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Identification of Issues in Negligence Cases

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IDENTIFICATION OF ISSUES IN NEGLIGENCE CASES*

by

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THE identification and formulation of the basic issues in negligence cases mark the greatest weakness in the common-law litigation process. If issues are not identified and formulated with considerable accuracy a case is almost certain to come to grief. Practically all the negligence cases in which the decisions are questionable involve errors in identifying or in the formulation of the basic issues.

The basic affirmative issues in a negligence case are few, but lie so close together that they are easily confused. The basic affirmative defensive issues are correspondingly few and may also be confused. There are usually evidentiary issues relevant to the determination of a basic issue and not infrequently an evidentiary issue is treated as a basic issue, with injustice to a litigant.

The first affirmative basic issue of any negligence case is the identification of the defendant and the causal connection between his conduct and the plaintiff's injury. After both parties have closed, the trial judge must determine if the evidence is sufficient to require submission of the issue to the jury. This issue is a fact issue to be determined by the hindsight and good sense of the jury. The evidence may also raise evidentiary issues which must be resolved by the jury in its determination of this basic issue. In some cases causal connection is clear, not contested, and even conceded, but it must be shown by the facts even though not submitted to the jury. It is the gateway issue, and if not at least provisionally established the case will proceed no further.

Assuming that causal connection is established or is an issue for the jury, the plaintiff must then establish a duty owed to the plaintiff by the defendant which protects the plaintiff against the risk of injury he has suffered. While this is an issue of law for the court, the scope of protection is determined by the court's evaluation of the facts of the case and of the various policies that may be involved. It may be further noted that the determination of the scope of the defendant's duty to the plaintiff is a matter of hindsight, whether based on the pleadings or the evidence introduced in the case. This function of the court is sometimes ignored by the trial court or is left by design for determination by the appellate courts. Appellate courts, however, too frequently misconceive the issue of the defendant's duty, and seek to affirm or reverse a judgment with a labored opinion based on false issues supported by questionable doctrinal refinements.

The violation of a duty (the negligence issue) is the heart of a negligence case. Its consideration is deferred for full discussion. The issue of damages is also very important, but cannot be considered in this brief Article.

The denials and affirmative issues of defense add greatly to the burdens of

* This Article is a by-product of a series of studies made by Professor Allen Smith and the author entitled "Negligence Law—No-Fault and Jury Trial." Professor Smith is not to be indicted for the views expressed here.

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a plaintiff in a negligence case. He can ill afford to err in the identification of the basic issues of his case or permit the defendant or the court to do so. It is said by some that since the plaintiff has the laboring oar the defendant can drift until the plaintiff runs afoul of snags. Yet, the defendant who assumes this attitude may find himself in a torrent without an oar. It is as important for the defendant to have the issues identified and accurately formulated as it is for the plaintiff. A case out of control is dangerous and unpredictable for all litigants.

These general statements can be supported by cases taken from any American common law jurisdiction. An important recent decision by the California Supreme Court will be examined at some length in support of some of the more important statements; brief consideration of several recent decisions of the Supreme Court of Texas will follow.

I. THE CALIFORNIA EXPERIENCE

Haft v. Lone Palm Hotel[1] is one of those simple negligence cases in which the issues were so inadequately defined that the trial of the case was a tragedy of errors. Even the California Supreme Court could make little sense out of what had been done correctly and had to settle for a reversal and new trial.

The case involved the drowning of Haft and his five-year-old son in the swimming pool of the defendant Hotel,[2] which at the time of the drownings was operated without any of the numerous safeguards required by statute.[3] Only one witness saw Haft and his son while they were making use of the pool, and it was he who later discovered them on the bottom of the pool.

At the trial the plaintiffs, Haft's wife and daughter, moved for a directed verdict on the issue of liability, or in the alternative, for an instruction to the jury that the defendants were negligent as a matter of law and that this negligence was the proximate cause of the drownings. A further instruction that the son was not contributorily negligent was also requested. The trial judge refused plaintiffs' motions and the jury returned a verdict for the defendants on both causes of action.

On appeal, the plaintiffs raised several contentions. They asserted initially that the trial judge erred in not finding as a matter of law that the defendant's most serious violation of the statute—the failure to provide lifeguards or to erect a sign so notifying the guests—was the proximate cause of the deaths. This is the basic proposition discussed by the court and the basis on which the case was reversed. The court stated its conclusion as follows: "[A]fter plaintiffs proved that defendants failed to provide a lifeguard or to post a warning sign, the burden shifted to defendants to show the absence of a lifeguard did not cause the deaths."[4]

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[1] 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

[2] Although there were several defendants in the case, for convenience they will be referred to as Hotel.

[3] CAL. HEALTH & SAFETY CODE § 24101.4 (West 1967) requires that a swimming pool, for which no direct charge for use is made, shall provide for lifeguard service or shall erect signs clearly indicating the absence of such service. Additional rules and regulations were imposed on Hotel by CAL. ADMIN. CODE tit. 17 (West 1971).

[4] 3 Cal. 3d at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750.

If the basic issues of the case had been accurately stated, the court could have resolved the case decisively for the plaintiffs without having to reach the highly doubtful conclusion that the defendants had the burden to "show the absence of a lifeguard did not cause the deaths." In support of this statement the basic issues of the case are stated as follows:

Issue No. 1. Did the operation of its swimming pool by Hotel substantially contribute to the deaths of Haft and his son?

Issue No. 2. In the operation of its swimming pool was Hotel under a duty to provide safeguards for its guests, Haft and his son, in their use of the pool?

Issue No. 3. Was Hotel negligent in the operation of its swimming pool in failing to provide safeguards for the protection of Haft and his son?

Issue No. 4. Did Haft in making use of the swimming pool contribute substantially to his death and to the death of his son?

Issue No. 5. In making use of the swimming pool was Haft under a duty to exercise reasonable care for the protection of himself and his son from the risk of drowning?

Issue No. 6. Did Haft in making use of the swimming pool fail to exercise reasonable care for the protection of himself and his son against the risk of drowning?

Issues 1, 2, and 3 are the basic affirmative issues of causation, duty, and negligence a plaintiff must sustain in order to impose liability on a defendant. Issues 4, 5, and 6 are the basic affirmative issues a defendant must sustain to establish contributory negligence and defeat liability.

Causal Connection. The operation of the swimming pool for the benefit of its guests was an affirmative undertaking by Hotel. In order to recover, the plaintiffs were required to show the causal connection between operation of the pool and the deaths of Haft and his son. That connection was required as a basis for the consideration of all the other issues in the case.[5] The identification of a defendant and proof of a causal connection between his conduct and the victim's injury is a gateway issue that cannot be ignored in any negligence case, but when established does not of itself impose liability.[6] It is a factual issue based on hindsight which may be supported by direct, circumstantial, or expert opinion evidence. Innumerable details of fact may be relevant in making proof of Hotel's conduct in the operation of the swimming pool and its connection with the deaths.

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[5] This is true of any negligence case, as is indicated in cases dependent upon *res ipsa loquitur* to sustain the negligence issue. *See, e.g.*, Barnes v. United States, 349 F.2d 553 (5th Cir. 1965); Davis v. Memorial Hosp., 58 Cal. 2d 815, 376 P.2d 561, 26 Cal. Rptr. 633 (1962); Manley v. New York Tel. Co., 303 N.Y. 18, 100 N.E.2d 113 (1951); Comet Motor Freight Lines, Inc. v. Holmes, 203 S.W.2d 233 (Tex. Civ. App.—Eastland 1947).

[6] *See* W. PROSSER, LAW OF TORTS § 41, at 236 (4th ed. 1971) [hereinafter cited as PROSSER]. Dean Prosser does not clearly state that causal connection and proximate cause are distinct concepts, but his discussion is good, and he does recognize that "causation is a fact," *id.* at 237, and since proximate cause is a defensive legal concept, the distinction necessarily follows.

It will be noted that the court would require "the defendants to show the absence of a lifeguard did not cause the deaths."[7] With great respect, it must be said that the absence of a lifeguard or the failure to provide other safeguards *caused* nothing.[8] Negligence law is based on affirmative conduct, or the failure to do something after an affirmative undertaking to perform. Here the operation of the pool was Hotel's undertaking which caused the death of the guests. The failure to provide lifeguards or the absence of other safeguards by Hotel were highly relevant to the issues of Hotel's duty and the negligent violation of its duty, but those issues could only be reached after causal connection was established. The determination of causal connection is emphasized because in many cases it is ignored, erroneously identified, confused with other issues, or submerged by irrelevancies.[9] In this case the causal connection between the Hotel's operation of its pool and the deaths of Haft and his son was incontestable, but apparently it became confused with "proximate cause," an entirely different concept, and one that if relevant at all cannot be reached until later issues are considered.[10]

Duty—and the "Issue" of Proximate Cause. Once the causal connection between Hotel's operation of its pool and the deaths is established, or at least formulated for submission to the jury for its determination, the next basic issue that must be considered and determined is whether the risks of the drownings were within the scope of Hotel's duty to exercise reasonable care in its operation of the pool.[11] The decedents, as guests of Hotel, were entitled to use the pool, and in view of the safeguards imposed by the legislature and required of the Hotel in the operation of its pool, the risks incurred by them fell within the scope of Hotel's duty. In fact, drowning was the extreme risk against which Hotel was required to give protection. The determination of this issue demanded the judgment of the court as a matter of law. Even if

[7] 3 Cal. 3d at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750.

[8] There are many statements by courts and writers indicating that omissions or the absence of protections are proximate causes. This cannot be true as to causal connection, cause-in-fact, or causal relations (three synonyms for the same factual concept). Proximate cause reflects "fault" and is frequently used to indicate a limitation of duty, or a defense to the negligence issue. Dean Prosser recites many cases in which these usages are found, though no doubt many courts and writers use proximate cause to indicate casual connection. *See* PROSSER § 42, at 244-46.

[9] Until the defendant, the injury, and the connection of the two are identified none of the other issues of a case can be considered. A close reading of PROSSER § 41, at 236-44, will disclose all of these failures to recognize the importance of causal connection, a factual concept, as a separate and distinct first step in the analysis of any case, and especially a negligence case. To ignore it, or to tie it into any fault doctrine, generally leads to false analysis. The seeming simplicity of causal connection as an issue is deceptive. This is due in many instances to the fact that cause and fault are frequently used synonymously. In medieval tort law, before the negligence action was developed, cause alone imposed liability. When negligence law developed as a moderation of medieval strict liability, the two concepts had to be separated. The great emphasis common-law lawyers and judges placed on fault as a limitation of liability apparently made them forget that causal connection continued as an essential requisite of negligence liability. Everyone, litigants, judges, advocates, law teachers, law students, and negligence law itself, have suffered as a result of this confusion in the usage of these concepts.

[10] *See* COMMITTEE ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES §§ 2.02, 3.01-.13 (1969) [hereinafter cited as TEXAS PATTERN JURY CHARGES]. The proximate cause issue concludes each series of questions.

[11] *See* PROSSER § 42, at 244-50.

there were no statutory safeguards required, Hotel would no doubt be required to provide reasonable protection for its guests in making use of the pool.[12]

It is a matter of some importance that the extent of a defendant's duty or its coverage has often been treated as a question of proximate cause.[13] In many of the early maritime insurance cases, whether certain risks fell within the coverage of maritime insurance depended upon whether they were proximate or remote, and if proximate, the insurer was liable for the loss.[14] This concept was carried over to the early fire cases, especially for fires set by railway engines,[15] and has been expanded to many types of negligence cases as a solvent for almost any difficult issue that can be raised in a negligence case.[16] The concept has become so impossible to define, and so lacking in integrity, that some courts have rejected it altogether.[17] Others give it only slight recognition,[18] and some courts continue to require that it be submitted to the jury as a factual issue in all negligence cases.[19] Its validity is widely questioned.[20]

In *Vesely v. Sager*[21] the California Supreme Court, in a far-reaching decision, rejected a venerable and almost universal usage of proximate cause as a limitation on the duty of a defendant who dispenses alcoholic beverages. Chief Justice Wright, speaking for the court, made the issue clear:

> In this case we are called upon to decide whether civil liability may be imposed upon a vendor of alcoholic beverages for providing alcoholic drinks to a cus-

[12] Under the traditional application of the economic benefit doctrine the hotel guests were invitees of Hotel and were owed the duty of reasonable care. *See generally id.* § 61.

[13] *Id.* § 42, at 244.

[14] *See, e.g.*, McDonald v. Snelling, 96 Mass. (14 Allen) 290 (1867); Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918); Lewis v. Ocean Accident & Guar. Corp., 224 N.Y. 18, 120 N.E. 56 (1918). The distinction is still used in insurance cases as a basis for determining losses. *See, e.g.*, Stroburg v. Insurance Co. of N. America, 464 S.W.2d 827 (Tex. 1971).

[15] *See, e.g.*, Milwaukee & St. P. Ry. v. Kellogg, 94 U.S. 469 (1877). This case, with its "true" rule, has been extremely influential in expanding proximate cause as an all-purpose doctrine and a solution for all the difficult problems that arise in a negligence action.

The English think of this limitation on liability as a "measure of damages" and it serves that purpose automatically, by excluding the risks for which damages cannot be recovered. The doctrine was rejected in *In re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560, and also in Overseas Tank Ship (UK) Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388 (P.C.) (N.S.W.). This rejection was perhaps considerably modified in Overseas Tankship (UK) Ltd. v. Miller Steamhip Co., [1967] 1 A.C. 617 (P.C. 1966) (N.S.W.). These two cases grew out of the same factual setting and are known as *Wagon Mound No. 1* and *Wagon Mound. No. 2.* The latter may have greatly modified the decision in the first and to some degree resurrected *Polemis* which had been so often condemned. *See* Green, *The Wagon Mound No. 2, Foreseeability Revised*, 1967 UTAH L. REV. 197.

[16] PROSSER § 42, at 250. Dean Prosser indicates the classes of problems dealt with as soluble by the proximate cause approach. The list, he says, is not exclusive. In concluding his list he adds that "[o]nly the first of these problems [causation in fact] has anything whatever to do with the factual relation of cause and effect. The attempt to deal with the others in terms of causation is at the bottom of much of the existing confusion."

[17] Louisiana, in Celeste Hill v. Lundin & Associates, Inc., 256 So. 2d 620 (La. 1972), appears to be the most recent. *See* Stewart v. Jefferson Plywood Co., 255 Ore. 603, 469 P.2d 783 (1970); Wells v. City of Vancouver, 77 Wash. 2d 800, 467 P.2d 292 (1970). *See also* Probert, *Causation in Negligence Jargon, A Plea for Balanced Realism*, 18 U. FLA. L. REV. 369 (1965); Note, *Causation, Duty and Negligence*, 45 ORE. L. REV. 124 (1966).

[18] Judges Holmes and Cardozo preferred the phrase: "The law does not spread its protection so far." *See, e.g.*, Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927). *See also* Page v. St. Louis S.W. Ry., 349 F.2d 820 (5th Cir. 1965); H.R. Moch Co. v. Rennsselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

[19] TEXAS PATTERN JURY CHARGES §§ 2.02, 2.03.

[20] *See* PROSSER §§ 41-45.

[21] 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

> tomer who as a result of intoxication, injures a third person. The traditional common law rule would deny recovery on the ground that the furnishing of alcoholic beverages is not the proximate cause of the injuries suffered by the third person.[22]

After a very thorough and able consideration of proximate cause and the many cases (including its own decisions) that have sought to give it validity, the Chief Justice concluded that the central issue in the case was one of duty rather than proximate cause: "Did defendant Sager owe a duty of care to plaintiff or to a class of persons of which he is a member?"[23]

The Chief Justice found the duty, which had been rejected for a century, in one of the purposes expressed in the Alcoholic Beverage Control Act—"to protect the safety of the people of this state."[24] Courts in states in which such a duty is not defined by a civil code, as it is in California, can and do find the same purpose in modern common law.

In recent years the courts generally have come to realize that a similar question arises in many cases in which the duty of a defendant is involved. It may be a most difficult question to resolve. It calls for the important exercise of a court's power to determine the limits of law, both common law and statute, as a means of protection. It is a function that only a court can perform with precision and a high degree of finality. Any merits proximate cause has had in indicating the limitations of duty, or as the English say, the "measure of damages," are duly credited, but for that purpose it has long been recognized that whether a risk falls within the protection or scope of a defendant's duty is a much more meaningful standard since it necessarily requires both a study of the factual data, and the policies that may be affected. The courage and good sense of the California court, reflected in *Vesely v. Sager*, should encourage other courts to perform their functions fearlessly. In negligence law especially, this regenerative process is a necessity if the obsolescences of the past century are to be removed.

Negligence. Upon the establishment of a causal connection between Hotel's operation of its pool and the deaths of Haft and his son, and its duty to provide protection to Haft and his son in the use of its pool, the issue of negligent violation of Hotel's duty must be determined before liability can be established. This is the negligence issue, the heart of a negligence action, and here fault must be found as a requisite of liability. The court must first determine whether the evidence is sufficient to raise and support an inference of negligence. It is usually said that if "reasonable minds" can draw such an inference the issue must be submitted to the jury for determination. The sufficiency of

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[22] *Id.* at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625. Only a few years before, in Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955), the California Supreme Court had withdrawn a forthright opinion imposing liability, and reinstated and accepted as the basis of liability the cliché that it was the drinking and not the selling of the intoxicant that was the proximate cause of the victim's injury.

The most difficult task the courts have is to get rid of numerous like statements by the courts of the 1800's, which in this century are considered nonsense, as the basis for denying tort liability.

[23] 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

[24] *Id.*

the evidence to require submission to a jury, and to support a judgment based on a verdict for the plaintiff, requires, in the first instance, the judgment of the trial court, and later may require the judgment of the appellate court to sustain the trial court's judgment.

Weighing the factual data in evidence, the relevance of former decisions, and the policies that may be involved are basic functions of the litigation process. It is sometimes difficult to differentiate between the function of the court in submitting the negligence issue to the jury and its function in determining the extent of the defendant's duty to protect the victim against the risk of injury he has suffered. The two functions of the court are frequently confused, but the distinction is clear. The weighing of policies in support of the extent of duty involves making a decision that establishes a precedent while the weighing of the factual data to determine the basis for submission to the jury is limited to the particular case.

Once the issue of negligence is made by the evidence, the issue must be submitted to the jury, unless the factual situation is such that reasonable minds can draw but one inference. The submission of the negligence issue is the most treacherous phase of a negligence case.[25] More fatal errors are made at this stage of the litigation process in a negligence case than at any other stage. In most jurisdictions, the litigants must be given a fair opportunity to have their affirmative issues and their defenses considered by the jury without comments by the trial judge on the weight of the evidence. This is difficult enough when the common law and its refinements are involved. But when the consideration of statutes, ordinances, and administrative regulations are relevant to the scope of the defendant's duty and to the negligent violation of that duty, the difficulties of submitting the negligence issue are greatly multiplied. The negligence issue is usually simple, but it may be supported on several grounds, any one of which may entail liability.

At common law the foreseeability of some risk of injury such as the victim suffered is a necessary predicate to imposition of the duty of care, and the failure to use care imposes liability to the victim for negligent violation of the duty. The violation of a statutory duty to use care may in itself be negligent in that the legislature has foreseen the risk of injury and has deemed the violation of the duty to be negligent, whether the defendant could foresee the likelihood of injury or not. This is doubtless the situation in *Haft*. But most statutes designed to protect a victim from the risk of injury sustained for failure to use care are subject to excuse, and their violation is determined by the common law. While the finding of the jury is necessarily based on the jury's hindsight evaluation of the evidence, its guidance is the foresight and conduct of the defendant as a reasonably prudent person. Both the issue and the formula are comprehensive: Should the defendant as a reasonably prudent person, under all the circumstances which conditioned his conduct, have foreseen some such risk of

[25] *See* Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30 (1963), in L. GREEN, THE LITIGATION PROCESS IN TORT LAW 391 (1965). *See also* Green & Smith, *Negligence Law, No Fault, and Jury Trial—I*, 50 TEXAS L. REV. 1093 (1972).

injury as the victim suffered, and did defendant fail to exercise reasonable care to avoid such risk of injury as the victim suffered?

In *Haft* the factual data in support of the negligent violation of Hotel's duty are weighty as a matter of common law, and practically conclusive in view of the statutory safeguards required for the operation of Hotel's pool. The pool was dangerous for both Haft and his son. No safeguards whatsoever were provided by the Hotel for their protection, and as guests, their protection could not be ignored. A court would be justified in directing a verdict for plaintiffs on the issue, though out of an abundance of caution most courts would probably submit the issue to the jury.[26]

Contributory Negligence. The fact that Haft knew his son could not swim and that he himself could not swim well, and, further, that he must have observed the absence of any safeguards, is apparently the only defense Hotel had available. This was an affirmative defense of contributory negligence—with the burden on Hotel to sustain the defense. It would be subject to the same requisites of causal connection, duty, and violation of duty as were the affirmative issues of the plaintiffs, as indicated in the basic issues 4, 5, and 6 at the beginning of this discussion.

Causal connection between Haft's conduct in making use of the pool and the drownings is incontestable. Haft's duty to protect himself and his son from the risk of drowning must be conceded.

The failure to exercise reasonable care to avoid the risk of drowning is subject to proof, with the burden on Hotel. There was no specific factual evidence, however, to indicate that Haft did or did not exercise reasonable care on behalf of himself and his son. The discovery of the bodies on the bottom of the pool in deep water may be subject to considerable speculation, but nothing sufficient to sustain Hotel's burden. The situation does not rise to the level of *res ipsa loquitur*. With no specific evidence to support the issue of Haft's negligence, together with the almost, if not conclusive, evidence of Hotel's failure to exercise any care to protect its guests, the court would be justified in directing a verdict for the plaintiffs on this issue.

The California court apparently was not satisfied to quit the case at this point. Its argument proceeded with the supposition that the failure to provide lifeguard service was of consequence only if such negligence was a "proximate cause" of the drownings.[27] This failure enhanced the chances of the drownings, and suggested very strongly that a competent lifeguard would have prevented the deaths, but that was as far as plaintiffs could go in proving the causal link between an absent lifeguard and the deaths. To require plaintiffs to prove "proximate causation" to a greater certainty would give defendants the advantage of the lack of proof in a situation they created.[28] "Under these circum-

[26] 3 Cal. 3d at 762, 478 P.2d at 468, 91 Cal. Rptr. at 748: "In failing to satisfy all of these mandatory safety requirements, which were clearly designed to protect the class of persons of which the victims were members, defendants of course were unquestionably negligent as a matter of law."

[27] *Id.* at 770, 478 P.2d at 473, 91 Cal. Rptr. at 753.

[28] *Id.* at 773, 478 P.2d at 475, 91 Cal. Rptr. at 755.

stances," said the court, "the burden of proof on the issue of causation should be shifted to the defendants to absolve themselves if they can."[29]

The court made no distinction between causal connection and "proximate cause"—that is, no distinction between the factual issue of causal connection and the fault issue of proximate cause. It correctly placed the burden of proof on Hotel but erroneously designated the issue as factual cause instead of fault. This confusion of issues or double talk is not unusual. Nothing less than a careful examination of the causation doctrines can clarify such puzzles.

The Causation Doctrines—Defenses. Once plaintiff has established (1) that the defendant's conduct substantially contributed to plaintiff's injury, (2) that the defendant's duty included the risk of injury inflicted by his conduct, (3) that the defendant's conduct negligently violated his duty, and (4) that the plaintiff's conduct did not defeat his action against defendant, what else, other than the amount of damages plaintiff has suffered, must be established before judgment is rendered for the plaintiff? The California court held (and some other courts would agree) that plaintiff must still prove that Hotel's negligence was the proximate cause of the deaths. The "proximate cause" definition[30] given to clarify the issues is not stated in terms of factual causation. Causal connection does not have to be "natural" in the sense of ordinary, or follow a "continuous sequence" or "produce an event without which cause such event would not have occurred," or "an omission that a person using ordinary care would have foreseen that the event might reasonably result therefrom." Such restrictive terms are the language of fault, not cause and effect. Proximate cause is a defense available under the general issue at common law—and later the general denial—and is relevant to the issue of the defendant's wrongdoing or fault which the plaintiff must prove.

If the defendant has offered evidence that some third person or "event"[31] was responsible for plaintiff's injury, many courts would require the plaintiff to prove also, by a preponderance of the evidence, that such third person or event was not the proximate cause of plaintiff's injury. Even though this issue is treated only as a denial of plaintiff's affirmative issues, and the evidence supporting it necessarily must have been considered by the jury in the determination of plaintiff's issues, the negative issue must still be submitted affirma-

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[29] *Id.*

[30] TEXAS PATTERN JURY CHARGES § 2.02, at 46, defines the term as follows:

> 'Proximate Cause' means that cause, which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of, must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

[31] The term "event" is used quite generally to indicate any source of responsibility other than a person, such as a mob or natural phenomenon. This does not mean that a defendant is necessarily relieved of responsibility by showing that a victim suffered injury from either the conduct of a third party or other source, for the risk of injury may still be within the scope of the defendant's duty. Hence, usually the defendant claims that a third party or an "event" was the sole cause or sole proximate cause of the victim's injury. The defense need not challenge causal connection specifically at all; proximate cause challenges the whole case by shifting responsibility from the defendant to some other person or "event."

tively, although when submitted as a special issue the use of language is perverted.[32]

The defensive causation issue, whatever its terminology, is directed at plaintiff's case as a whole. The issue may be stated in one of several variations, as proximate cause, sole cause, sole proximate cause, but-for-which cause, intervening cause, superseding cause, supervening cause, or some other cause thought to be equivalent. These are known as the causation doctrines. They do not directly challenge any one of the plaintiff's affirmative issues. Instead, they challenge his whole case by asserting in a single issue the responsibility of some other person or event for the plaintiff's injury, and only by inference imply that the defendant is not responsible.

It will be noted that this defense introduces in effect a new case involving only one issue, but that issue is a wholesale or global denial of defendant's responsibility by shifting responsibility to another person or "event." How did it come about that the plaintiff must bear the double burden of proving his own case and disproving that the conduct of another person, or "event," introduced by the defendant, was not responsible for his injury? For many years during the development of the negligence action, all defenses could be given under the general issue or denial. Even the defense of contributory fault was available under the general issues, placing the burden on the plaintiff to plead and prove that the injury was not his own fault. Contributory negligence as an affirmative defense, with its consequent burden of proof on the defendant, was not recognized until the late nineteenth century, and in some jurisdictions not until much later.[33]

The "causation defenses" were available under the general issue and later the general denial, even though they brought into issue the conduct of a third person or "an event" as a basis for shifting responsibility from the defendant. Inasmuch as the conduct of a third party, or an event, is no less affirmative than the conduct of the plaintiff himself, why did the courts not make a similar shift in the burden of sustaining the causation defenses, as was done with the contributory negligence defense? The answer is found in the fact that the proximate cause defenses, the contributory negligence defense, and the other early common-law defenses to a negligence case were easily convertible one into another, and supported by much the same factual details. Thus, when the

[32] *See* TEXAS PATTERN JURY CHARGES § 2.02, which phrases the issue as follows: "Without which cause such event would not have occurred." This clause is referred to as the "but for" clause in the proximate cause definition. *See also id.* § 3.04: "Issue No. 2: Do you find from a preponderance of the evidence that the action of Tim Thomas in stopping his vehicle suddenly was not the sole proximate cause of the occurrence in question?" This and other double negative causation issues cannot be answered "Yes" or "No." Instructions are given to answer "It was not the sole proximate cause" or "It was the sole proximate cause."

The Texas supreme court has recently held that "sudden emergency" and "unavoidable accident" (another negative causation issue) are not independent issues entitled to be submitted. *See* Yarborough v. Berner, 467 S.W.2d 188, 192 (Tex. 1971). By implication, the same can be said of all "causation issues" other than causal connection.

[33] PROSSER § 65, at 416. In the opening sentences of the section Dean Prosser says the defenses of assumption of the risk and contributory negligence developed late in the law of negligence. This is apparently an oversight. Both developed very early in the 1800's while the negligence action was emerging from the common-law actions of trespass and trespass on the case. The negligence action required another century to reach maturity.

courts placed the burden of proof of contributory negligence on defendants, advocates for defendants simply converted the contributory negligence defense into proximate cause, sole cause, or some other causation defense. Likewise, the conduct of a third person was convertible into proximate cause, assumed risk, accident, and in some cases, last clear chance. Thus, all these defenses remained available as denials under the general issue.

It is interesting to observe that when the state and lower federal courts were attempting to apply the Employers Liability Act, which had made contributory negligence only a basis for the diminution of damages, defense attorneys simply converted contributory negligence into an appropriate causation defense. When the Supreme Court eliminated the "causation defenses" and recognized causal connection as the only legitimate cause issue, advocates, with the accommodation of the courts, converted the causation defenses into assumed risk, or accident, or no negligence. Congress then amended the Act to treat assumed risk and the converted defenses as contributory negligence. The Supreme Court took over protection of the Act's integrity at that point.[34] This did not stop the convertibility of the common-law defenses into other such defenses, but it made convertibility less decisive of the issue involved.

In the practice of negligence law in the state courts, common-law defenses became so easily convertible into causation doctrines that negligence litigation by shrewd trial and appellate lawyers was like playing with "loaded dice" or "marked cards" when the opposing lawyers and many of the judges were not experts in the litigation process. In recent years, both plaintiffs' attorneys and the judges have become more sophisticated, but instead of getting rid of the "loaded dice" or "marked cards," litigation has largely passed into the hands of experts who know how to play the defenses and counter-defenses. The causation doctrines are the preferred "cards" inasmuch as only a master advocate can play them to great advantage. The law reports are overflowing with the tragic results of this near-paltering with justice. No other practice in an area so close to the lives of those who daily must face the dangers of a mechanized society has done so much to discredit lawyers, jury trial, and the courts.

Returning to the consideration of this problem in *Haft*, the court began its discussion of the basic issues as follows: "Although the proof of the numerous statutory safety violations established defendants' negligence as a matter of law, this proof of negligence alone, of course, did not automatically establish liability; plaintiffs still bore the initial burden of showing that defendants' negligence was a proximate cause of the deaths."[35]

Under pressure of plaintiffs' contention that the evidence showed that the failure to have a lifeguard at the pool was, as a matter of law, a proximate cause of the deaths and that issue should not have been submitted to the jury, the court concluded, as indicated early in this discussion, that "the burden shifted to the defendants to show the absence of a lifeguard did not cause the deaths," and reversed the case for a new trial.[36]

[34] This development is indicated more fully in L. GREEN, THE LITIGATION PROCESS IN TORT LAW 371, 377-78 (1965); Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 488 (1956).

[35] 3 Cal. 3d at 765, 478 P.2d at 469, 91 Cal. Rptr. at 749.

[36] *Id.* at 765, 478 P.2d at 470, 91 Cal. Rptr. at 750.

The court, in an attempt to justify the shift in the burden of proof, placed reliance on the well-known case of *Summers v. Tice*,[37] which involved two hunters who shot at a bird flushed by plaintiff, who was hit in the eye by one shot. Plaintiff sued both hunters, but could not prove which defendant shot him inasmuch as both hunters fired simultaneously in the direction of plaintiff and were using the same size shot. Since the hunters and plaintiff were in the same hunting party, the plaintiff was not required to show from whose gun the shot came and the judgment against the hunter who appealed his case was affirmed. But the *Summers* court went further and projected a case in which two hunters, independently and without knowledge of each other's presence in the woods, fired their guns under similar circumstances and with similar results as the case before the court. The court concluded that the result would have been the same. It will be noted that in *Summers* and the projected case the problem is causal connection, a fact issue, and not a fault issue as is proximate cause. The court justified shifting the burden of proof of causal connection to the defendant in order to do justice. The same result could have been reached by orthodox procedural practice, but the shifting to do justice was an intelligent way to reach the result and no criticism is made of it.

Summers is valuable in another respect in that it indicates the confusion courts have in distingushing between factual causation and proximate causation. "Whose shot struck him in the eye" is an entirely different problem from whether "Hotel's negligence was a proxmate cause of the deaths of Haft and son." The California court apparently thought the two issues were the same. As indicated early in this discussion, Hotel's operation of the pool was a substantial cause of the deaths. When causation, Hotel's duty, and the negligent violation of its duty to provide safeguards at the pool for its guests were shown, that should have ended the case in plaintiffs' favor. Liability was complete unless Hotel sustained its burden of proof on the issue of contributory negligence. Since the court had already indicated that the plaintiffs proved the negligence of Hotel in not providing an important safeguard at the pool as required by statute, why was the burden placed on Hotel to prove that the absence of the safeguards did not cause the deaths of Haft and his son?

The holding of the court is made ambiguous by what is said, but what it did was to place the burden on Hotel to prove affirmatively the defense that its failure to have a lifeguard at the pool was not negligent. Although when a proximate causation doctrine is unmasked it is usually seen to be foolish, it is too much to make that charge against this court. What the court apparently had in mind was that if Hotel was to be relieved of liability for failing to have safeguards at the pool for its guests it must prove that it was not negligent. To do this the court converted the defense of "no negligence" into one of proximate cause, thus requiring Hotel to prove something that could not be proved.[38]

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[37] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[38] The court had already held that the plaintiffs could not prove that the absence of a lifeguard was a proximate cause of the deaths. *See* notes 27, 28, 29 *supra*, and accompanying text. It must have known that Hotel could not prove the contrary position.

II. THE TEXAS EXPERIENCE

The California Supreme Court is not alone in its failure to identify the issues in a negligence case, and to be taken on a "snipe hunt" for proximate cause. The contrast in the identification of the issues in two recent Texas cases reflects the importance of the correct identification of the issues. The driver of an automobile, Gentry, and his passenger, Stanley, were killed by a collision with defendant's train at a highway-railway crossing. Two actions were brought, but were consolidated for trial.[39] In the trial court the jury found both the driver and the defendant railroad negligent. The jury also found discovered peril issues in favor of the driver, but the trial court disregarded the latter findings and rendered an n.o.v. take-nothing judgment for defendant which was affirmed by the court of civil appeals.[40] On petition for review the supreme court held there was no evidence that the train operators actually discovered and realized the driver's peril in time to have avoided the collision and affirmed the judgments below.[41]

In the action for the death of Stanley, the verdict of the jury was the same, but the trial court rendered judgment for the plaintiff. On appeal the court of civil appeals reversed the judgment of the trial court and rendered judgment for the defendant.[42] Since Stanley was not contributorily negligent, the court of civil appeals held that the discovered peril issue was out of the case. The plaintiff based her claim of liability on the finding of the jury that the engineer failed to reduce the speed of the train at a time when a person of ordinary prudence in the exercise of care would have done so to avoid the collision, and the further finding that such failure was a proximate cause of the collision. The defendant urged that there was no evidence to support the submission of such issues and no evidence to support the jury's findings. The supreme court held there was some evidence to support the issues and remanded the case to the court of civil appeals to determine if the evidence was sufficient to support the issues.[43]

The disposition of the two cases vividly demonstrates the necessity of identifying the issues at each step of the litigation process through the trial and the two appellate courts. Even with a meritorious distinction of the issues so nicely made by the plaintiff, the court could not resist flexing its knees to the proximate cause obsession. It added: "The cause-in-fact element of proximate cause is close; i.e. whether the collision would have been averted if the brakes had been applied and the throttle adjusted at or after 1,000 feet from the crossing."[44] Such a consideration had no relevancy to the cause of the collision. The

[39] On appeal, the cases were ordered consolidated for purposes of briefing and oral argument, but were severed for disposition. *See* Southern Pac. Co. v. Stanley, 459 S.W.2d 232 (Tex. Civ. App.—Corpus Christi 1970); Gentry v. Southern Pac. Co., 449 S.W.2d 527 (Tex. Civ. App.—Corpus Christi 1969).

[40] Gentry v. Southern Pac. Co., 449 S.W.2d 529 (Tex. Civ. App.—Corpus Christi 1969).

[41] Gentry v. Southern Pac. Co., 457 S.W.2d 889 (Tex. 1970).

[42] Southern Pac. Co. v. Stanley, 459 S.W.2d 232 (Tex. Civ. App.—Corpus Christi 1970).

[43] Stanley v. Southern Pac. Co., 466 S.W.2d 548 (Tex. 1971). On remand, the court of civil appeals found that the evidence supported the findings of the jury that the engineer should have reduced the speed of the train and his failure to do so was a proximate cause of the collision. Accordingly, judgment was entered for the plaintiff and affirmed on subsequent appeal. Southern Pac. Co. v. Stanley, 473 S.W.2d 52 (Tex. 1971).

[44] 466 S.W.2d at 554.

cause of the collision and the death of Stanley was the combined conduct of the driver and the conduct of the operators of the train. Whether the risk of a collision should have been foreseen and measures taken to avert it by the operators of the train were considerations relevant to the determination of their duty and to the negligent violation of their duty.

In *Texas & Pacific Railway v. McCleery*[45] the plaintiff, a passenger in a truck driven into the side of defendant's train, which was found to have been traveling at twice the speed permitted by the Dallas ordinance, was denied recovery for his injuries by the supreme court. The court identified the issue as cause-in-fact, an element of proximate cause. Defendant's duty, violation of duty (negligence), plaintiff's injuries, and the absence of contributory negligence were in effect conceded, but the court held that "the burden was on the respondent to prove by a preponderance of the evidence that the collision would not have occurred but for the excessive speed of the train"[46] and "respondent did not discharge his burden of proving that the excessive speed of the train was a cause-in-fact of the collision and respondent's injuries; that is there is in the record no evidence of probative force that but for the excessive speed the collision would not have occurred."[47] With all respect, there was no such issue and no such burden. In brief, the court ignored the actual collision as a cause of plaintiff's injury and would require him to prove by a preponderance of the evidence that had the train been traveling at the legal rate of speed a collision with the truck would not have occurred, a negative fact not subject to proof and which at most could only exist in the imagination.

The basic issue involved in the case was whether the risk of injury plaintiff suffered was within the scope of the defendant's duty. Did the ordinance imposing the speed limit, even though violated, include within its coverage and protection the risk of a truck crashing into the side of a moving train at a street crossing 415 feet from the lead engine? No support for such a holding can be found. While the ultimate decision of the case was unquestionably correct, the identification of the issue was erroneous, and the doctrinal theory in support of the decision will be used to harass litigants and the courts and do great injustice as long as it withstands repudiation.

In fact, the bitter fruit of the *McCleery* decision was not long in ripening. In *East Texas Theatres, Inc. v. Rutledge*[48] the plaintiff, a patron of defendant's movie theatre, was struck by a whiskey bottle thrown from the balcony by an unidentified person. There had been a long history of rowdies in the balcony throwing things on patrons below and defendant had provided measures, including removal of rowdies, to prevent such irresponsible conduct by persons admitted to the balcony. On that particular night there was a failure to police the balcony. Yet, while the evidence was conclusive that the defendant was negligent, and the court so assumed, it held there was no evidence to establish the cause-in-fact element of proximate cause. The supreme court could find no evidence identifying the bottle thrower, or that the bottle would not have

[45] 418 S.W.2d 494 (Tex. 1967).
[46] *Id.* at 497.
[47] *Id.* at 498-99.
[48] 453 S.W.2d 466 (Tex. 1970).

been thrown but for the failure to remove the rowdy persons from the balcony, and made several statements to that effect; all were, of course, completely irrelevant.

The issue was not who threw the bottle or whether he could be identified or would have been removed. It was known that plaintiff's injury was caused by a bottle thrown from the defendant's balcony. That was the cause-in-fact. The defendant was under a duty to police the balcony and its duty was negligently violated. The risk of a bottle being thrown from the balcony was clearly within the protection of the defendant's duty and its failure to perform its duty was sufficient to impose liability, or a jury could so find. The absence of evidence on which the court based its decision involved speculations which the plaintiff could not prove and did not have to prove. The court interposed a fictitious issue, ignored the only valid affirmative issue in the case, and reversed the judgments of the courts below on the fictitious issue. Numerous cases of similar import can be cited.[49]

In *Technical Chemical Co. v. Jacobs*[50] the plaintiff sought damages against the defendant for injury suffered by an explosion of its freon product, while connecting the container to the wrong side of plaintiff's automobile air conditioner compressor. The action was based on strict liability for failure to place a warning on the freon container. The court held that it must be shown that the absence of a warning on the container caused the explosion and the injury to the plaintiff. The holding is obviously erroneous as the absence of a warning caused nothing. It was the product that exploded and injured Jacobs. Causal connection between defendant's conduct in marketing the product and plaintiff's injury could not be clearer. The basic issue was whether the marketing of the product without a warning made it so unreasonably dangerous as to impose strict liability on the defendant. If so, every element of liability was present: causal connection, duty, violation of duty, and injury.

Bell v. Campbell[51] illustrates how the Texas courts fail to identify the basic issues of a negligence case, submit numerous evidentiary issues, become entangled in mislabeled "causes," and labor through three courts to reach a decision that should have been final at the trial court level if the issues had been accurately identified and submitted.

A pickup truck driven by Mrs. Campbell was rear-ended by an automobile with trailer attached driven by Marshall. The pickup truck was knocked off the highway. Marshall's automobile was stopped off the travelled portion of the highway, but the trailer was turned over in one lane of the highway. Bransford, Bell, and Payton attempted to remove the trailer, which was struck by an automobile driven by Fore. Bell and Payton died of their injuries. Their beneficiaries and Bransford brought actions against Mrs. Campbell, Marshall, and

[49] *See, e.g.*, Lenger v. Physicians Gen. Hosp., 455 S.W.2d 703 (Tex. 1970) (patient given solid foods in violation of doctor's orders and suffered separation of colon after a section was removed by operation); Briones v. Levine's Dep't Store, 446 S.W.2d 7 (Tex. 1969) (lawnmower in clothing area of department store); Constant v. Howe, 436 S.W.2d 115 (Tex. 1968) (patient disoriented by shock treatments fell out of bed and suffered broken hip); Genell, Inc. v. Flynn, 358 S.W.2d 543 (Tex. 1962) (child resident of apartment cut by glass in efforts to open a negligently maintained hallway door).

[50] 480 S.W.2d 602 (Tex. 1972).

[51] 434 S.W.2d 117 (Tex. 1968).

Fore to recover their damages.[52] They settled with Fore, but continued their actions against Mrs. Campbell and Marshall.[53]

The trial court rendered judgment for defendants Campbell and Marshall. The court held as a matter of law that the negligence of Mrs. Campbell in causing the first collision was not a proximate cause of the second collision; and the jury did not find Marshall guilty of any negligence which the court considered to be a proximate cause of the second collision. The judgment of the trial court was affirmed by the court of civil appeals. The supreme court stated: "As the case reaches us, the controlling question is one of causation. We agree with the Court of Civil Appeals that, as a matter of law, no alleged negligence on the part of either Marshall or Mrs. Campbell that was submitted or requested to be submitted to the jury was a proximate cause of the second collision."[54]

With great respect for the three courts, we analyze the case as follows.

It was incontestable that the operation of the vehicles by Mrs. Campbell and Marshall and their collision substantially contributed to the injuries and deaths of the rescuers. Likewise, it was incontestable that the operation of Fore's automobile and its collision with the trailer substantially contributed to the injuries suffered by the rescuers. These were the only questions of causation involved in the case.

Whether the injuries and deaths of the rescuers caused by the defendants in the operation of their vehicles were risks within the scope of their duties owed the rescuers was an issue of law for the trial judge, and later the judges of the appellate courts. If found favorably to the defendants, they were entitled to a directed verdict. If found favorably to the plaintiffs, or if the trial judge was in doubt and the evidence would support an inference of negligence, the court should have submitted the following issues to the jury:

> (a) Do you find from a preponderance of the evidence that Mrs. Campbell was negligent in the operation of her truck so that it came into collision with the automobile of Marshall and overturned his trailer as an obstruction in the highway? Yes ——— No ———
>
> *Instruction*: Before you can answer the foregoing question "Yes" you must find that Mrs. Campbell as an ordinary prudent person, under all the circumstances that conditioned her operation of the truck, should have reasonably foreseen some such risks of collision with Marshall's automobile and the overturning of his trailer as an obstruction of the highway, and you must further find that she failed to exercise ordinary care to avoid such risks.
>
> If you have answered the foregoing question "Yes" then answer the following question:
>
> (b) Do you find from a preponderance of the evidence that in causing the highway to be obstructed by the overturned trailer of Marshall, Mrs.

[52] In order to avoid the repetition of the names of the victims, they will be referred to as the rescuers.

[53] Bell v. Fore, 419 S.W.2d 686 (Tex. Civ. App.—Texarkana 1967), *aff'd sub nom.* Bell v. Campbell, 434 S.W.2d 117 (Tex. 1968).

[54] 434 S.W.2d at 118-19.

Campbell was also negligent with respect to the collision of Fore's automobile with the obstruction and the injuries suffered by the rescuers while they were engaged in the removal of the obstruction from the highway?
Yes ——— No ———

Instruction: Before you can answer the foregoing question "Yes" you must find that Mrs. Campbell as an ordinary prudent person under all the circumstances that conditioned her operation of the truck and the creation of the obstruction of the highway by Marshall's trailer, should have foreseen the risk of the collision of Fore's automobile, or the collision of some other traveller's vehicle, with the obstruction, and the risk of some such injuries as were suffered by the rescuers while they were engaged in the removal of the obstruction from the highway; and you must further find that Mrs. Campbell failed to exercise reasonable care to avoid such risks and injuries.

Similar issues and instructions should have been submitted if the evidence was sufficient to support an inference arising from Marshall's conduct in the operation of his automobile and trailer. Inasmuch as Fore, for all practical purposes, conceded his negligence, it would not be necessary to submit an issue covering his negligence.

Under the facts as indicated, there would have been no basis for the submission of other issues. All relevant arguments could have been regimented affirmatively and defensively on the court's ruling on the scope of the defendant's duties and the issues submitted.

What the court did is another matter. No statement other than the supreme court's recital can reflect the steps taken in the litigation and how the court reached its affirmance of the judgments below. A summary of what it did can only dimly reflect the needless circumlocution that engulfed the litigation of the case.

More than forty fragmentary evidentiary issues and several false issues were submitted to the jury, but not a single basic issue was submitted. This is not unusual. The Texas courts seem to think that every dispute of factual detail presents an issue for submission to the jury. The Texas Rules of Civil Procedure require basic, ultimate, or controlling issues to be submitted, but in negligence cases the rule is ignored.[55]

The controlling question of causation[56] with which the court began its discussion became a multitude of causes spread through its opinion—proximate cause, sole cause, unavoidable accident, *volenti*, new and independent cause, active and immediate cause, intervening agency, concurring cause, efficient cause, cause as a condition, foreseeability as a test of proximate cause, but-for-which cause, superseding cause. A statement by the court is worthy of quotation as a basis of comments to be made: "All acts and omissions charged against respondents had run their course and were complete. Their negligence did not actively contribute in any way to the injuries involved in this suit. It simply

[55] TEX. R. CIV. P. 279.
[56] 434 S.W.2d at 118.

created a condition which attracted Payton, Bell and Bransford to the scene, where they were injured by a third party . . . ."[57]

How could it be said that things had run their course as long as the overturned trailer obstructed the use of the highway? By whose activity did it get there? Would things be at rest as long as other highway travellers were in peril? Was there no responsibility on the defendants to remove the trailer from the highway? The court could not deny that the injuries of the rescuers were substantially caused by the conduct of the defendants in the operation of their vehicles. Nor did it deny that the defendants were under a duty of care to other travellers using the highway or to the rescuers who attempted to protect other travellers from injury, and defendants themselves from liability. The court's answer is merely that defendants were not the proximate cause of the injuries the rescuers suffered, but that Fore became the proximate cause of their injuries.

While the court was answering in terms of *cause*, there is no doubt that it was thinking in terms of *fault*—that the wrongdoer responsible for the rescuers' injuries was Fore. It was not the function of the judges to make this judgment. It was a question of mixed fact and law for the jury. If it was a question of law for the judges, why not say clearly that the risks of injuries to the rescuers here involved were not within the scope of the duties of the defendants in the operation of their cars on the highway?

III. CONCLUSION

Why do the courts of Texas and other jurisdictions engage in metaphysical causation circumlocution in dealing with liabilities in negligence cases when the more understandable concepts of causal connection, duties, and negligent violation of duties provide the basis for every requisite of liability and defense needed for stating issues and making judgments? Even more pointed, why frequently, after using the more understandable terms to reach a judgment, do the courts then attempt to translate the reasons for their judgments into the phantom concepts of proximate cause and its brood of causes?

Nothing said here is designed as an attack on the judges or the courts. They are the most trustworthy and dedicated institutions of our society. Their obsession with "causes" has its origin far back in human history. We are told that the ancients of all peoples have believed that their disasters were caused by the anger of their gods, and they sacrificed animals and even children to appease the gods. Today we look elsewhere for the causes of our catastrophes. The causes we seek afar are on our own doorsteps. The implications are staggering.

The analysis of the numerous negligence cases decided by the courts of civil appeals and the supreme court will indicate that proximate cause and its spin-offs are fault defenses parading under the colors of causation.[58] It is be-

[57] *Id.* at 122.

[58] Lower Valley Bus Lines v. Lewis, 485 S.W.2d 957 (Tex. Civ. App.—El Paso 1972); Samford v. Duff, 483 S.W.2d 517 (Tex. Civ. App.—Corpus Christi 1972); Short v. Potts, 473 S.W.2d 338 (Tex. Civ. App.—Tyler 1971); Sears Roebuck & Co. v. Stiles, 457 S.W.2d 580 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

lieved that if the trial courts and advocates would take the time to identify, formulate, and submit the basic controlling issues of negligence cases, with such clarifying instructions as may be required to give the jury understanding of the issues they are empaneled to decide, the time of trial and review and the expense of litigating negligence cases could be reduced by fifty percent, and at the same time the quality of justice improved. The supreme court controls the procedures of all the courts and has the power to bring the administration of negligence law into the twentieth century. Some of its decisions in recent years give promise that it is moving in that direction. The greatest step it could take in that direction would be to take the time to discover for itself that the "causation doctrines" have no part to play in the intelligent disposition of negligence or other cases, and that when unmasked they are found either to be false or to hold in eclipse some meritorious doctrine that can be more intelligently employed.