God" to bring about the result. Three later decisions have made statements to the same effect.

It is permissible to inquire to what lengths the court would carry the doctrine of the Bibb Broom Corn Case. The fact of causation is of course reasonably clear: without the delay caused by the defendant, the shipment would have been beyond the reach of the flood, and would not have been damaged. But the flood was not to be anticipated, and defendant's negligence did not increase the risk. Since it could not be foreseen, it was equally likely to damage the goods at any time or place. Suppose defendant, after the delay, had turned the car over to the connecting carrier, and at the Minnesota line it had been struck by lightning? Suppose even that it had reached the consignee, still ten days behind schedule—that is, with the defendant's delay still

153 "As a general rule, applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's neglect and some other cause for which he is not responsible, including an act of God, he is nevertheless liable if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. If, but for his negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable." Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Ry., (1905) 94 Minn. 269, 271, 275, 102 N. W. 709, 69 L. R. A. 509, 3 Ann. Cas. 450, 100 Am. St. Rep. 361.

154 Anderson v. Minneapolis, St. P. & S. S. M. Ry., (1920) 146 Minn. 430, 179 N. W. 45 (fire spread by gale of wind reaching 76 miles an hour); Van Wilgen v. Albert Lea Farms Co., (1929) 176 Minn. 339, 223 N. W. 301 (property flooded by unprecedented rainfall); National Weeklies, Inc v. Jensen, (1931) 183 Minn. 150, 235 N. W. 905 (same). The language in the first of these cases seems to be dictum, since the court considered that the injury which resulted was no different in kind from that to be expected from a foreseeable intervening force. See the discussion below in part C, p. 53.

Another decision which apparently permits the plaintiff to recover where defendant's negligence concurred with an unforeseeable intervening force, is Wallin v. Eastern Ry., (1901) 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481, where defendant's handcar, with one front handle missing, was so operated by its employees as to derail another handcar. The point was raised by the dissenting opinion, but the majority ignored it.
operating—and had been destroyed in his hands by a similar unforeseeable flood? It is difficult to believe that the defendant would ever be held liable for such occurrences; and yet no reasonable basis of distinction is to be perceived.\textsuperscript{155}

It may be suggested, with deference, that the time has come when the court might well overrule the \textit{Bibb Broom Corn Case}. It is out of line with the weight of authority, and has been rejected by the Restatement.\textsuperscript{156} It is contrary to the rule of the federal courts, and cannot be applied to interstate commerce,\textsuperscript{157} so that recovery may depend upon the entirely fortuitous circumstance that the shipment did not cross a state line.\textsuperscript{158} It seems incapable of being reconciled with at least one other Minnesota decision, written by the same judge, involving an unforeseeable act of God.\textsuperscript{159} It is not easy to justify upon any familiar prin-

\textsuperscript{155}The case might perhaps be justified upon the ground that defendant was a carrier, and there is an analogy in the rule that a deviation from the designated route makes the carrier an insurer of safe delivery. See Minneapolis, St. P. & S. S. M. Ry. v. The Reeves Coal Co., (1921) 148 Minn. 196, 181 N. W. 335. But the decision does not rest upon any such ground, and states a general rule as to unforeseeable intervening forces; and it has been cited in later cases which did not involve carriers of goods. See footnote 154.

Cases involving foreseeable intervening forces, such as ordinary changes in the weather, are of course to be distinguished. Fox v. Boston & Maine R. R., (1889) 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; cf. White v. Minneapolis & Rainy River Ry., (1910) 111 Minn. 167, 126 N. W. 533.

\textsuperscript{156}Restatement, Torts, sec. 451. The explanatory note to the tentative draft of this section, Restatement, Torts, Tentative Draft No. 8, p. 111, states that some fourteen states follow the rule of the \textit{Bibb Broom Corn Case} as to a carrier's liability for acts of God, while some thirty-two are opposed to it—citing 10 C. J. sec. 154, 155.

\textsuperscript{157}Northwestern Consolidated Milling Co. v. Chicago, B. & Q. R. R., (1917) 135 Minn. 363, 160 N. W. 1028, cert. denied (1917) 245 U. S. 644, 38 Sup. Ct. 8, 62 L. Ed. 528 (holding that under the Hepburn Act the court is compelled to follow the federal rule as to interstate shipments).

\textsuperscript{158}"If for no other reason, the federal rule should be preferred unless it is clearly against the weight of authority or the necessary implications of the general principles which determine legal causation. Nothing is more difficult than to determine whether a particular traffic movement is or is not interstate in character. If the rule in any particular state differs from the federal rule, the rights of the parties must depend upon whether the goods were lost during an interstate or intrastate traffic movement, with all the uncertainty and difficulties attending the determination of this question." Restatement, Torts, Tentative Draft No. 8, p. 111.

\textsuperscript{159}Strobeck v. Bren, (1904) 93 Minn. 428, 101 N. W. 795. Defendant's property lay between plaintiff's property and a railway. Defendant left open a gate in the fence between his property and the right of way. A storm blew down a tree, which fell on the fence between plaintiff's land and defendant's. Plaintiff's cattle passed through the gap in this fence, over defendant's land, and through the gate onto the right-of-way, where they were killed. The case might have been disposed of upon the ground that there was no negligence, since no injury to others was to be foreseen. The court said that it need not determine this question, since there was
ciples of the law of negligence, and it holds the carrier responsible for a force of nature which is no part of the foreseeable risk created.\textsuperscript{160}

If the case is to stand as the law in Minnesota, it remains for the court to explain why a defendant should be held liable for an intervening storm or flood, and not for other unforeseeable intervening forces. It must be conceded that, apart from the natural desire of the bar to be able to predict what the court will do, there is no real reason for consistency in these cases, and that the attempt to make them a matter of rule is doomed to failure. Various moral factors and considerations of policy may justify liability in one case and not in another.\textsuperscript{161} But no such considerations are evident here. It seems clear that the court never has given full consideration to the problem, for the sufficient reason that it never has been adequately presented by counsel.

C. Unforeseeable Force, Foreseeable Result. 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 reasonably be anticipated changes the situation, but ultimately produces the same kind of result?\textsuperscript{162} The problem is well illustrated by a recent federal case.\textsuperscript{163} The defendant failed to clean the residue out of an oil barge, tied to a dock, leaving it full of explosive gas. This was of course negligence, since fire or explosion was to be anticipated from any one of several possible sources, and might result in harm to any person in the vicinity. A bolt of lightning struck the barge, exploded the gas, and injured the employees of a contractor working on the premises. Should the defendant be held liable? It may be as-

\textsuperscript{160}Compare the case of Berry v. Sugar Notch Borough, (1899) 191 Pa. St. 345, 43 Atl. 240, where the motorman's speed brought the car under a tree in time to be struck when it was blown down. Is there any real distinction?\textsuperscript{161}Discussed at length in Edgerton, Legal Cause, (1924) 72 U. Pa. L. Rev. 211, 343.

\textsuperscript{162}For example, suppose defendant, in dry weather, runs its train without proper spark arresters on the locomotive. A spark from the engine sets fire to a field of hay on the south side of the track; a cyclone blows the fire in a circle of a hundred miles, and a wheat field adjoining the right of way on the north side at the same point is burned. Is the defendant liable?

\textsuperscript{163}Johnson v. Kosmos Portland Cement Co., (C.C.A. 6th Cir. 1933) 64 F. (2d) 193.
sumed that the lightning was an unforeseeable intervening force; but the result was one to be anticipated, and its foreseeability imposed upon the defendant the original duty to use proper care.

In such a case the result which has occurred is within the scope of the defendant's negligence. His obligation to the plaintiff was to protect him against such an accident. It is a comparatively slight extension of responsibility to hold him liable when the danger which he has created actually materializes, but in an unforeseeable manner, and as the result of external factors which could not be anticipated. An instinctive feeling of justice leads to the conclusion that the defendant is morally responsible in such a case, and that the loss should fall on him rather than on the innocent plaintiff.

Yet it seems impossible to generalize upon any such basis. There undoubtedly are intervening forces whose nature is such that they supersede defendant's responsibility, even for a foreseeable result. Suppose that A knocks B down and leaves him lying unconscious in the street, where he may be run over by passing automobiles, and C, a personal enemy of B, comes along and intentionally runs him down? Or that defendant has excavated a hole in the sidewalk, and plaintiff is deliberately pushed into it? Or that a chair is left on the railing of a theater balcony, and a boy throws it down? Probably no court would hold a defendant liable in such cases, but it is not easy to discover the distinction. Intangible factors of moral responsibility are involved, which defy definition.


Professor Edgerton, whose thesis is that "justice" is the test of proximate cause, lays great stress upon these moral factors, and rationalizes such decisions for the defendant by saying that the interest of society in discouraging intentionally wrongful conduct is likely to be best served by denying a recovery against the original wrongdoer, since a judgment against him reduces the likelihood that the intervening wrongdoer will be made to answer. Edgerton, Legal Cause, (1924) 72 U. Pa. L. Rev. 211, 343, at pp. 344, 364, 367. But see the criticisms of this "justice" test in McLaughlin, Proximate Cause, (1925) 39 Harv. L. Rev. 149, 187; Carpenter, Workable Rules for Determining Proximate Cause, (1932) 20 Cal. L. Rev. 229, 244.
its rather vague language, is willing to hold a defendant liable for foreseeable results caused by extraordinary forces of nature, but not for those due to unforeseeable negligent or intentional acts of third persons.\textsuperscript{168}

There are a number of Minnesota cases which have held the defendant responsible for the foreseeable result where it is caused by an unforeseeable intervening force, and which apparently cannot be explained on any other basis. The earliest was *Moore v. Townsend*,\textsuperscript{169} where defendant left a ladder standing on the sidewalk against a building. It was blown down by an "unusual blast of wind," and injured plaintiff. It was held, with no discussion of the problem, that defendant was liable. A line of subsequent decisions, which dealt with runaway vehicles,\textsuperscript{170} or the intervening negligent acts of other parties,\textsuperscript{171} have confirmed this conclusion.

\textsuperscript{168}Restatement, Torts, sec. 442 (a), sec. 451, and secs. 447-449.

\textsuperscript{169}(1899) 76 Minn. 64, 78 N. W. 880. The court said merely: "The fact that some other cause operated in connection with this negligence could not relieve defendants from liability. The original negligence concurred with another cause, and, operating at the same moment, produced the injury."

\textsuperscript{170}In *McDowell v. Village of Preston*, (1908) 104 Minn. 263, 116 N. W. 470, the defendant partially obstructed the street with a building; plaintiff's horse took fright at a raised umbrella, bolted and ran into the obstruction, injuring the plaintiff. A verdict for plaintiff was affirmed. The court said: "Such is the law in this state, whatever may be the rule elsewhere. It is based on the principle that, where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it."

\textsuperscript{171}In *Turner v. Chicago, R. I. & P. Ry.*, (1917) 136 Minn. 383, 162 N. W. 469, defendant failed to maintain a right-of-way fence. Plaintiff's cattle got onto the right of way, passed over the cattle guards at a crossing, and along the highway to a farm. The farmer's wife set the dog on them, and frightened them out of the farmyard and through an open gate onto the right-of-way again, where they were killed by the train. The act of the farmer's wife was held not to be such an intervening force as to break the causal connection as a matter of law; the question was for the jury.

In *Palyo v. Northern Pacific Ry.*, (1920) 144 Minn. 398, 175 N. W. 687, defendant failed to place any barriers between its tracks and property on
There is no clear statement of the principle, and there are one or two cases\textsuperscript{172} to the contrary, but the weight of the decisions is decidedly in favor of liability.

which there was a short cut habitually used by small children. Plaintiff’s six year old child was standing close to the tracks, and another boy threw his cap under a standing train, and pushed him under after it. The train was started without warning and ran over his foot, inflicting fatal injuries. A majority of the court were of the opinion that it was a question for the jury whether the act of the other boy was the sole cause of the injury.

In Farrell v. G. O. Miller Co., (1920) 147 Minn. 52, 179 N. W. 566, the defendant sold gasoline in a can not colored or tagged as required by statute. A third party placed the can beside other cans containing kerosene. Plaintiff mistook it for kerosene and was injured. “The act of the farm hand in placing the can of gasoline beside the kerosene cans in the shed was not such an efficient cause intervening between defendant’s wrongful act and plaintiff’s injury as to free defendant from liability.”

In Reynolds v. Great Northern Ry., (1924) 159 Minn. 370, 199 N. W. 108, a freight train was feeding gasoline through a hose into an intake pipe. A brakeman set his lighted lantern near the mouth of the intake. The conductor for some unknown reason ordered the pump stopped, and pulled the nozzle of the hose out of the pipe. Gasoline sprayed onto the lantern, and a fire resulted which extended along the hose to the tank car. The conductor ran along the side of the car trying to cut the hose; his clothing caught fire, and he was burned to death. The court said that whether the conductor’s act in pulling the hose out was the sole proximate cause was for the jury.

Other cases which apparently are to be explained on this basis are Musolf v. Duluth Edison Elec. Co., (1909) 108 Minn. 369, 122 N. W. 499 (it is not clear whether the court considers the intervening acts as foreseeable); Neidhardt v. City of Minneapolis, (1910) 112 Minn. 149, 127 N. W. 484 (it is not clear whether the automobile is considered foreseeable, but the court lays stress on the fact that plaintiff would have been compelled to step out of the way of a carefully driven car); Moehlenbrock v. Parke, Davis & Co., (1918) 141 Minn. 154, 169 N. W. 541; Reichert v. Minnesota Northern Natural Gas Co., (1935) 195 Minn. 387, 263 N. W. 297 (the court regarded it as foreseeable that someone would cut out the head of a paint drum with a chisel; it is easier to justify the case upon the ground that the explosion itself was foreseeable); Wedel v. Johnson, (1936) 196 Minn. 170, 264 N. W. 689.

“Such a cause must be one which not only comes between the original cause and the injury in point of time, but must turn aside the natural sequence of events and produce a result which would not otherwise have followed.” Gillespie v. Great Northern Ry., (1913) 124 Minn. 1, 144 N. W. 466.


\textsuperscript{172}Childs v. Standard Oil Co., (1921) 149 Minn. 166, 182 N. W. 1000. Defendant filled a mercantile company’s tank with kerosene, and permitted it to overflow into the basement. Employees of the company soaked up the oil with sawdust, and left oil-soaked sawdust near the furnace. An occupant of the building, putting fuel on the furnace fire, took a shovel which had been used to scrape up the sawdust, and tried to shove a stick through the furnace door. There was a burst of flame, and the building, containing plaintiff’s property, was destroyed. It was held that the intervening acts of the other persons “insulated” the original negligence of defendant. It is difficult to agree with this case. Intervening forces of the same general
There are two Minnesota cases\textsuperscript{173} in which an intervening act of God, unforeseeable in itself, caused damage of the same kind as that to be anticipated, but greatly increased in extent. The court apparently has approved the conclusion of the Restatement,\textsuperscript{174} that the defendant should be liable in such a case. Perhaps the justification of such a result is the practical impossibility of separating out the damages, and assigning a part of them to the intervening force.

It cannot be reiterated too often that any such classification of the cases is useful only to focus attention upon the problems involved, and that no mechanical solution is possible, and the matter cannot be reduced to a set of rules. It should be evident, however, that the problem of intervening forces is not so much one of causation as of the scope of the defendant's original obligation; and that the "material element and substantial factor" test is of no assistance in dealing with it.

V. Damages

It has been assumed quite generally by the courts that if the defendant has proximately caused the plaintiff's injury, and is liable at all, he must be liable to the full extent of any loss sustained.

Chief Justice Peaslee of New Hampshire, in an extremely interesting nature (attempts to clean up the oil, fire from some source) might reasonably have been anticipated, and defendant greatly increased the risk; and in any case, the destruction of the building by fire was foreseeable. It seems decidedly unjust to put the loss on the plaintiff, even though there might be recovery from others.

See also Peterson v. Martin, (1917) 138 Minn. 195, 164 N. W. 813, where plaintiff's son found dynamite caps left by defendant in his granary: plaintiff knew the boy had them in his possession, and failed to take them away from him. It was held that "the father's course of conduct would break the connection between the original negligent act and the injury to the boy." Carpenter, Workable Rules for Determining Promixate Cause, (1932) 20 Cal. L. Rev. 229, 396, 471, at p. 489, is inclined to disagree with the case. Cf. Mathis v. Granger Brick & Tile Co., (1915) 85 Wash. 634, 149 Pac. 3; Diehl v. A. P. Green Fire Brick Co., (1923) 299 Mo. 641, 253 S. W. 984; Henningsen v. Markowitz, (1928) 132 Misc. 547, 230 N. Y. S. 313.

See also Lundstrom v. Giacomo, (1935) 194 Minn. 624, 261 N. W. 465.


ing article in a recent issue of the Harvard Law Review, has pointed out that this is not always true. The situation which gave rise to the article arose in a New Hampshire case. A boy standing on the high beam of a bridge trestle lost his balance, and started to fall onto rocks far below. To save himself, he caught hold of defendant's wires, which were uninsulated, and was electrocuted. It may be assumed that defendant was negligent, and that its negligence proximately caused the death of the boy. Clearly there is liability; but what is its extent? The loss of balance and the incipient fall were accomplished facts before the defendant's wrong came into active operation. What is the life expectancy of a boy falling to certain death? The court allowed only nominal damages, upon the ground that his life had no value at the time the defendant killed him.

The case suggests that there are situations where a force already in operation has made the loss certain, or at least very probable, before the defendant causes it, and that such existing facts are reflected in the valuation of the loss. It is familiar law that the fact that a decedent already was dying of cancer will reduce his life expectancy, and accordingly, the damages recoverable against a defendant who kills him with an automobile. Then what is the market value of a house in the path of a conflagration, which the defendant destroys with dynamite? Suppose that he attempts to save a building, already undermined by a flood and in imminent danger of collapse, and in doing so negligently destroys it?

A search of the Minnesota decisions reveals no consideration of this problem, but a few cases where the point might well have been raised. A man is seriously ill with diphtheria, and the doctor negligently lances his throat, causing his death; what was the value of his life? The defendant runs its train over a hose which is being used to put out a fire in the plaintiff's building, and the building is destroyed. What is the value of the building at the time, and does it depend upon the nature of the fire and the extent

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175 Peaslee, Multiple Causation and Damage, (1934) 47 Harv. L. Rev. 1127.
177 Clark v. George, (1921) 148 Minn. 52, 180 N. W. 1011. Cf. Viou v. Brooks-Scanlon Lumber Co., (1906) 99 Minn. 97, 108 N. W. 891, to the effect that a physician negligently treating an injury is not liable for damages caused by the original wrongdoer.
178 Erickson v. Great Northern Ry., (1912) 117 Minn. 348, 135 N. W. 1129; Bodkin v. Great Northern Ry., (1914) 124 Minn. 219, 144 N. W. 937, Ann. Cas. 1915B 705. In the latter case the court touched upon the edges of the point.
to which it was under control? Plaintiff's engaged in saving his stock of goods from a burning store, when the defendant cuts off the electric current and leaves the store in darkness, and the goods are lost. What value should the jury set upon goods which must be rescued from a fire, in view of the chance of saving them? In *Morris v. St. Paul City Ry.*, where plaintiff suffered a miscarriage, the court refused to permit the jury to balance against the pain suffered from the miscarriage the pain to be expected from the normal birth of the child, saying that it was "too remote, speculative and uncertain to be taken as a basis for estimating damages." Perhaps the future contingency is not sufficiently certain to be considered; would the result be otherwise if the miscarriage had occurred three days before the birth of the child was due?

Reverting to the New Hampshire case of the boy falling from the trestle, suppose now that the boy had been pushed off by another person, before coming in contact with defendant's wires. There are now two responsible causes, upon each of which liability may be imposed. Should the damages to be charged against the second be diminished by reason of the certainty of loss created by the first? So far as the rules of damages alone are concerned, such a result might be defensible. But the two defendants are joint tort-feasors, and it is the common law rule that each of two such wrongdoers is liable for the entire amount of the loss which they have concurrently caused. The rule is founded upon a policy which relieves the plaintiff of the necessity of apportioning the fault between two persons who together have injured him, and permits him to recover in full from either, leaving them to settle between themselves the question of their respective responsibility. Primarily it is based upon convenience of administration. It is generally agreed that the rule is a desirable one, and that the fault, if any, lies in the confused and unsatisfactory holdings as to contribution between tort-feasors.

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180(1908) 105 Minn. 276, 117 N. W. 500. Cf. Joyce, Damages, sec. 185.  
181Reference to Respondent's Brief in the case, p. 2, indicates that plaintiff was pregnant only two months.  
As the law now stands, a plaintiff who has been injured by the concurrent misconduct of two defendants may recover full damages against either. In any question arising between the two wrongdoers, however, the question of the damages to be charged against either deserves consideration. And in any case where there is no joint tort, but the plaintiff has sustained successive, independent injuries, it is clear that the damages should be apportioned.

Where one of the two concurring causes is of innocent origin, the rule as to joint tort-feasors has no application, and the question of the portion of the loss attributable to the wrongdoer might well be considered. Chief Justice Peaslee has opened up a new field.


184 Minnesota permits contribution between joint tort-feasors where the negligence of each is of a similar nature. Ankeny v. Moffett, (1887) 37 Minn. 109, 33 N. W. 320; Underwriters at Lloyds v. Smith, (1926) 166 Minn. 388, 208 N. W. 13; see Duluth, M. & N. Ry. v. McCarthy, (1931) 183 Minn. 414, 236 N. W. 766, 767; Mayberry v. Northern Pac. Ry., (1907) 100 Minn. 79, 83, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754. But no contribution is permitted in favor of a wilful and conscious wrongdoer, from one who has been merely negligent. Fidelity & Casualty Co. of New York v. Christenson, (1931) 183 Minn. 182, 236 N. W. 618. Quaere: whether this rule might be extended to prohibit contribution in favor of one responsible for the greater part of the loss?

185 In McGannon v. Chicago & N. W. Ry., (1924) 160 Minn. 143, 199 N. W. 894, plaintiff was employed as a sand-house man under the director general of railroads for two years and two months, and was then employed under the defendant railway company for the succeeding seven months. He suffered injury because of fine sand and fumes escaping from the sand drier during the entire period. It was held that the director general and the railway company could not be joined as defendants, since there was no joint tort. Each defendant was liable only for the injury sustained during the period of actual employment of the plaintiff. "If the plaintiff's health was impaired through the negligence of his former employer, and he subsequently sustained further injury through the negligent acts of the railway company, thus aggravating his former injury, the company would be liable to the extent that its acts aggravated the plaintiff's condition, but the former employer would not be liable for such aggravation."

It is clear that the court considers the situation the same as if one defendant had injured plaintiff's foot, causing amputation of the foot, and the other had injured him later, causing amputation of the leg.

Compare Johnson v. City of Fairmont, (1933) 188 Minn. 451, 247 N. W. 572; Novre v. Wright, (1906) 98 Minn. 477, 108 N. W. 865, 8 Ann. Cas. 1071. As to the nature of a joint tort, see Notes, (1931) 19 Cal. L. Rev. 630; (1924) 24 Col. L. Rev. 891; (1932) 17 MINNESOTA LAW REVIEW 109.

186 Peaslee, Multiple Causation and Damage, (1934) 47 Harv. L. Rev. 1127, justifies on this ground the distinction made in the Wisconsin fire cases, Cook v. Minneapolis, St. P. & S. S. M. Ry., (1898) 98 Wis. 624, 74
of inquiry, which has received little attention from the courts. It goes without saying that the "material element and substantial factor" test does not aid in the solution of the question.

VI. SHIFTING RESPONSIBILITY

Perhaps the most nebulous and difficult of the problems connected with "proximate cause" is that which, for lack of a better term, may be designated as the problem of shifting responsibility. The type of situation involved is illustrated by the recent case of Ferraro v. Taylor. The defendant rented an automobile, on the "drive yourself" plan, to one Taylor. The car had defective brakes, an accelerator which stuck when pressed down, a loose steering wheel, and a windshield wiper which was out of order, and it was a rainy day. After discovering these defects, Taylor continued to drive the car. He lost control of it while going down grade

N. W. 561, and Kingston v. Chicago & N. W. Ry., (1927) 191 Wis. 610, 211 N. W. 913. The Cook Case was rejected expressly by the court in Anderson v. Minneapolis, St. F. & S. S. M. Ry., (1920) 146 Minn. 430, 179 N. W. 45, but it does not appear that the damages point, as to the value of plaintiff's property at the time of the destruction, was brought to the attention of the court.

Carpenter, Concurrent Causation, (1935) 83 U. Pa. L. Rev. 941, attempts to refute Peaslee's article, interpreting it as a defense of the "but for" rule, and a contention that in these cases the defendant has not caused any injury to the plaintiff. To the writer, it does not seem that this is Peaslee's contention; it is conceded that defendant has caused a loss to plaintiff, and is liable for it, and the only question is as to the amount of recovery—the value of what has been destroyed.


188 "In his testimony he described the car as 'a pineapple,' an 'old melon,' and an 'old wreck;' that 'this car was just like all the rest of them I ever rented over there. There's none of them in shape.' He 'came near colliding' with a street car because the brakes wouldn't work. At another time he thought he would have 'to pretty near put it in reverse in order to stop.' Another near accident occurred while he was following another car, the foot throttle stuck and he had to reach down with his hand to raise it. Fully aware of these many and serious defects he nevertheless continued to drive this 'old wreck' upon the busy streets of Minneapolis. The weather was rainy. Because of the claimed defective windshield wiper he continued to stop and wipe off the windshield. Instead of taking the car back to the service company he thought it was all right to drive it even if it was not 'in shape;' it was not his 'lookout' but the owner's 'hard luck' if anything happened." Dissenting opinion of Mr. Justice Julius J. Olson, Ferraro v. Taylor, (Minn. 1936) 265 N. W. 829.

over a viaduct, and collided with the plaintiff. The court, with one justice dissenting, said that defendant was liable, since it had rented the car for the very purpose of driving it upon the highway, and the negligence of Taylor was a foreseeable intervening force.\footnote{199}

It may be assumed that the conduct of the defendant in renting the car in such a condition was not due care. If one of the defendant's servants had driven the car, there could be no doubt as to liability. It may also be assumed, in accordance with the opinion, that the acts of Taylor in driving the car with knowledge of the defects might be foreseen. Certainly the ultimate result, the injury to a person on the highway, might be anticipated. But the question remains, whether the defendant is relieved of responsibility by the fact that another responsible individual has taken full charge of the situation. The question is not one of causation, for the causal connection is clear; it is essentially one of the termination of the defendant's original responsibility.

A similar problem is involved in a wide variety of cases. Mention of some of the conclusions of the court will indicate the difficulty of reducing them to any common principle. A landlord who leases premises is not responsible for injuries to third persons caused by their defective condition,\footnote{199} unless he has covenanted to keep them in repair,\footnote{191} or knew of a concealed defect at the time of the lease.\footnote{192} But if the property is leased for a public purpose, as, for example, a theater, the landlord's responsibility cannot be shifted to the tenant;\footnote{193} and the same is true if the condition of the premises at the time of leasing constitutes a public nuisance, or is dangerous to those outside of the property.\footnote{194} Not even notice to the tenant and his agreement to repair will relieve the landlord in such a situation.\footnote{195} Carriers furnishing defective cars to con-

\footnote{199}Technically the decision is dictum, since a new trial was ordered because of misconduct of counsel. It should be noted that liability is now clearly imposed by Minn. Laws 1933, ch. 351, sec. 4, making the driver the agent of the owner; but the statute was not in effect at the time of this accident.

\footnote{191}Harpel v. Fall, (1896) 63 Minn. 520, 65 N. W. 913; Daley v. Towne, (1914) 127 Minn. 231, 149 N. W. 368.

\footnote{192}Barron v. Liedloff, (1905) 95 Minn. 474, 104 N. W. 289.


\footnote{194}See Glidden v. Goodfellow, (1913) 124 Minn. 101, 104, 144 N. W. 428; cf. Tvedt v. Wheeler, (1897) 70 Minn. 161, 72 N. W. 1062.

\footnote{195}Isham v. Broderick, (1903) 89 Minn. 397, 95 N. W. 224. See (1931) 16 MINNESOTA LAW REVIEW 111; (1934) 18 MINNESOTA LAW REVIEW 229. But cf. Nickelsen v. Minneapolis, Northfield & Southern Ry., (1926) 168 Minn. 118, 209 N. W. 646, which seems to hold that a covenant by a responsible lessee to put and keep the premises in safe condition before permitting the public to use them may protect the lessor.
necting carriers or shippers are not absolved from liability to employees by the employer's failure to inspect and discover the defect; but the responsibility continues only while the car is used for the purpose for which it was furnished. A manufacturer who sells defective goods to a dealer is liable for injuries resulting when the goods are negligently resold without inspection to the consumer; and it is not altogether clear that even the dealer's discovery of the defect will terminate the responsibility. A drug company which supplies impure ether is liable when doctors negligently administer it and kill the patient. Persons on the highway may assume that automobile drivers will proceed with proper care; but the responsibility may not be left to them where the situation indicates an especial likelihood of their negligence. A county auditor who fails to use care to detect a forgery may


199The point was expressly left open in Krahn v. J. L. Owens Co., (1914) 125 Minn. 33, 145 N. W. 626; Farrell v. G. O. Miller Co., (1920) 147 Minn. 52, 179 N. W. 566.

200Moehlenbrock v. Parke, Davis & Co., (1918) 141 Minn. 154, 169 N. W. 541.


202Holmberg v. Villaume, (1924) 158 Minn. 442, 197 N. W. 849, discussed in note. (1925) 9 Minnesota Law Review 273; Edblad v. Brover, (1929) 178 Minn. 465, 227 N. W. 493; Brown v. Murphy Transfer & Storage Co., (1933) 190 Minn. 81, 251 N. W. 5; Dragotis v. Kennedy, (1933) 190 Minn. 128, 250 N. W. 804 ("It is not due care to depend upon the exercise of care by another when such reliance is accompanied by obvious danger."). Compare the rule that one who has the right of way at an intersection is not relieved of the duty to slow down and keep a proper lookout. Rosenau v. Peterson, (1920) 147 Minn. 95, 179 N. W. 647.
not rely upon the treasurer to discover it. An employer may not leave to others the duty to warn a servant of blasting operations in the vicinity; but he may assume that the employees themselves will not disobey express orders. A workman digging a hole in the street may certainly leave it to his superiors to set out a warning lantern.

The outstanding case in Minnesota is Goar v. Village of Stephen. The defendant electric company constructed a transformer pole, under contract with the village. There was evidence from which the jury might find that the wire leading from high tension wires to the transformer box was placed too close to service wires below. The contract required the village, after the pole was turned over to it, to notify defendant of any defects which it might be required to make good. The village failed to inspect the pole for seventeen months, during which time the “sometimes none too gentle breezes that play over the Red River valley” rubbed the wires together, and wore off the insulation. Twenty-three hundred volts came over the service wire into plaintiff’s house, and injured her. The court held that, assuming that defendant was negligent in constructing the pole, still it was not liable, since the village had assumed the duty of inspection and maintenance, and defendant was entitled to rely upon the village. The negligence of the village was an “independent producing agency of such character that it broke the causal connection.” Stress was laid upon the fact that the pole was not immediately dangerous when it was turned over, and that “it took a year and a half of neglect before any injury resulted.”

The cases involving liability of manufacturers to
consumers were distinguished upon the ground that the goods were presently dangerous when turned over by the manufacturer, and there was no affirmative undertaking to inspect and maintain upon which defendant was entitled to rely.

Perhaps no common element is to be found in all these cases. It certainly is not easy to find any one deciding factor. The essential question, in each case, is whether the defendant is reasonably justified in placing the responsibility upon another, rather than exercising proper care himself. The foreseeability of the intervening negligence is important; without it there could scarcely be liability. But in many cases the defendant is not required to guard against what is foreseeable, because the responsibility is not his. It is probable that many factors have weight, and that no one is conclusive in all cases: the seriousness of the danger, and the class of persons included within it, the character and position of the party upon whom reliance is placed, his knowledge of the situation, the degree of likelihood that he will not use due care, the length of time elapsed, the existence of an express agreement, the situation of defendant and his power of control, and perhaps many others.

If an attempt must be made to generalize, the cases might be summarized in some such statement as the following: That where the defendant is under an obligation to use due care for the protection of a class of persons in which the plaintiff is included, and may reasonably anticipate that another person will fail to use proper care if that responsibility is transferred to him, and may foresee serious danger of injury as a result of such failure, the defendant is not relieved of his obligation by the fact that the other has also a duty to use due care. Something of an analogy might be found in the rules applied to the liability of an employer.
for the negligence of an independent contractor.\textsuperscript{211} Ordinarily full responsibility is assumed by the contractor, and the employer is under no liability for injuries to third persons caused by the contractor's negligence.\textsuperscript{212} But this is not the case where the employer has a "non-delegable" duty—\textsuperscript{213} as, for example, the duty to protect persons coming upon his premises—\textsuperscript{214} or where the work done obstructs a highway or creates a nuisance,\textsuperscript{215} or where the work is "intrinsically dangerous."\textsuperscript{216} The employer's liability appears to rest upon the especial likelihood of injury unless special precautions are taken.\textsuperscript{217} Obviously it is a far cry from such problems to any question of causation, and the issue is only obscured by discussion in terms of "proximate cause."


\textsuperscript{213}Harper, Law of Torts, sec. 292, p. 647.

\textsuperscript{214}Corrigan v. Elsinger, (1900) 81 Minn. 42, 83 N. W. 492; Minneapolis Mill Co. v. Wheeler, (1883) 31 Minn. 121, 16 N. W. 698.


\textsuperscript{217}Cf. Restatement, Torts, sec. 416. One of the earliest statements of this principle is that of Cockburn, C. J., in Bower v. Peate, (1876) L. R. 1 Q. B. D. 321: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and can not relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to the contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventative measures are adopted. While it may be just to hold the party authorizing the work in the former cases exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."
Surely enough has been said to indicate that there is no universal solvent or philosopher's stone awaiting the alchemist in the field of proximate cause. The "material element and substantial factor" test is adequate as to the problem of causation in fact, but is of no real assistance in dealing with other problems. The attempt to find a general formula obscures the existence of separate questions, which have nothing in common. Some further mention might be made of the frequency with which the court has discussed in terms of "proximate causation" cases which appear merely to present questions of negligence, contributory negligence, assumption of risk or the last clear chance, with its Minnesota equivalent of "wilful negligence." But the writer is inclined to share the conclusion of the earlier note in the Law Review.

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218 See for example Simek v. Korbel, (1911) 114 Minn. 533, 131 N. W. 1134; Kennedy v. Hedberg, (1924) 159 Minn. 76, 198 N. W. 302; Nelson v. Chicago, M. & St. P. Ry., (1882) 30 Minn. 74 (violation of statute). Compare Benson v. Larson, (1916) 133 Minn. 346, 158 N. W. 426, where the court disposed of the case upon the ground that plaintiff "was not such a pedestrian as the statute intended." It seems clear that there was no causation.


221 Minnesota does not recognize the "last clear chance" doctrine by name, but holds the defendant liable if he had a "conscious last clear chance," by calling negligence after discovery of the peril "wilful negligence." Evarts v. St. Paul, Minneapolis & Manitoba Ry., (1894) 56 Minn. 141, 57 N. W. 459; Sloniker v. Great Northern Ry., (1899) 76 Minn. 306, 79 N. W. 168; Rawitzer v. St. Paul City Ry., (1904) 93 Minn. 84, 100 N. W. 664; Havel v. Minneapolis & St. Louis R. R., (1913) 120 Minn. 195, 139 N. W. 137. The court has recognized the anomaly of such a definition, which is out of line with the meaning assigned to "wilful negligence" in other states. See dissenting opinion of Jaggard, J., in Anderson v. Minneapolis, St. P. & S. S. M. Ry., (1908) 103 Minn. 224, 114 N. W. 1123; Gill v. Minneapolis, St. P. & S. S. M. Ry., (1915) 129 Minn. 142, 151 N. W. 896; Pickering v. Northern Pac. Ry., (1916) 132 Minn. 205, 156 N. W. 3.

In one or two cases the court has dealt with such "wilful negligence" in terms of proximate causation. Fonda v. St. Paul City Ry., (1898) 71 Minn. 438, 74 N. W. 166; Rawitzer v. St. Paul City Ry., (1904) 93 Minn. 84, 100 N. W. 664. This seems unsound, since if a third person should be injured by the negligence of plaintiff and defendant, his injury would clearly be caused by the negligence of both, and he could recover against either, even though defendant had discovered the peril, or had a last clear chance. Why any different conclusion as to causation of the plaintiff's injury? See Note, (1924) 8 MINNESOTA LAW REVIEW 329.

In Hinkle, v. Minneapolis, Anoka & Cuyuna Range Ry., (1925) 162 Minn. 112, the court seems to have reduced the matter to a complete absurdity by holding that if defendant alone is "wilfully negligent," his negligence is the proximate cause of the injury, but if the plaintiff also is "wilfully negligent," defendant's conduct is not the proximate cause. The causation would seem clearly to be the same in either case. The conclusion seems right, but the court in reality is applying a rule of comparative fault,
that with a surprisingly small number of exceptions, the conclusions reached in the Minnesota cases, upon whatever theory, are sound and reasonable, and have accomplished substantial justice. The confusion of theories, the variety of approaches,


Opinions as to whether a case is "right" or "wrong" must be a matter of personal impression, and such impressions may be expected to differ. The writer is inclined to disagree with the following cases, and to feel that a different conclusion might have been reached:

Wallin v. Eastern Ry., (1901) 83 Minn. 149, 86 N. W. 76, 54 L. R. A. 481. In the absence of the fellow servant rule, the case might of course be justified upon the ground that the employees on the second handcar were negligent, and defendant should be liable for their negligence.

Weisel v. Eastern Ry., (1900) 79 Minn. 245, 82 N. W. 576. The case seems wrong; but it holds merely that there was no negligence, and in the absence of a detailed statement as to how the coal was piled, it is difficult to quarrel with the court.


Clapper v. Dickinson, (1917) 137 Minn. 415, 163 N. W. 752. See footnote 115. It is difficult to believe that the intervening forces or the result could have been anticipated, or that the statute was intended to cover such injuries. Perhaps the case might be supported on the basis of negligence in failing to set the brakes on one car, or in shunting the other against it; but the opinion does not rest upon any such ground.


Lundstrom v. Giacomo, (1935) 194 Minn. 624, 261 N. W. 465, may hold only that defendant's negligence was not a cause of the injury at all, since the accident would have happened without it. Cf. Lind v. Great Northern Ry., (1927) 171 Minn. 486, 214 N. W. 703. If not, the writer is inclined to disagree, upon the ground that the accident was of a kind which was foreseeable, even though the intervening force was not.

Guile v. Greenberg, (1934) 192 Minn. 548, 257 N. W. 649, is a troublesome case. Plaintiff was riding on the outside of an armored money truck, with one foot on the bumper and the other between the fender and the hood, with his hands on the radiator cap, while the truck was in motion. The truck collided with defendant's car, which negligently pulled out from the curb, without any signal, and without a proper lookout. Plaintiff fell from the truck and was injured. The court, citing the Restatement, Torts, sec. 452 (Tentative Draft No. 10, comment to sec. 3, p. 11), said that the rules of proximate causation apply to contributory negligence, and that defendant's car was an independent cause which "insulated" plaintiff's negligence, which was not a "material element or a substantial factor" in bringing about the collision. It may be argued that the intervening force was foreseeable—the court recognizes that the driver of the armored truck might be found negligent in failing to anticipate it—and it would appear that plaintiff's position increased the risk of injury in case of such a collision. Certainly it was a substantial factor in bringing about, not the collision, but the fall from the truck, which actually caused the injuries. Yet the result seems right. The writer would have no difficulty in justifying it, if the court were to adopt the doctrine of the last clear chance—see Restatement, Torts, sec. 479—which is particularly applicable to cases of this sort. But this possibility seems to be foreclosed by the case of Kaiser v. Minneapolis Street Ry., (1920) 147 Minn. 278, 181 N. W. 569,
the numerous unsuccessful attempts to state fixed and definite rules, have not obscured what the court has said over and over again: that "proximate cause" is, in the last analysis, nothing more than a question of common sense.\textsuperscript{224} The confusion of doctrine is doubtless of real aid to the court, in permitting some degree of flexibility, and a just result in each individual case; but by the same token it becomes more difficult for attorneys to predict what the court will do. The only suggestion intended here is that a division of "proximate cause" into separate problems might permit a little more in the way of definite rules, without any real surrender of "common sense."