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THE EVOLUTION OF FORSEEABILITY IN THE COMMON LAW OF TORT

By

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INTRODUCTION

“Proof of negligence in the air, so to speak, will not do.”¹

In the long, rich, dense, and circuitous history of the common law, no cause of action is so fraught with legal intrigue and controversy as tort law. Within tort law, no case has generated so much of that legal and intellectual intrigue as *Palsgraf v. Long Island Railroad*.² As every first year law student learns, Judge Cardozo, writing for the majority, and Judge Andrews, writing for the dissent, have a classic battle of the titans in arguing whether *foreseeability* is intertwined in the legally-determined duty or whether it is a component of the factually-decided proximate cause. *Palsgraf* creates a number of legal questions which reflect back on, and determine the future of common law torts. Let’s begin with the classic overview of *Palsgraf*.

PALSGRAF V. LONG ISLAND RAILROAD³

Two employees of the defendant, the Long Island Railroad, were helping a late-arriving passenger onto his train

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when their actions caused the passenger to drop a package containing fireworks. The fireworks exploded and the shock wave caused a scale at the other end of the platform to fall, injuring Mrs. Helen Palsgraf. Palsgraf sued successfully and prevailed on appeal as well. The New York Court of Appeals, comparable to every other state's Supreme Court, reversed by a 4-3 decision, with Judge Cardozo writing for the majority and Judge Andrews writing for the dissent.⁴

The gist of the decision was not whether *foreseeability* was a requirement in determining tort liability, but where that *foreseeability* was placed, so to speak. Cardozo argued that foreseeability is part and parcel of the determination of duty, and as such, is an issue of law. To that end, Cardozo opined that the foreseeability requirement was not met, as a matter of law.⁵ Andrews argued that *foreseeability* is part and parcel of causality, specifically proximate cause, and subject to a jury's finding.⁶ As such, he argued that the trial jury found for Palsgraf, affirmed on appeal, and thus the judgment should be affirmed by the state's highest court.

These arguments beg the questions of when, how and why did *foreseeability* make an appearance in tort theory.

STRICT LIABILITY OR NEGLIGENCE

The source of the common law of torts comes from the ancient English legal theory of the writ of trespass.⁷ It is argued that this writ may have evolved from the appeal of a felony since trespass required an action be alleged to have occurred "with force and arms" (*vi et armis*). The writ also provided for a jury trial and money damages.⁸ Rather than an innovative development by the royal courts, it is thought that royal courts,

in recognizing this writ, were merely reflecting what local courts had recognized traditionally. By the fourteenth century, the requirement of “with force and arms” had disappeared with the recognition of the writ of trespass on the case.⁹ It is interesting to note that this writ of trespass on the case would lead to the modern tort of negligence, common law of contract via the writ of *assumpsit*, property law via the writ of *ejectment*, and the modern theory of restitution.¹⁰

Rather than travel through the winding, tortuous (pun-intended) route of tort law’s evolution from the fourteenth century until now, let’s start with the notion that “[t]he English law of torts—like the law of contract—was quite underdeveloped in the eighteenth century.”¹¹ Common law rules of evidence prohibited both the victim and the tortfeasor, as parties in interest, from testifying. Such testimony was generally crucial to trial success. Likewise, in what we would now call medical malpractice, the plaintiff had to survive in order to pursue an action, a questionable condition in light of the medical crudity of the times.¹²

It seems that prior to the advent of negligence as the driving causation of tort, tort law reflected more of a strict liability approach, which could be schematically reflected as Action=>result=>injury. Thus, the actor is liable for the resulting injury so long as the injury is causally related to the action committed. It seems that the relationship between Action and Result is a strict liability one, i.e. Action-causes-result (regardless of how and why). The causality issue then is viewed as “result=>not-too-remote injury,” whatever “not-too-remote” means. “It is the general principle, that every person is liable for the consequences of his own acts; he is thus liable in damages for the proximate results of his own acts, but not for remote damages.”¹³ So, the “Action” is not required to be a *negligent* action, but *any* action. The strict liability here is in

the breach of duty, not the causality of injury. As one commentator notes rather definitively:

...prior to 1850 remedies for civil wrongs were governed by common law principles of strict liability...Fault was irrelevant in trespass actions and proximate cause as a concept was nonexistent. Defendants were strictly liable for trespass injuries. Indirect injuries, those that occurred as a consequence of the defendant's actions but not because of direct physical contact, could be compensated for by using "trespass on the case."¹⁴

What caused the relatively rapid shift from strict-liability to negligence in the late nineteenth century? The often-cited Morton J. Horowitz argues that the fault theory of negligence was not established in American tort law until "nineteenth century judges sought 'to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development.' The modern notion of negligence, then, was incorporated into tort law by economically motivated judges for the benefit of businessmen and business enterprises."¹⁵ Lawrence Friedman supports Horowitz's contention in arguing that negligence-based tort liability "has to be attributed to the industrial revolution—to the age of engines and machines [which] have a marvelous capacity to cripple and maim their servants."¹⁶ "According to Friedman, nineteenth-century judges believed that holding business strictly liable for all of the injuries they caused could have drained them of their economic blood. Consequently, these judges reduced tort liability to a standard of ordinary care 'to limit damages to some modern measure' so that capital could 'be spared for its necessary work.'"¹⁷

However, Kaczorowski vehemently disagrees with Horowitz's conclusion in his exhaustive review of historical tort law.¹⁸ His rationale, though, is a bit confusing. He argues that the shift to negligence-based tort liability and away from strict liability is a result of changing public policy of "economic interests of society generally, not the interests of particular classes," apparently referring to "business" as a "particular class."¹⁹ Kaczorowaki writes

As societal conditions changed, the judicial application of these principles and policies changed accordingly to achieve the same public policies. Judicial instrumentalism, understood as judges formulating, modifying, and changing rules to achieve desirable goals of public policy, was characteristic of the common-law system for centuries. It was not new or unique to the nineteenth century as some legal historians, such as Morton Horowitz, have argued.²⁰

He further claims that "modern tort law was not the creation of judges in nineteenth century America trying to protect business interests and to promote economic development."²¹ Yet, in a paragraph before this conclusion and as referred to above, he notes "[j]udges also sought to promote economic activity as a social good. However, they used tort law to protect and promote the economic interests of society generally, not the interests of particular classes."²² Kaczorowski does an excellent job in identifying the use of negligence in tort liability prior to the nineteenth century.²³ However, an argument can be that the preponderance of using negligence in tort liability did not fully come into its own until the latter part of the nineteenth century. Maybe the difference here is so nuanced that the differentiation is not clear. But there are two "clear" conclusions to be drawn from this debate:

- 1) The mid- to –late nineteenth century saw a clear shift in tort theory away from strict liability and towards negligence; and
- 2) Whether intended or coincidental, the result of this shift clearly aided business and economic development.

It seems that by fast-forwarding fifty to sixty years or so, history can determine that this development foreshadows the legal realism attack on classical formalism in formalistic contract areas, such as estoppel theories. If, as Morton claims, these judges were social engineers, so to speak, then they did indeed lay the foundation for legal realism’s practical result-oriented views leading us to believe that the tort liability shift was indeed deliberate and designed for the economic result which actually manifested itself. The timing is simply too coincidental to conclude otherwise. Now, as to whether judges crafted the negligence theory out of new, whole cloth, as Morton may be implying, or whether it was the coming together of centuries of tort evolution at this specific time is a topic for a legal historian, which both of these scholars are, but for our purposes, it is essentially an interesting side note.

THE EMERGENCE OF FORESEEABILITY

It seems that “foreseeability” may have been in the law from very early times in tort evolution, but simply unrecognized as such. Even though Frances Bacon referred to something like “foreseeability” and even more specifically “proximate cause” in his early seventeenth century maxim *in jure non remota causa, sed proxima specatatur*,²⁴ the maxim was not cited in any legal opinion until the mid-nineteenth century.²⁵ As the previous section of this paper indicates, tort-like damage theory was rooted in a strict liability foundation.

As Pollock and Maitland identify during the reign of Henry I in the *Leges Henrici* “[d]amages which the modern

English lawyer would assuredly describe as ‘too remote’ were not too remote for the author of the *Leges Henrici*.²⁶ However, we begin to see cracks in the wall of strict liability in the late eighteenth century, a full hundred years prior to the clear rise of the articulation of foreseeability in tort theory. These cracks begin to show in the often-cited case of *Scott v. Shepherd*,²⁷ known more famously as the “squib case.”

The case involves a youth, Shepherd, who tossed a lit squib into a public market area. A squib is a miniature explosive, much like a moderately powerful firecracker. It landed on the table of a gingerbread dealer who immediately tossed it away onto another merchant’s table. That merchant quickly tossed it as well when it hit and exploded, injuring one Mr. Scott, who lost an eye as a result of the explosion. Scott sued Shepherd in trespass. The question before the court on Shepherd’s appeal raised a number of issues: 1) does the action sound in trespass or trespass on the case?; 2) are the consequences too remote for liability to vest in Shepherd?; 3) does the third party intervener rule provide a defense for Shepherd?

A divided court affirmed the judgment for Scott over the dissent of none other than Judge Blackstone. Blackstone points out that trespass lies for immediate or direct damages while trespass on the case lies for any kind of consequential damages. Thus, Blackstone states that the matter must be dismissed in that it sounds in trespass. However, even more interesting is that Blackstone argues that if the case sounds in trespass on the case because the damages are both too remote and subject to the third party intervener defense with the two merchants who tossed the squib after Shephard’s original toss.

However, the majority relies on “strict liability” in rejecting Blackstone’s rationale in a two-pronged argument: 1)

Shepherd is liable in a strict-liability argument in that “. . .he who does the first wrong is answerable for all the consequential damages. . .”²⁸; 2) since the original act, the throwing of the squib into a public place, is an unlawful act, the miscreant is responsible for all results.²⁹ This hardly raised the specter of foreseeability. However, it is Blackstone’s dissent that creates the “first chink in the wall,” so to speak, but it is intermingles with a significant question regarding the form of the action. Does he rely on a concept of foreseeability or third party intervener or some hybrid of the two? In his dissent he cites

Suppose several persons are playing at foot-ball [sic], which is tossed by many, and at last breaks windows; trespass *vi at armis* will only against the man who struck it against the windows.³⁰

Is Blackstone saying here that the injury to the third party is too remote for an action to lie against the original assault? If so, we have the presence of “foreseeability.” Or, is he referring more to the form of the action: trespass versus trespass on the case? He seems to rest his ultimate conclusion on the form of the action; however, his dicta clearly states that he believes that an action on the case would fail under a remoteness or third party intervener analysis. Blackstone’s opinion does seem to follow contemporary English legal precedent that

“A line of distinction” between trespass and case settled in *Reynolds v. Clarke*

[T]hat, where the *immediate act itself* occasions a prejudice, or is an injury...the proper remedy is by action of trespass *vi et armis*; but, where the *act itself* is not an injury, but a *consequence* from that act is prejudicial to the plaintiff’s person, etc his remedy is by an action on the case.³¹

Perhaps the question of when *foreseeability* arose lies in the distinction between trespass/trespass on the case and the rise of negligence. Strict liability, and conversely the lack of a foreseeability requirement, did not require the proof of foreseeability as a necessary element to prevail on a trespass or on the case action.³²

POST PALSGRAF

In American tort law, clearly *Palsgraf* was a game changer. Courts rushed to establish formulas and standards to use to insure that there was no longer unlimited liability for any of the potentially accused. Many of the cases that established modern tort law involve the shipping and transportation industries, which were the most lucrative and potentially dangerous in the early twentieth century. Competing legal theories soon emerged as courts continually cited foreseeability as the reasoning for their decisions but lacked any existing theory to justify their decisions.

Noted legal theorist Leon Green wrote *The Rationale of Proximate Cause* in 1927 which established that any tort has six requisite elements: "(1) An interest protected, (2) against the particular hazard encountered, (3) by some rule of law, (4) which the defendant's conduct violated, (5) thereby causing, (6) damages to the plaintiff."³³ Patrick J. Kelley, a professor of law at Southern Illinois University, postulated in 1991 that Green led a group of hard-line legal realists that believed that the courts' reliance on proximate cause limitations for liability in decisions was really a cover for legislative policies of the time that were not as easily citable or understandable.³⁴

When looking at modern tort law, it is most important to examine the period just after *Palsgraf*, when strong jurists like Justice Cardozo and Learned Hand appeared to want to

establish clear and consistent rules for tort law so that there would be no confusion as to duties of care nor unlimited potential liability for the accused. While public opinion may not have always been on the same page (see *Liebeck* sixty years later), Twentieth Century tort law took great strides in limiting accused's potential liability while also factoring in plaintiff's possible contributory negligence (and to an extent establishing their own care of duty).

EARLY DAYS OF PROXIMATE CAUSE LITIGATION POST-PALSGRAF

In *McFarlane v. City of Niagara Falls*³⁵, only a year after *Palsgraf*, Justice Cardozo took a swing at the nuisance area of tort law, making sure to factor in contributory negligence into any liability equation. In this case, a woman tripped over cement that had extended onto a driveway after the City of Niagara Falls had ineptly installed a sidewalk three years prior. After catching her heel, the woman sued the City for damages, stating that their negligent cement pouring had created a nuisance in her driveway which had caused her to trip.

However, Justice Cardozo established here that "whenever a nuisance has its origin in negligence," negligence must be proven and a plaintiff "may not avert the consequences of his [or her] own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance."³⁶ Basically, Cardozo found that the woman was partly to blame and could not just cite the city's "nuisance" as a factor in any perceived damages from her tripping.

“Like many of Cardozo’s innovate decisions, *McFarlane* was a decision restricting potential liability. It was also a decision that preserved uniformity and

predictability in tort law even though it apparently changed some rules ... The more often litigants in a tort case could anticipate the set of rules that would be governing their conduct, the more skillfully might they plan their affairs.”³⁷

In *United States v. Carroll Towing Co.*,³⁸ written by the great jurist Learned Hand, this case established “the calculus of negligence” or “Hand test.” In this case, the United States had been leasing the barge *Anna C*, which was loaded with flour owned by the United States and moored to Pier 52 in New York Harbor. When the towing tug *Carroll* was sent out to move another barge, it accidentally severed the mooring line for all barges connected to Pier 52 and *Anna C*, now free, ended up sinking, causing the United States to sue the Carroll Towing Company in an indemnity action.

The crux of this case is an algebraic formula whereby if $B \geq L \times P$ then the accused may have met the standard of care, with B being the burden on the accused, L the possible cost of injury and P the foreseeable probability. If $B < L \times P$, then the accused will not have met the standard of care required to have them free from liability. Often abbreviated BPL, this test is also referred to as $C > GL$ (where Cost is greater than Gravity of Loss). It is important to note as well that this test first occurred in case law in 1932 in *The T.J. Hooper*³⁹, another tugboat case. In this case, it was found that the Carroll Towing Company failed the Calculus of Negligence test since the Court ruled that leaving a barge unattended during daylight hours posed such a significant risk that it would be fair to require the towing company to have a crew member to be aboard the ship.

SHIFT TOWARDS PROTECTING DEFENDANTS AND ADDING DUTY OF CARE TO PLAINTIFFS

In *Webster v. Blue Ship Tea Room*⁴⁰, much like the McDonald's coffee case⁴¹, this important decision (at least in New England) involved a woman being hurt by a restaurant's offering that many in the public would likely scoff at. While eating her fish chowder (the restaurant was out of the clam chowder she initially tried to order) at a Boston restaurant, Ms. Webster soon found herself unable to swallow after a fishbone became lodged in her throat. Like the plaintiff in the McDonald's coffee case, which on its face seems like a trivial injury, "this misadventure led to two esophagoscopies at the Massachusetts General Hospital, in the second of which, on April 27, 1959, a fish bone was found and removed. The sequence of events produced injury to the plaintiff which was not insubstantial."⁴²

Noting that the plaintiff had been born and raised in New England ("a fact of some consequence" according to the court)⁴³, the Defendant asserted that "here was a native New Englander eating fish chowder in a 'quaint' Boston dining place where she had been before; that '[f]ish chowder, as it is served and enjoyed by New Englanders, is a hearty dish, originally designed to satisfy the appetites of our seamen and fishermen'; that '[t]his court knows well that we are not talking of some insipid broth as is customarily served to convalescents.' We are asked to rule in such fashion that no chef is forced 'to reduce the pieces of fish in the chowder to miniscule size in an effort to ascertain if they contained any pieces of bone.' 'In so ruling,' we are told (in the defendant's brief), 'the court will not only uphold its reputation for legal knowledge and acumen, but will, as loyal sons of Massachusetts, save our world-renowned fish chowder from degenerating into an insipid broth containing the mere essence of its former stature as a culinary masterpiece.'"⁴⁴

While the initial auditor as well as the judge and jury in the Massachusetts Superior Court (the trial level in the Massachusetts court system) originally sided with the plaintiff, ultimately the Massachusetts Supreme Judicial Court sided with the Defendant's arguments, after much discussion into the history of chowder and even a footnote including a recipe. The Court stated that "We are not inclined to tamper with age old recipes by any amendment reflecting the plaintiff's view of the effect of the Uniform Commercial Code upon them ... Thus, while we sympathize with the plaintiff who has suffered a peculiarly New England injury, the order must be Exceptions sustained. Judgment for the defendant."⁴⁵

This case, while apparently silly and amusingly written, is helpful to provide a look at the attitude of the era since the Court even goes so far as to cite a similar California case (since, in the Court's opinion, "we know that the United States District Court of Southern California, situated as are we upon a coast, might be expected to share our views"⁴⁶) as well as an Ohio case that was written by the future Chief Justice Taft (which the Court was "most impressed, however, by *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167, where in Ohio, the Midwest ..."⁴⁷).

Continuing Justice Cardozo's fight (and eventually the legislatures') against frivolous suits, the Massachusetts Supreme Judicial Court ultimately ruled in favor of the Defendant due to an underlying sense that basically the plaintiff should have known what she was getting herself into. Going further than contributory negligence, the Court in this case decided not to punish a Defendant for a Plaintiff's suffering an injury that could be seen as a natural and foreseeable by-product of eating fish chowder. It is not unreasonable for a fish bone to be found in fish chowder (now had she been able to order the clam chowder as originally

desired, this case would have probably had a different outcome). Regardless, the Court here limited Plaintiff's ability not only to recover any damages but to sue in the first place because the plaintiff's ordering of the fish chowder was the proximate cause of her suffering an injury due to a fishbone in her food.

CONSUMER LIABILITY AND PROXIMATE CAUSE

During the latter half of the twentieth century, proximate cause case law shifted from transportation and larger entities to the individual and consumer liability as the individual consumer became the greater focus. There is no greater example of this than the infamous "McDonald's coffee" case, aka *Liebeck v. McDonald's*.

In *Liebeck v. McDonald's Restaurants*,⁴⁸ while not an appellate decision that established any grand tort theory, this case is arguably one of the most famous of the last fifty years. Stella Liebeck, a then 79-year-old woman, was the passenger in her grandson's 1989 Ford Probe, which lacked cup holders. After going through the McDonald's drive-through and ordering a 49-cent cup of coffee, her grandson pulled over so that she could add cream and sugar to her coffee. As she placed the cup between her knees and pulled the lid off towards her, the coffee spilled on her cotton sweatpants, causing third-degree burns on her thighs, groin and butt. As a result, the plaintiff had to be hospitalized for eight days and required multiple skin grafts.

Testimony during trial included McDonald's stating that they purposefully kept the coffee hot so that the coffee would remain hot during the commuters' drive. However, McDonald's own research showed that people often drank the coffee right away. By making the coffee as hot as it was served

(around 180 degrees Fahrenheit), the plaintiff's attorneys argued that coffee drinkers could suffer third-degree burns in approximately twelve to fifteen seconds. Cooling the coffee another 20 degrees extended that time to twenty seconds.

Applying the principles of comparative negligence, the jury found McDonald's 80% liable and Liebeck 20% liable, awarding her \$200,000 in compensatory damages and \$2.7 million in punitive damages (totaling two days' worth of coffee sales for McDonald's). While the case never made it to appellate court, settling for less than \$600,000 before it was heard, this case became the stereotypical example in the media of a frivolous lawsuit and, much to the delight of huge corporations, helped to pave the way for many states to pass legislation capping potential tort case recovery.

To this day, many Americans, when they hear this case, believe the plaintiff's claims to be without merit and frivolous, with the extent of her injuries suffered often massively underestimated by the general populace. However, once this case is boiled down (no pun intended), it really is simply a proximate cause case, asking the jury to determine just how much McDonald's should have been able to foresee and how much they should have been able to prevent in Liebeck's injuries. While the idea of a customer being able to sue because she spilled coffee on herself may seem ridiculous on its face, this case ultimately made corporations more responsible and more fearful of publicity-damaging litigation, forcing them to reexamine their care of duty and their potential proximate cause liability while lobbying state and federal legislatures to limit any such punitive monetary liability.

While the outcome of this case has ultimately been to coincide with the mid-century shift back towards the establishing of a care of duty towards the plaintiffs, this case

was interesting in that it showed that some of the early century trend towards establishing just how much of a care of duty existed for the accused still was prevalent in the public mind. This case also speaks to the difficulty of allowing juries to determine seminal tort law – absent an appellate decision on this case it is almost impossible to discern where courts would have come down on this verdict (though many similar cases were thrown out by trial courts prior to this one and most assuredly since).

PROXIMATE CAUSE IN THE UNITED KINGDOM

Our analysis of the modern tort theory of proximate cause would not be complete without a look at the Court system of the United Kingdom, if for no other purpose than as a comparison to the evolution of the theory in the United States.

Before jumping into the modern field of proximate cause in the courts of the United Kingdom, a cursory look at the historic case law of foreseeability shows a similar development to that of the United States. Beginning, very simply, with the earlier mentioned *Scott v. Shepard*⁴⁹ also known as the Squib case, negligence is determined by a simple “but-for” causation analysis. However, as we move into the next century another case enters the British legal system in 1841 that displays aspects of what any American law student would recognize as proximate cause. In *Lynch v. Nurdin*⁵⁰ the Court held that a defendant who negligently left a horse cart unattended for a lengthy period of time in an area where children are known to play is liable for harm to the plaintiff (a child) who fell off the cart and was injured when another child started up the horse attached to the cart. This decision introduced the foreseeability argument into the “but-for” causation analysis in the United Kingdom. More than thirty

years later another case involving a horse and cart arose in *Clark v. Chambers*⁵¹ (1878) where the Court found that the defendant-landowner, who negligently blocked a carriageway with spiked stakes, is liable for harm caused to the plaintiff when an unknown third-party removed the stakes from the road and put them in the middle of an adjoining footpath causing injury to the plaintiff. Again, foreseeability is used as a means of finding liability *through* a but-for analysis, and erasing the intervening cause defense.

The historical analysis then jumps into the 20th century with a string of three cases that set the stage for modern causation in tort law in the United Kingdom. Starting with *In re Arbitration Between Polemis and Furness, Withy & Co., Ltd.* (1921)⁵² which held defendant liable for damage “directly traceable to the negligent act” even if that damage is not “the exact kind of damage one would expect.” Thus utilizing the foreseeability analysis laid out in the previous century and adding a limitation to said analysis in terms of causation and liability. Eleven years later, a duty is established in *Donaghe v. Stevenson* (1932)⁵³ which expounded the general principle that reasonable foreseeability of physical injury to another generates a duty of care. This principle is then explained more thoroughly thirty years later in the Australian case *Wagon Mound I* (1961)⁵⁴ which stated that the injury must be reasonably foreseeable otherwise it is “outside the scope of duty” or “too remote.” The proposition being that reasonable foreseeability governs the question of whether the injury comes within the scope of duty.

As this analysis indicates the United Kingdom does have a smattering of case law from the past two hundred years, some of which parallels the proximate cause case law of the United States. However, the United Kingdom never had the seminal *Palsgraf*-type case that we all learn about in our Law

School 1L torts class. There is no assumption of proximate cause, and in fact, that term rarely to never comes up in the literature and cases. Foreseeability is the benchmark and standard by which all negligence cases are determined in the UK. Per the case *Bourhill v. Young's Executor*⁵⁵ foreseeability is used four times to determine: 1) whether a duty exists; 2) whether an act or omission is a breach of duty; 3) whether reasonable care has been taken (in the guise of probability); and 4) for what damage the defender is liable.⁵⁶ Below are four cases that illustrate and outline the current field of negligence analysis currently in play in the courts of the United Kingdom.

In the facts of *Jolly v. Sutton London Borough Council*,⁵⁷ a small boat and trailer that had been abandoned in 1987 on a piece of open land owned by the Sutton Borough of London and adjacent to a block of apartments also owned by the Borough. The open land where the boat was placed was a green space where children from the neighboring apartments often played. In 1988 the Council placed a sticker on the boat stating "Danger do not touch this vehicle unless you are the owner" and also stated that the boat would be removed in seven days if not claimed by the owner. The boat was never removed and in mid-1989 the Plaintiff, Justin Jolly, then 13 years old, and a friend found the boat as they were walking past. The following February the plaintiff and his friend returned to the boat with the intention of fixing it up in order to sail it. During the course of their repairs, which took several months, the plaintiff and his friend turned the boat over and propped it up so it was supported by the trailer and a jack the plaintiff brought from home in order to crawl underneath to render repairs. During one work session in April 1990, Justin was alone under the boat when it started rocking. Before the plaintiff could crawl out from under the boat, it collapsed off the jack and trailer that were holding it up and fell onto the

plaintiff causing him to suffer a broken back resulting in paraplegia.

The issue that arose before the House of Lords was whether the boat was a reasonably foreseeable trap or allurement to children such that it would cause them injury, and whether or not the defendants should have taken measures to protect the plaintiff from danger.⁵⁸

At trial the court held that the accident and sustained injury to the plaintiff were reasonably foreseeable, therefore the defendants breached their duty to plaintiff as occupiers.⁵⁹ The Appeals Court reversed and held that the immediate cause of the injury was the plaintiff's decision to jack up the boat and work underneath it, essentially claiming his "work" was an intervening cause. The Secondary Court then went on to determine that it was not reasonably foreseeable that the injury would occur in this way.⁶⁰ The House of Lords ultimately agreed with the trial court and held that even though this particular injury may not have been foreseeable, it was foreseeable that the boat would cause injury, thus the defendant is liable.⁶¹

The Trial Court reasoned that it was foreseeable that children would play in the area where the dilapidated boat was abandoned and thus could be attracted to the boat and thus harmed by it if they were to play on it. This particular harm was foreseeable because children imitating adults, in this case working on the boat, is a form of play.⁶² The Court of Appeal however, held that working on the boat was not playing and therefore was not a foreseeable action.⁶³ Upon appeal to the House of Lords it was determined that the trial court was the finder of fact and at trial it was determined that play can mimic adult behavior, thus what the plaintiff and his friend were

doing was play. “The Court of Appeal was not entitled to disturb the judge’s findings of fact.”⁶⁴

This case hinges on the basic legal and factual concept of foreseeability. Although it was foreseeable that the abandoned and derelict boat could cause harm to children playing on or in it, the exact play that was used in this case was perhaps not foreseeable. Nonetheless, the trial court determined that the plaintiff’s actions were play and that therefore the damage was foreseeable. The House of Lords goes on to determine that the Court of Appeals was wrong to overrule the trial court’s finding of fact, and by viewing the injury as unforeseeable meaning the defendant as not liable. The House of Lords ruled that prevailing case law determined that a foreseeable hazard even if an unforeseeable consequence results in liability.⁶⁵ Lord Hoffman, concurring with the majority, states that the Council admits a duty in regards to the damages of the boat as evidenced by the “Danger” sign. Therefore, to eliminate this risk would have been the same amount of effort as to eliminate the risk to the plaintiff.⁶⁶ “[T]he judge’s broad description of the risk as being that children would ‘meddle with the boat at the risk of some physical injury’ was the correct one to adopt on the facts of the case. The actual injury fell within that description and I would therefore allow the appeal.”⁶⁷ Because some injury was foreseeable to the child-residents a duty was owed to the plaintiff. Defendant is liable because it breached this duty even though the exact injury which occurred was not entirely foreseeable.

In the 2004 Scottish case of *Simmons v. British Steel Plc.*,⁶⁸ the plaintiff, Christopher Simmons, was employed by the defendant, British Steel, doing a job which involved holding a burning torch to strip off scrap metal. The torch was fed with gas and oxygen through flexible tubes. On the date in question

Simmons had climbed onto a table to complete his work, approximately 1.5 feet off the ground. As he went to step down off the table he became entangled in the tubes attached to the torch and as a result fell off the table, hitting his head and splitting the visor on his headgear. The plaintiff sustained an injury to his right ear and complained of a sore head and a headache. A few weeks after the accident the plaintiff's pre-existing skin condition became exacerbated and the plaintiff developed signs of depression. This was accompanied by the plaintiff's inability to return to work and an ever increasing anger at the situation.

“Some time after the accident the pursuer's anger exacerbated his pre-existing psoriasis and, as a result, the defenders' works medical officer refused to allow him to return to work. This, too, angered the pursuer. His prolonged absence from work caused him to become preoccupied with the accident and more angry at the defenders, inter alia because the defenders' personnel department failed to visit him or to take any interest in him. All of this resulted in a deterioration in the pursuer's mental state, leading to his depressive illness.”⁶⁹

The issue on appeal was whether the trial court was correct in finding that the defendant is liable for not only the immediate physical injuries of the accident (which it did not contend) but also that the defendant is liable for the emotional distress, depression, and exacerbated skin condition.

The Trial Court found that the emotional damages and skin condition were not part of the defendant's liability.⁷⁰ The Second Division (appeal) found for the plaintiff and awarded him a sum of £498,221.77.⁷¹

The basic rule states that if physical injury to the defendant was foreseeable, then there is a duty of care established, and therefore the actual injury doesn't matter.⁷² “[A]ll that matters is that the defenders were in breach of their duty of care not to expose the pursuer to the risk of personal injury and that, as a result of the breach, the pursuer suffered both physical and psychiatric injuries.”⁷³ The duty was clearly established through the employer-employee relationship, but is further established by the fact that other stations, similar to the one at which plaintiff worked, had altered torches with retractable tubes to prevent accidents such as the one in question in this case.⁷⁴

The House of Lords found that “Regret, fear for future, frustration at the slow pace of recovery and anger are all emotions that are likely to arise, unbidden, in the minds of those who suffer injuries in an accident such as befell the pursuer. If, alone or in combination with other factors, any of these emotions results in stress so intense that the victim develops a recognized mental illness, there is no reason in principle why he should not recover damages for that illness.”⁷⁵ Thus stating the rule that defendants are liable for both physical and psychological damage incurred as a result of the negligence, even if this extent of injuries were not foreseeable.⁷⁶ This general rule and other rules from case law are then laid out, being often quoted and applied in subsequent cases.

“[O]nce liability is established, any question of remoteness of damage is to be approached along the following lines which may, of course, be open to refinement and development. (1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable. . . (2) While a defender is not liable for damage that was not

reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a novus actus interveniens or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable. . . (3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen. . .(4) The defender must take his victim as he finds him. . .(5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing."⁷⁷

In the case of *Corr (Administratrix of the Estate of Thomas Corr (Deceased)) v. Ibc Vehicles Limited*,⁷⁸ Thomas Corr, now deceased, was employed by the defendant as a maintenance engineer. On the day in question, Mr. Corr was working on a line producing prototype vehicles when a machine fitted with a high intensity sucker picked up a metal panel and moved it quickly and without warning at Mr. Corr. Mr. Corr ducked, otherwise he would have been decapitated, however the metal did hit the right side of his head and severed most of his right ear. As a result of this accident Mr. Corr had to endure reconstructive surgery, he was disfigured, and he suffered from unsteadiness, tinnitus, severe headaches, and had trouble sleeping. Mr. Corr also suffered from post-traumatic stress disorder as a result of the accident. Due to the accident and lingering physical and emotional effects it left on him, Mr. Corr developed depression

and became suicidal over the next six years until 2002 when he took his own life by jumping off a parking garage.

The issue before the House of Lords was whether the plaintiff, the estate of Mr. Corr, can recover damages from the defendant for the financial loss attributable to Mr. Corr's suicide? Was Mr. Corr's death caused by a wrongful act, namely the employer's breach of duty? Or is the suicide too remote from the accident to make the defendant liable?⁷⁹

The general rule states that "it is now accepted that there can be no recovery for damage which was not reasonably foreseeable"⁸⁰ The foreseeability issue is tackled by determining that the depression was a reasonably foreseeable consequence of the breach of duty (the accident) and the suicide was a direct result of the depression.⁸¹ "Here, the inescapable fact is that depression, possibly severe, possibly very severe, was a foreseeable consequence of this breach."⁸²

Causation is established by using a purely but-for chain of analysis. "[B]ut for the employer's negligence the accident at work would not have happened, that but for the accident at work and the physical damage he suffered Mr. Corr would not have become clinically depressed and that but for that psychiatric feature he would not have entertained suicidal thoughts or have attempted suicide."⁸³ When physical injuries are foreseeable and have been caused by the defendant, the defendant cannot then limit liability because the extent of those physical injuries were not foreseeable.⁸⁴ This rule was then extended by a later case to include psychiatric injury.⁸⁵

The court in this case applies the five principles, or rules, laid out in *Simmons*⁸⁶ and finds that although suicide may not have been a foreseeable consequence in terms of the extent of the injury (death), injury was foreseeable and there

was a duty which was breached. Therefore, because some injury was foreseeable, and because that injury was a result of the accident the defendant is liable for the suicide.⁸⁷

The events of *Robert Eric Spencer v. Wincanton Holdings, Ltd.*⁸⁸ started when plaintiff was in a collision with a stationary tractor unit while serving as a serviceman in the Royal Air Force (RAF). The collision injured his right knee, which remained so painful that he eventually had to terminate his employment and underwent an above-knee amputation. Plaintiff adapted to his new physical situation, obtained a new job and bought a car which was in the process of being outfitted for use with a prosthetic leg. Before the car could be altered for use with the prosthetic, however, plaintiff was out in the car when he pulled into the local gas station and without the assistance of his prosthetic leg or any sort of crutches filled his tank up by steadying himself against his car. As the plaintiff returned to the driver's side he tripped over a raised manhole cover and fell, causing him to rupture his left quadriceps tendon and confining him to a wheelchair.

The issue before the House of Lords was whether or not the consequences of the second accident were caused by the negligence of the defendant, the party originally liable for the initial accident while plaintiff was in the RAF? To answer this question the House of Lords uses the five rules set out in *Simmons*.⁸⁹

“English law uses the concept of causation to attribute responsibility for things that happen. . .In this context the English law of tort has developed what might be called ‘exclusionary rules.’ These are intended to assist judges in deciding the circumstances in which a defendant, whose liability to a claimant for a particular occurrence has been established, will not be responsible

for certain consequences of an act of negligence and the damages that are claimed to flow from those consequences. Such consequences and the damages resulting are said to be 'too remote' in law to be recoverable."⁹⁰

The court then goes on to discuss, what American law would call proximate cause by stating that "[f]airness, baldly stated, might be thought to take things little further than reasonableness. But what it does is acknowledge that a succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue. In relation to tortious liability for personal injury, this point is reached when (though not only when) the claimant suffers a further injury which, while it would not have happened without the initial injury, has been in substance brought about by the claimant and not the tortfeasor."⁹¹

Despite the discussion and recognition of the theory of proximate causation and the limitations it places on negligent causation the House of Lords ultimately holds that "[l]ike the amputation, the fall was, on the judge's findings, an unexpected but real consequence of the original accident, albeit one to which Mr. Spencer's own misjudgment contributed."⁹² Utilizing the tried-and-true "but for" causation analysis the court holds that the gas station accident was a natural consequence of the original incident and would not have happened but for the original negligence.

As this succession of these cases from the past 15 years shows, the courts of the United Kingdom are holding very closely to the but-for causation analysis. Rather than limiting liability assigned to the defendant by cutting the chain of events, the courts in the UK are in fact expanding liability through factually based foreseeability analysis. What is also

clear through the broader analysis and discussion within the case law, is that there is the idea of a limitation on defendant liability, similar to that of the role of proximate cause in the United States, there just has not yet been the widespread application of such a limitation.

CONCLUSION

In law school classrooms all across the country, first year students are struggling with the concept of proximate cause. They aren't alone. "Attorneys and the courts fail to understand the task involved in deciding the question and are often confused by terms such as proximate cause and foreseeability."⁹³ The courts of our nation, as well as the courts of our fellow common law country the United Kingdom, continue to struggle with this nebulous legal concept. Where does foreseeability attach? Is it part of duty or causation? What if the plaintiff contributed to the action? These questions are indicative of the struggle that lawyers, judges, legal scholars, and our society as a whole must grapple with when confronted with a system of common law, the evolution of legal concept. What is clear from case law and analysis over the past century is that liability has shifted away from the defendant with the devaluing of the but-for analysis, and towards a more thoughtful, and limiting, analysis based in proximate cause. While the evolution has been relatively quick to progress in the United States, perhaps due in part to the ever growing interests of big business, in the United Kingdom they are still working to figure out if a limitation on liability via a proximate cause analysis is appropriate. Moving forward into the jurisprudence of the 21st century, the courts will need to determine more fully how to define and apply proximate cause in negligence tort cases. Common law is only useful if we can rely on it for precedent, even if that precedent is evolving.

¹ Pollock on Torts, p.455

² 162 N.E. 99 (N.Y. 1928)

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 341.

⁶ *Id.* at 356.

⁷ Langbein, John H. *et al.*, *History of the Common Law* (Wolters Kluwer:2009) p. 103 citing to fn. 50 *Select Cases of Trespass from the King's Court: 1307-1399* (Morris Arnold ed. 1985) (Selden Soc., vol 100)

⁸ *Id.* p. 103

⁹ *Id.*

¹⁰ *Id.* at 104.

¹¹ Ibbetson, David, *A Historical Introduction to the Law of Obligations* (1999) pp. 97-98.

¹² Langbein, *op. cit.* p.1068

¹³ *Ryan v. N.Y. Central R.R.*, 35 N.Y.210 (1866) p. 210.

¹⁴ Ballam, Deborah, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 *Am. Bus. L.J.* 4 (1994), p 583 citing to Lawrence Friedman, *A History of American Law* (2d ed. 1985) and Kermit Hall, *The Magic Mirror: Law in American History* (1989)

¹⁵ Kaczorowski, Robert, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 *Ohio St. L.J.* 1127 (1990) citing to Morton Horowitz, *The Transformation of American Law 1780-1860* (1977)

¹⁶ *Op.cit.* Friedman p. 300 as cited in Kaczorowski 1128.

¹⁷ *Op. cit.* Kaczorowski 1128 siting to both Morton and Friedman cf. fn 16, 17

¹⁸ *Id.* 1199

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ fn. 111 citing to *M'Clures v.Hammond*, 1 BAY 99, 100 (S.C. 1790)

²⁴ Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 *Wash. U.L.R.* 54 (1991) citing to F. Bacon, *A Collection of Some Principal Rules and Maximes of the Common Laws of England*, in *The Elements of the Common Laws of Engli\and* (1630 and

photo reprint 1978), Regula 1, at 1. (Translated as “In law not the remote, but the proximate cause is looked at”.)

²⁵ *Id.* 55

²⁶ Pollock, Frederick and Maitland, Frederic, *The History of English law*, Vol II (1959) 470-471

²⁷ 96 Eng. Rep. 525 (K.B. 1773)

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Kaczorowski, op.cit 1184 citing to Taylor v. Rainow, 12 Vs. (2 Hen. & M) 443 (1808) at 445 (citing with approval Raynolds v. Clarkem 2 Ld. Raym. 1399, 1402, 92 Eng. Rep 410, 413 (K.B. 1725); for an excellent historical review see Dix, Elizabeth Jean, *Origins of the Action of Trespass on the Case*, 46 *Yale L.J.* 1141 (1936-37).

³² Winfield, Percy and Goodhart, Arthur, *Trespass and Negligence*, 49 L. Q. Rev. 359 (1933) at 372 citing “...as late as 1875, in *Holmes v. Mather*, [L.B. 10 Ex. 261, 266] Herschell, Q.C., as counsel for the plaintiff, could argue: ‘it is immaterial in all these cases there was negligence in the drivers; for, in considering whether trespass will lie, negligence is not regarded.’”

³³ See L. Green at 3-4; for an excellent discussion of “duty” and Professor Leon Green’s reformulation of “duty” which was contemporaneous with the *Palsgraf* case, see Vandall, F.J., “Duty: The Continuing Vitality of Dean Green’s Theory,” 15 *Quinnipiac L.R.* 343 (1995)

³⁴ Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 Wash. U. L. Rev. 49, 105.

³⁵ 247 N.Y. 340, 160 N.E. 391 (1928)

³⁶ White, G. Edward, *Tort Law in America: An Intellectual History*, Oxford University Press, 2003, citing *Id.* at 344-5.

³⁷ *White* 129.

³⁸ 159 F.2d 169 (2d. Cir. 1947)

³⁹ 60 F.2d 737 (2d Cir.), cert. Denied, 287 U.S. 662 (1932)

⁴⁰ 347 Mass. 421, 198 N.E.2d 309 (Mass., 1964)

⁴¹ Cf. fn 51 *infra* and discussion associated therewith

⁴² *Webster v. Blue Ship Team Room*, 198 N.E.2d at 310.

⁴³ *Id.* at 309.

⁴⁴ *Id.* at 310-11.

⁴⁵ *Id.* at 312.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 1994 Extra LEXIS 23 (Bernalillo County, N.M. Dist. Ct. 1994), 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. 1994)

⁴⁹ 2 Wm. BL 892, 96 Eng. Rep. 525 (1773)

⁵⁰ 1 Q.B. 29 (1841)

⁵¹ L.R. 3 Q. B.D. 327

⁵² 3 KB 560

⁵³ AC 562

⁵⁴ [1961] UKPC 1

⁵⁵ [1943 SLT 105] at p. 107.

⁵⁶ *Id.* at para. 17.

⁵⁷ [2000] UKHL 31.

⁵⁸ *Jolly v. Sutton London Borough Council* [2000] UKHL 31 *Id.* 3.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 8.

⁶² *Id.* at 3.

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 6.

⁶⁵ *Hughes v. Lord Advocate* [1963] A.C. 837; *Id.* 7.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 10.

⁶⁸ *Scotland* [2004] UKHL 20

⁶⁹ *Id.* at 52

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 2.

⁷² *Id.* at 54.

⁷³ *Id.* at 56.

⁷⁴ *Id.* at 31.

⁷⁵ *Id.* at 55.

⁷⁶ *Id.* at 56.

⁷⁷ *Id.* at 67.

⁷⁸ [2008] UKHL 13

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 11.

⁸¹ *Id.* at 12.

⁸² *Id.* at 13.

⁸³ *Id.* at 27.

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 29.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 13.

⁸⁸ [2009] EWCA Civ. 1404

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 29.

⁹¹ *Id.* at 15.

⁹² *Id.* at 23.

⁹³ Vandall, *op. cit.* p 343