Marquette Law Review

Volume 34
Issue 3 *Winter 1950-1951*

Article 5

1951

Proximate Cause - Confusion of Jurors by Misleading Label

Jerome J. Dornoff

Follow this and additional works at: https://scholarship.law.marquette.edu/mulr

 Part of the Law Commons

Repository Citation
Jerome J. Dornoff, *Proximate Cause - Confusion of Jurors by Misleading Label*, 34 Marq. L. Rev. 204 (1951).
Available at: https://scholarship.law.marquette.edu/mulr/vol34/iss3/5

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

PROXIMATE CAUSE — CONFUSION OF JURORS BY MISLEADING LABEL

Judicial construction has developed its own definition of proximate cause, but in so doing has failed to conform the term itself. The result is that jurors are plagued with a terminology that connotes to them a meaning contrary to the legal definition. In an honest attempt to perform their duty, they sit through a trial in which the word "proximate" is constantly repeated. The thought that comes to the lay mind upon hearing the term is nearness. Thus as the trial develops the juror's thought is that the cause of the accident must be in some way near the accident in order for the plaintiff to recover. Only at the end, upon receiving the instruction of the court, is he made aware that, "neither time nor distance is essentially a controlling element."[1] What are the problems involved in any formulation of a new label?

The definition of proximate as given in the dictionary is, "lying or being in immediate relation with something else. Near."[2] The purpose of a dictionary is to express what a particular word means according to common knowledge. It is understandable, as the courts are quick to point out in the matter of contracts, that if a word is used it is to be given no other construction than that which common knowledge has given to it. The courts do not state that a word in question in a particular contract or conveyance should be given the technical meaning that only a lawyer or judge would impart to it. The writer recognizes that the law has a language of its own which has developed through the common law. Such a language is to be commended as necessary, because few words can convey an entire concept to the court and adversary without the necessity of lengthy explanation. But is it proper to use a term such as "proximate cause" in its legal sense when the effect is to confuse twelve laymen unschooled in the language of the law? Assuming the dictionary definition given above to represent the common lay understanding, the above quotation from the Wisconsin Supreme Court decision in *Deisenrieter v. Kraus-Merkel Malting Co.*[3] certainly injects confusion. In that case an instruction to the jury, to the effect that the word "proximate" means the "direct, immediate, the near cause, or the nearest cause," was held to be erroneous. Instead the jury should have been told that their understanding of the term was improper for legal purpose, and the definition given by the dictionary should not be considered. Attorneys can readily see the error in

---

[1] Deisenrieter v. Kraus Merkel Malting Co., 97 Wis. 279, 72 N.W. 735 (1897).
[2] Funk and Wagnall, New Standard Dictionary of the English Language (1946).
[3] *Supra*, Note 1; See also Wheeler v. Milner, 137 Wis. 26, 118 N.W. 187 (1908); Huber v. LaCrosse City R. Co., 92 Wis. 636, 66 N.W. 708 (1896); Meyer v. Milwaukee Electric Railway & Light Co., 116 Wis. 336, 93 N.W. 6 (1903).

the instruction as given by the trial court, but it is not quite as apparent to the jury members.

It would require too much space to describe the complete evolution of the concept of proximate cause in Wisconsin law, but it will aid in the search for a better term to summarily examine the growth of the concept. The earliest, and perhaps most simple explanation of the concept appeared in a decision of the Supreme Court in 1853. The Court stated the idea without actually using the term as follows: "We are of the opinion that they (defendants) are liable for the consequence of the want of ordinary care."[4] This is how liability was described, and it necessarily embodies proximate cause. Seventy-eight years later, Justice Fowler in his concurring opinion in *Osborne v. Montgomery*[5] intimated that the only considerations to be determined by the jury in considering liability are, "1) Did the defendant fail to use due care." and, "2) Did such failure cause plaintiff's injury." It is accepted that "Due care" and "ordinary care" are convertible terms.[6] If the jury finds in the affirmative on both points the defendant is liable for the consequence of his act. At first glance it appears that the concept has remained crystalized throughout the years. A closer look at the intervening decisions, however, indicates that the juggling of legal terminology has led to a great deal of confused thinking.[7] In 1884 the Supreme Court said;

> "In order to warrant a finding that negligence is the proximate cause of the injury it must appear that such injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."[8]

This is the definition of proximate cause. Note the omission of any reference to nearness or immediate relation. Thus as the phraseology of the definition developed the term used to convey the idea became wholly inadequate. In *Steinkrause v. Eckstein*[9] the Court did not use the dictionary concept of *immediate* relation but determined that there must be a *causal* relation between the act complained of and the injury sustained. This, perhaps, is as close as the court has ever come to the lay definition of "proximate." There is, however, no necessary synonymity in the terms "causal" and "immediate." In *Berrafato v. Exner*[10] the Court changed the then accepted definition of proximate cause, ruling that it was not necessary that the particular injury should

[4] Richards v. Sperry, 2 Wis. 216 (1853).
[5] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
[6] Union Traction Co. of Ind. v. Berry, 188 Ind. 514, 121 N.E. 655 (1919).
[7] Berrafato v. Exner, 194 Wis. 149, 216 N.W. 165 (1927).
[8] Atkinson v. Goodrich Transportation Co., 60 Wis. 141, 18 N.W. 764 (1884).
[9] Steinkrause v. Eckstein, 170 Wis. 487, 175 N.W. 988 (1920).
[10] *Supra,* note 7.

have been forseen by a reasonable man under the circumstances, but only some harm to the interests of another. This was upheld in *Osborne v. Montgomery*[11] and is the ruling law in Wisconsin today. It must be remembered that these definitive statements are viewed to determine whether or not the term "proximate cause" is a label that fulfills its purpose in conveying the correct concept to the minds of the jurors. Obviously it is inadequate. The whittling at the element of forseeability tends to widen the gap between the legal and lay definition and to heighten the confusion inherent in courtroom use of the label. A classic example of this type of confusion can be found in *Koehler v. Waukesha Milk Co.*[12] The defendant's agent in that case was a milkman who delivered a bottle of milk to plaintiff's intestate's doorstep. The bottle was defective and the deceased cut her hand in picking it up. Blood poisoning set in and she died three weeks later. The court held that the extent of the liability is for all consequent damages naturally following the injuries whether or not such resulting damages are reasonably to be anticipated. A causal relation was present, but a proximate relation as understood in its ordinary sense, certainly was not. One of the most exhaustive and complete definitions is given in *Stefanowski v. Chain Belt Co.*[13] where the court said;

> "Proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event, should as an ordinary intelligent, and prudent person, have reasonable grounds to expect at the moment of his act or default that an injury to some person might result therefrom."

Notice that the court attempted to cover every possibility in describing proximate cause. It is true that the court used the word "immediate" in its description, but in the alternative only, and to relate the last event with the injury. It is also clear that a definite tie-up between the defendant's act and the injury is required by this definition, but it is not such as would be understood as falling within the lay meaning of the word "proximate". The order in the explanation is logical and the result readily acceptable, but the term used to label this logic and result remains confusing. A jury member ordinarily would not understand the word "proximate" to involve all the elements included in this definition. It was said again in *Wheeler v. Milner*[14] that the wrong-

[11] *Supra*, note 5.
[12] Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926).
[13] Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N.W. 532 (1906).
[14] Wheeler v. Milner, 137 Wis. 26, 118 N.W. 187 (1908).

doer reasonably must be held only to forsee that some harm may result, and not the actual harm that does result.

It can be seen from the cases reviewed that the courts have agreed to some extent as to the definition of the causal element required for liability, but have made no progress toward the adoption of a more suitable label for it. The point on which the most conflict exists is as to whether the wrongdoer reasonably under the circumstances must have forseen the actual resulting harm. For purpose of applying a more appropo label this distinction is not important. As this analysis of the problem is directed toward clarification of terms for jurors, assumed to be unfamiliar with legal terminology, it should help to draw analogies to ideas with which they are familiar. If the man on the street is told that you are the owner of a Chrysler product, he knows that you have either a Plymouth, Dodge, De Soto or Chrysler automobile. If he is told that you are the owner of a Dodge he is immediately enlightened as to the qualities and style of the automobile you are driving. Speaking in the presence of the jury of proximate cause conveys to it the idea of nearness. It is as though you have said, "I own a Chrysler product." While making this statement you know you have a Dodge, but the jury is most apt to assume you own a Chrysler. Thus in spite of the accepted use and judicial understanding of the concept, the jury members will continue to be confused, at least up to the time, at the end of the trail, when they are instructed upon the actual meaning of the term. Chief Justice Rosenberry perhaps recognized the problem when he said:

> "Neither this court nor the trial court should for the sake of of peace of mind cease their efforts to discover a better statement of the rule or at least a statement of the rule more understandable in certain classes of cases."[15]

He advocates that clarification be achieved in the existing definition. He further intimated that perhaps it is the term that is at fault, saying: "Etymologically it (proximate cause) refers to the next or nearest cause"[16] and therefore is often misleading to lawyers as well as jurors. Contrasting with the opinion of Chief Justice Rosenberry, that a clear definition should be adopted for certain classes of cases, Street, in his work on torts, vaguely declared that the determination of proximate cause depends on the facts of each case and on mixed considerations of logic, common sense, justice, policy and precedent.[17] As put by Prosser;

> "Proximate cause cannot be reduced to absolute rules. The most that can be hoped for is very general guides."[18]

---

[15] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
[16] *Supra,* note 15.
[17] 1 Street, Foundations of Legal Liability, 110 (1906).
[18] Prosser on Torts, West Publishing Co., (1941).

From the review of the cases above, culminating in the Osborne case,[19] we can see the development of the causal test. The definition as it stands does much to clarify the defendant's liability justly and accurately. The guides exist to aid the courts and lawyers, but the confusing label remains to perplex the jurors.

Efforts to change the terminology have frequently been made, but the term "proximate cause" is so firmly entrenched that it is difficult to convince anyone that a more appropriate term should be tried. This task has fallen to the text writers, many of whom consistently refrain from the use of the word "proximate" in describing the concept. Members of this group formulated the language in the Restatements of Torts,[20] which advocates the label "legal cause". The Restatement definition is based on the principle of responsibility. Prosser's definition of proximate cause is also based on the idea of responsibility[21] and he advocates the use of the term "responsible cause." The idea of responsibility is also brought out in the definition given by the court in the Stefanowski Case,[22] only the term used in that instance was "proximate legal cause." Although these three definitions are written around the idea of responsibility, they have different labels—legal cause, responsible cause, and proximate legal cause. Justice Rosenberry contended that the word "responsible" should not be used because:

> "If one is responsible for a thing he is liable for it. In an attempt to analyze liability, it is confusing to use a word which to some extent at least involves the term sought to be analyzed or defined."[23]

Perhaps the Wisconsin Court would be reluctant to adopt the term "responsible cause." Street advocates the use of "effective legal cause."[24] The Wisconsin Court has indicated as suitable the terms "proximate cause," "legal cause," and "substantial factor" provided that the proper meaning be attributed to each term.[25] The term "substantial factor" is used by the Restatement in its description of what is meant by legal cause.[26]

In preparing this article the writer conducted a survey which embraced the opinions of housewives, business men, laborers, office work-

[19] *Supra,* note 15.
[20] Restatement of Torts, 431.
[21] Prosser on Torts, page 312, West Publishing Co. (1941). "Proximate cause is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct.
[22] Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N.W. 532 (1906).
[23] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
[24] 1 Street, Foundations of Legal Liability, 110 (1906).
[25] *Supra,* note 23.
[26] Restatement of Torts, 431: "Legal cause; what constitutes. The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm and (b) there is no rule of law releiving the actor from liability because of the manner in which his negligence has resulted in harm.

ers, and college students. This survey was based on the fact situation in the *Palsgraf Case.*[27] The above named groups were asked for their understanding of the terms "proximate cause," "legal cause," "substantial factor," and "effective legal cause," in reference to the fact situation. Needless to say the majority were at a loss to describe the meanings, but all agreed that the term "proximate" meant "near." They indicated that the term "legal cause" meant something for which the law would hold a man responsible. Assuming that the people interviewed represented the average members of a jury, it is obvious that "proximate cause" is a most confusing term with which to describe the legal concept involved.

To summarize, the term "proximate" when used to describe the legal concept of cause as a condition to liability tends to confuse the lay persons who must find the facts and apply them to the law. The courts have generally rejected the synonyms, refusing to accept "immediate," "direct," or "near." The idea of nearness is pushed into the background by the rule that the actual result of the wrongful act need not be forseen. The word "responsible" connotes "liable," and its use is no more than a restatement of the kind of cause being described. "Substantial factor" is better, but carries no particular meaning to the lay mind, and contains possibilities of the same kind of confusion which results from the use of "proximate." The use of "proximate legal cause" would probably serve only to confound the confusion. The Supreme Court of Virginia has summed up the problem by aptly stating, "It has not only troubled the unlearned but vexed the erudite."[28]

In the last analysis the most effective term is probably "legal cause." In *155 A.L.R. 158* it is indicated that it would be better to adopt a neutral label, nothing more than a tag to identify a legal concept. Such a term does not purport to be self-defining. "Legal cause" is just such a term. All the authorities cited have accepted this term. At no time have any of the courts rejected its use they merely have refrained from using it extensively.

Just how would the term "legal cause" aid jury members? Notice that in the survey mentioned above the majority of the interviewees agreed that "legal cause" meant that for which the law would hold a man responsible. If those people were jury members they would reserve any opinion concerning the liability of the defendant until such time as the court would explain to them what the law requires for legal responsibility. No opinions as to liability would be formulated until an explanation of the label was given. It is the neutral term. It is a term that does not connote nearness or directness. It does not connote

---

[27] Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).
[28] Ethridge v. Norfolk & So. Ry Co., 143 Va. 789, 129 S.E. 680 (1925).

immediate. It is a term that waits for definition rather than one that purports to be defining. "Legal cause" is a term that does not infer time or distance as elements in determining defendant's liability. It is suggested that the courts refrain from using the terminology of "proximate cause" and adopt the use of "legal cause" as an aid in removing confusion in the minds of jurors concerning this perplexing concept.

JEROME J. DORNOFF