

## Torts: Negligence: Proximate Cause Doctrine in Wisconsin

Clifford A. Randall

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TORTS—NEGLIGENCE—PROXIMATE CAUSE DOCTRINE IN WISCONSIN.—The ultimate question being investigated in any negligence action is whether or not the defendant is liable to the plaintiff in damages.<sup>1</sup> The plaintiff has been injured by a sequence of events in which the conduct of the defendant has played a part. He is alleging that there is a rule of law which affords him the right to be compensated for the injuries received. He is asking the court to vindicate this right by imposing upon the defendant liability for the damages because of the fact that the defendant's conduct has played some part in the sequence of events leading up to the injury. The question before the court is, was the conduct of the defendant such as to make him responsible for the injury complained of? The determination of this question involves the consideration of many propositions<sup>2</sup> among which is the inquiry whether or not *in the eyes of the law* the defendant's conduct was *the cause* of the injury. It is this inquiry which, by tradition, has come to be inappropriately termed the question of "Proximate Cause," and which through constant definition, modification, expansion and interpretation has become so weighted down with language,<sup>3</sup> that it is now, despite its universal usage, an unbelievably confusing doctrine.<sup>4</sup>

<sup>1</sup> *Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372 (1931). Defendant automobile driver, negligently parked his car "double" on a street in the business district. As he opened the door of the automobile to alight, the door caught the handlebars of the bicycle on which plaintiff was riding, throwing him to the ground and causing painful injuries. The plaintiff was permitted to recover. Chief Justice Rosenberry, speaking of liability in negligence cases, said, "Assuming \* \* \* that an actor is guilty of negligence which results in damage to another, what is the extent of his liability? It is often said that he is liable for all the natural and probable consequences of his wrongful act. This is not the law in Wisconsin; his liability is not so limited. This court adopted the rule that, given a negligent act creating liability, the extent of that liability is for all consequent damages naturally following the injuries whether such resulting damages were reasonably to be anticipated or not."

<sup>2</sup> Green, *Rationale of Proximate Cause*, (1st Ed., 1927). On page 2 there appears this summary: "(1) Is the plaintiff's interest protected by law, i.e., does the plaintiff have a right? (2) Is the plaintiff's interest protected against the particular hazard encountered? What rule (principle) of law protects the plaintiff's interest? Does the hazard encountered fall within the limits of protection afforded by the rule? (3) Did the defendant's conduct violate the rule which protects the plaintiff's interest? (4) Did the defendant's violation of such rule cause the plaintiff's damages? (5) What are the plaintiff's damages?"

<sup>3</sup> In *Stefanowski v. Chain Belt Co.*, 129 Wis. 484, 109 N.W. 532, 7 L.R.A. (N.S.) 955 (1906) the following definition of proximate cause was given, ostensibly in an effort to incorporate every possible element in one statement: "The 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 probably result therefrom. The act creating a peril may none the less be the legal cause of an injury to another because of intervening events which might or might not take place, provided such events are natural and probable, and provided the probability might be reasonably anticipated."

<sup>4</sup> *Ethridge v. Norfolk & So. Ry. Co.*, 143 Va. 789, 129 S.E. 680 (1925). "It has not only troubled the unlearned but vexed the erudite. By its use in unnumbered cases it has grown to be a part of the livery of the law of negligence,

A recent decision of the Wisconsin Supreme Court reveals that the doctrine as applied in this state is as much surrounded with uncertainty as it is elsewhere.<sup>5</sup> It is almost as difficult for the practicing attorney to ascertain beforehand what interpretation the trial court judge or the supreme court justice is going to place upon the proximate cause element of the negligence situation as it is for him to estimate what treatment his particular facts will receive at the hands of the jury. Prior to the recent decision mentioned above, a determined clarification of its position on the proximate cause doctrine seemed the nearby goal of the Wisconsin Court.<sup>6</sup> But the decision in this case, although not specifically overruling the case of *Osborne v. Montgomery* seems deliberately to negate much of what was said in the latter holding. For example, in the *Osborne* case there was a definite separation of the physical causation idea from the proximate cause doctrine. There was a definite indication of a tendency to remove the burden of determining legal liability from the jury and to place it more squarely upon the judge.<sup>7</sup> The *Chester* case apparently makes an effort to revive the relationship of physical cause to legal cause by the insistence on traditional language and terms such as "efficient cause," "remote," etc., likewise it shows an apparent tendency to move away from the idea of placing the determination of liability among the administrative functions of the court. In this particular case the imposition of liability on the defendant carried with it as a consequence a monetary compensation to the plaintiff of an unusually large sum of money. It is difficult to avoid the conclusion that the court was resorting to the ancient artifice of masking its real reason for overruling the trial court by a criticism of the language of the verdict rather than the result reached by it. Certainly the conclusion that the court is still struggling to inter-

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and it is now too late to discard it." But see also, *Berrafato v. Exner*, 194 Wis. 149, 216 N.W. 165 (1927) at p. 157 where the court expresses dissatisfaction with a more concise statement defining proximate cause for the jury, " \* \* \* they retire to their jury room with a somewhat hazy conception as to what is proximate cause."

<sup>5</sup> *E. L. Chester Co. v. Wis. Power & Light Co.*, 211 Wis. 158, 247 N.W. 861 (1933). Plaintiff's store was destroyed by an explosion and resulting fire, caused by gas escaping from defendant's gas main. The main was improperly constructed. It was not equipped with a certain type safety valve. Judgment for the plaintiff was reversed on appeal because defendant's lack of care was not established as the proximate cause of the accident by the jury's verdict. The court is obviously impressed with the "unusual and extraordinary result." The decision in this case should have followed the decision in the *Osborne* case, but the Supreme Court in its opinion reversing the verdict of the trial court, re-inserted the idea of foreseeability or reasonable anticipation of resulting damages in the inquiry as to proximate cause. It avoided the authority provided by the decision in *Fox v. Koehnig*, 190 Wis. 528, 209 N.W. 708, 49 A.L.R. 903 (1926), for holding the negligence not the proximate cause of the unusual and extraordinary result as a matter of law. The court remarks that there are cases in which reasonable anticipation should be limited to a particular type of injury. Cf. *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926).

<sup>6</sup> See Note 1.

<sup>7</sup> "Any rule which operates to limit liability for a wrongful act must be derived from *judicial policy*, and its limits cannot be defined by any formula capable of automatic application, but must rest in the sound *discretion* of the court." Chief Justice Rosenberry in *Osborne v. Montgomery*, supra.

pret in terms of causation the legal liability of an alleged wrongdoer for the consequences of his act is inevitable.

"Causation as such is a question of fact. Proximate cause is a question of law."<sup>8</sup> In the determination of every negligence action these two questions must be answered; the factual question, obviously, to determine the cause and effect relationship between the conduct of the defendant and the consequences complained of by the plaintiff; the legal question to determine whether or not liability will be imposed upon the defendant for those consequences.<sup>9</sup> A study of the cases, however, reveals that both questions are usually presented to the jury in such a manner that differentiation between the two is at least improbable. The consequence is that but one answer is forthcoming where there should be two. It is only logical to conclude that the jury has been motivated in its answer more by the factual question than by the legal question. In *Deisenrieter v. Kraus-Merkel Malting Co.*<sup>10</sup> it was said, " \* \* \* it is for the court to say, as a matter of law, what constitutes proximate cause in the law of negligence and for the jury to find whether the defendant is legally chargeable with having set it in motion."<sup>11</sup> And in the instruction actually given in the case, an instruction later approved by the Supreme Court,<sup>12</sup> the jury was told to decide *exactly* for what legal consequences the defendant was to be held liable. If *the* injury of the plaintiff was the natural and probable result of the negligent act, and if in the circumstances an ordinary, prudent man would have foreseen *the* injury then the defendant's negligence was the proximate cause, that is, he was liable. In this situation the jury's task was comparatively clear and simple once the negligence of the defendant was proved. This interpretation of the jury test for determining liability developed and expanded following the decision in *Feld-*

<sup>8</sup> See, James Angell McLaughlin, "Proximate Cause," 39 Har. Law Rev. 149, 155 (1925).

<sup>9</sup> No attempt is made here to examine the etymology of the term "proximate cause." For discussion of this topic, see, Jeremiah Smith, "Legal Cause in Actions of Tort," 25 Har. Law Rev. 103 (1911); Maxwell Herriot, "Proximate Cause and Negligence in Wisconsin," 4 Wis. Law Rev. 193 (1927).

<sup>10</sup> 92 Wis. 164, 66 N.W. 112 (1896). Plaintiff employee was seeking to hold his employer for injuries sustained by reason of a fall on uncovered machinery. Gas fumes emanating from a malt kiln below the room in which plaintiff was working caused him to faint. Evidence showed that gas had never escaped from the kiln before. The defendant was not held liable for the injury.

<sup>11</sup> Compare the preceding case with *Gilbert v. Wittenberg*, 189 Wis. 181, 207 N.W. 264 (1926) and *Haggerty v. Rain*, 177 Wis. 374, 186 N.W. 1017 (1922). In both cases damages resulted from the collision of two automobiles. Defendant driver, in each case was guilty of a violation of a statute. In the former case it was said that the question whether or not the violation of the statute was the proximate cause of the collision was for the jury, while in the latter case it was held that the violation was the proximate cause of the collision as a matter of law. See also, *Taylor-Button Co. v. Smith*, 179 Wis. 232, 190 N.W. 999 (1922).

<sup>12</sup> In *Lemke v. T. M. E. R. & L. Co.*, 149 Wis 535, 136 N.W. 286 (1912) the instruction was, "Negligence is the proximate cause of an injury when *that* injury is the natural and probable result of such negligence, and where in the light of attending circumstances *the* injury ought to have been foreseen by a person of ordinary care and prudence." See also, *Halwas v. American Granite Co.*, 141 Wis. 127, 123 N.W. 789 (1909); *Feldschneider v. C. M. & St. P. Ry. Co.*, 122 Wis. 423, 99 N.W. 1034 (1904).

*schneider v. C. M. St. P. Ry. Co.*,<sup>13</sup> to a point where foreseeability of some or any injury was the accepted guide for measuring liability.<sup>14</sup> A series of decisions following the *Feldschneider* case<sup>15</sup> with somewhat vague and doubtful authority<sup>16</sup> brought the test to a point where juries were being instructed that it was not necessary that the particular injury should have been foreseen, but that it was sufficient for purposes of imposing liability if "the consequences" of the act or conduct of the defendant were within the field of "reasonable anticipation."<sup>17</sup> Consider the burden placed upon the jury when it is asked to ascertain first what were the consequences of the act or conduct and secondly what is within "reasonable anticipation" in those cases where the negligent act combines with forces already in existence or which come into existence subsequently.<sup>18</sup> The lay mind of the juror is concerned with what it encounters constantly, daily—cause and effect. The jury is impressed not by "proximate," or "remote," or "reasonable anticipation" but by the problem of causation in the popular sense of the word. But in the difficult situations this is often not the problem at all. The real inquiry is, how far does the law go in protecting the plaintiff or in imposing liability on the defendant for the results produced by events

<sup>13</sup> 122 Wis. 423, 99 N.W. 1034 (1904). The rear section of a freight train became disconnected from the front section. The cars making up the rear section, after traveling some distance, crashed into the front section. Plaintiff, who was sleeping in the caboose, was thrown out of his bunk and injured as a result of the collision. The defendant was held liable. The instruction as given the trial court was as follows: "And by proximate cause I mean the efficient cause, that which produces the injuries complained of, and which in the light of attending circumstances ought reasonably to have been foreseen by persons of ordinary intelligence and prudence." The instruction contains nothing about the injuries being the natural and probable result of the negligence. The Supreme Court, in reviewing the case, did not approve of this omission but did approve the instruction as given.

<sup>14</sup> See, Recent Decision, 6 Wis. Law Rev. 178 (1931).

<sup>15</sup> See Note 13.

<sup>16</sup> *Mauch v. Hartford*, 112 Wis. 40, 87 N.W. 816 (1901); *Meyer v. T. M. E. R. & L. Co.*, 116 Wis. 336, 93 N.W. 6 (1903); *Coolidge v. Hallauer*, 126 Wis. 244, 105 N.W. 568 (1905); *Sparks v. Wisconsin Central Ry. Co.*, 139 Wis. 108, 120 N.W. 850 (1909).

<sup>17</sup> *Morey v. Lake Superior T. & T. Ry. Co.*, 125 Wis. 148, 103 N.W. 271, 12 L.R.A. (N.S.) 221 (1905).

<sup>18</sup> See, *Cook v. Minneapolis, St. Paul & S. St. M. Ry. Co.*, 98 Wis. 624, 74 N.W. 561, 40 L.R.A. 457, 67 Am. St. Rep. 838 (1898) and *Kingston v. C. & N. W. Ry. Co.*, 191 Wis 610, 211 N.W. 913 (1927). In both cases fires were started by the negligence of the defendant and united with other fires of unknown origin to produce the injury to the plaintiff. In the *Cook* case the verdict was for the plaintiff but the supreme court reversed it on the grounds that the second fire was a superseding cause and broke the chain of causation so that the fire started by defendant's negligence was a remote and not a proximate cause of plaintiff's injury. In the *Kingston* case recovery was allowed on the theory that it was incumbent on the defendant to show that the fire set by it was not the proximate cause of the plaintiff's injury and failing to do this, there being no evidence that the unknown fire was not of human origin, the joint tortfeasor rule would not apply. The question in both cases was one of liability for the consequences of an act proved negligent. The problem was where to draw the line. Without criticising the results of the two cases, it is submitted that a great deal of time, and expense would have been saved the litigants and the courts by the judges disposing of these problems as questions of administration, instead of passing them along to the jury under the guise of proximate cause.

in which his conduct has played a part. It is a question for the determination of the court.<sup>19</sup>

But trial judges almost consistently shrink from determining the problem, and the Supreme Court evades it except where the results of the jury verdict are against reason,<sup>20</sup> or where there is an opportunity to resort to the reasoning that the result is unusual and extraordinary.<sup>21</sup> In view of the statements made by the Supreme Court speaking through Justice Owen in the *Chester* case it is to be expected that the efforts to frame a charge for the jury which will successfully translate liability in terms of causation by some hoped for magic of phraseology, will continue. The ingenious device of "patterns" for submitting questions in special verdicts which have been the crystallization of these efforts in the past<sup>22</sup> has hardly clarified matters. The immediate temptation has been to criticize and condemn the trial court for failing to submit questions in strict accordance with a pattern previously approved.<sup>23</sup> In the *Chester* case, for example, such failure of the trial court to submit the questions in approved fashion was seized upon as a means of avoiding a verdict which the court did not wish to alter as a matter of law.

The *Chester* case provides ample grounds also for the assumption that the tendency to inject the foreseeability element into the doctrine of proximate cause will continue in one form or another.<sup>24</sup> That is, the reasonable anticipation idea will continue to be a part of the test for liability. The presence of the foreseeability of reasonable anticipation idea in the test for liability is explained in part by the gradual expansion of the "probability of harm" theory in the cases. A brief resume of the cases will be given to show this expansion. In *Kellog v. C. & N. W. Ry. Co.*<sup>25</sup> it was held that liability would be imposed " \* \* \* for all actual injuries which were the natural and *probable* result of the wrongful act or were *likely* to ensue from it under ordinary circumstances."<sup>26</sup> In the case of *Brown v. C. M. & St. P. Ry. Co.*<sup>27</sup> it was held that the defendant would be liable for all the direct injuries re-

<sup>19</sup> Green, "Rationale of Proximate Cause," p. 67.

<sup>20</sup> See, *Monaghan v. Northwestern Fuel Co.*, 140 Wis 457, 122 N.W. 1066 (1909). Justice Marshall dissenting.

<sup>21</sup> *Fox v. Koehnig*, supra. Defendant negligently allowed his horse to escape from its enclosure. It ran on the highway and into plaintiff's car, thrusting its head through the windshield and causing injuries to the plaintiff. It was held as a matter of law that the negligence of the defendant was not the proximate cause of plaintiff's injury. The act of the horse in thrusting its head through the windshield was so extraordinary and unusual that damages resulting therefrom should not have been anticipated. *Huber v. LaCrosse City Railway Co.*, 92 Wis. 636, 66 N.W. 708, 31 L.R.A. 583, 53 Am. St. Rep. 940 (1896).

<sup>22</sup> *Berrefato v. Exner*, supra.

<sup>23</sup> *Hamus v. Weber*, 199 Wis. 320, 226 N.W. 392 (1929).

<sup>24</sup> See Note 14; also Note 5.

<sup>25</sup> 26 Wis. 223, 7 Am. Rep. 69 (1870).

<sup>26</sup> It is interesting to note that in one of the first recorded negligence cases in the state the term "proximate cause" is not used. *Richards v. Sperry*, 2 Wis. 216 (1853). "We are of the opinion that they (the defendants) should be held liable for the consequences of the want of ordinary care."

<sup>27</sup> 54 Wis. 342, 11 N.W. 356, 41 Am. Rep. 41 (1882). See also, *LeBeau v. Minneapolis St. Paul & S. St. M. Ry. Co.*, 144 Wis. 30, 159 N.W. 577, L.R.A. 1917 A, 1017 (1916); *Crouse v. C. & N. W. Ry. Co.*, 104 Wis. 473, 80 N.W. 752 (1899); *Koehler v. Waukesha Milk Co.*, supra. In these cases the rule of liability for all injuries directly resulting regardless of foreseeability is definitely stated.

sulting from his negligent act, although such resulting injuries could not have been contemplated as the probable result.<sup>28</sup> In *Atkinson v. The Goodrich Transportation Co.*<sup>29</sup> the "natural and probable consequence" rule was again stated much the same way as it was stated in the *Kellog* case, but to it was added the statement that the injury "ought to have been foreseen in the light of attending circumstances." The idea of foreseeability or reasonable anticipation of some injury appeared to be a definite part of the theory of proximate cause in this state.<sup>30</sup>

But in *Bell Lumber Co. v. Bayfield T. Ry. Co.*<sup>31</sup> it was said that " \* \* \* strictly speaking reasonable anticipation characterizes negligence rather than causation, but it is now too firmly entrenched in the definition of proximate cause to be removed therefrom."<sup>32</sup> This resignation to an admittedly unsatisfactory situation was unjustified in the light

<sup>28</sup> It has been contended that there are two rules of liability in this state. One rule applicable to cases involving injuries to property with liability imposed for the consequences which are natural and probable, the other applicable to cases involving personal injuries with liability imposed for all natural consequences whether probable or not. See, Maxwell Herriot, "Proximate Cause and Negligence in Wisconsin," 4 Wis. Law Rev. 193 (1927). A review of the holdings provides some evidence that there might be a tendency in this direction. The holding in the *Chester* case provides encouragement for such a conviction.

<sup>29</sup> 60 Wis. 141, 18 N.W. 764, 50 Am. Rep. 352 (1884).

<sup>30</sup> *Schmeckpepper v. C. & N. W. Ry. Co.*, 116 Wis. 592, 93 N.W. 533 (1903); *Morey v. Lake Superior T. & T. Ry. Co.*, supra; *Coolidge v. Hallauer*, supra; *Odegard v. Northern Wisconsin Lumber Co.*, 130 Wis. 659, 110 N.W. 809 (1907); *Sparks v. Wisconsin Central Ry. Co.*, supra; *Coel v. Green Bay Traction Co.*, 147 Wis. 229, 133 N.W. 23 (1911); *Schabow v. Wisconsin Traction, Light, Heat and Power Co.*, 162 Wis. 175, 155 N.W. 951 (1916); *Richter v. C. M. & St. P. Ry. Co.*, 176 Wis. 188, 186 N.W. 616, (1922).

<sup>31</sup> 169 Wis. 357, 172 N.W. 955 (1919). The instruction in this case also included the "but for," or the sine qua non rule. See also, *Milwaukee Coke and Gas Co. v. Industrial Commission*, 160 Wis. 328, 151 N.W. 145 (1915), where the same justice declared, "The element of reasonable anticipation is a characteristic of negligence not of physical causation." The justice was interpreting the term "proximately caused" in the Workman's Compensation Act and distinguished it from the proximate cause of the negligence law.

<sup>32</sup> In *U. S. F. & G. Co. v. Verbergt*, 197 Wis. 542, 222 N.W. 709 (1929) defendant negligently left his automobile standing on the highway in such a manner that the driver of an oncoming bus was unable to avoid colliding with it. In the collision two people were killed. The defendant was held liable for the deaths. "It is apparent that foreseeability must be present either separately or as a part of proximate cause in order that the actor may be found liable for the consequences of his act." The use of the alternative is significant. See *Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N.W. 545 (1903). The negligence alleged here was the failure of the defendant to deliver a telegraph message. The consequences were a loss of profits, for which the plaintiff was attempting to recover. Recovery was denied. The opinion of the court contained the following statement: "An actionable injury having taken place, the results forming legitimate subjects for compensating damages are not dependent upon any presumed knowledge or reasonable apprehension on the part of the wrongdoer of the probability of such or any particular result. It is only necessary, as to any particular result, that it shall have been a natural consequence of the injury having regard to the usual course of nature and of cause and effect in a law of unbroken causation." The distinction between the liability for injury and the liability for the consequences thereof is clearly and distinctly made. The court was afforded material for laying down as a precedent, that foreseeability is an element of negligence (See, *Koehler v. Waukesha Milk Co.*, supra.) and not of proximate cause. The recognition of this was somewhat belated. See, *Osborne v. Montgomery*, supra, and discussion in Note 37.

of subsequent decisions. In *U. S. F. & G. Co. v. Verbergt*<sup>33</sup> and in *Hamus v. Weber*<sup>34</sup> the court revealed a disposition to remove the foreseeability test from the proximate cause doctrine but to retain it definitely in the test for negligence. In *U. S. F. & G. Co. v. Verbergt* the court states, "It is apparent that foreseeability must be present either separately or as a part of proximate cause in order that the actor may be found liable for the consequences of his act." At least it is a reasonable conclusion that the use of the words "either separately or as a part of proximate cause" shows an *inclination* to put foreseeability in but one of the two tests. Likewise, foreseeability is a very material element in the definition of negligence. A man is said to be negligent when, among other things, he does something or fails to do something which he, as a reasonable, prudent man *ought to foresee* will expose the interests of another to unreasonable risk of harm. In view of this inclination of the court to place foreseeability in but one of the two tests and also in view of the fact that foreseeability is definitely a part of the negligence test, it is logical to believe that the court, by reason of its language quoted above, intended to leave it there.

In *Koehler v. Waukesha Milk Co.*<sup>35</sup> the issue was whether or not to impose liability for the "unforeseen consequences" of an injury. The Supreme Court favored the idea that, given a negligent act the extent of the liability was for all consequent damages naturally following the injuries whether such damages were reasonably to be anticipated or not. In this case, however, the usual instructions containing the foreseeability element in the causation test were given by the trial court. The Supreme Court in its decision makes a very definite effort to draw a distinction between a primary liability for the injury resulting from a negligent act, and a secondary liability for the damages arising out of and consequent upon the injury. The "inclination" to remove foreseeability from the liability test altogether is still apparent but the court seems unwilling to go beyond that stage. It makes an effort to retain foreseeability in the test for determining the primary liability for the injury while eliminating it from the test for determining how far the liability is to go. In other words the court indicates that there are three tests in such negligence cases. First, the test for the violation

<sup>33</sup> See Note 32. "Reasonable anticipation has no connection with causation." Mr. Justice Doerfler in *U. S. F. & G. Co. v. Verbergt*, supra.

<sup>34</sup> See Note 23.

<sup>35</sup> See Note 4. The action was for wrongful death. Plaintiff's wife cut her finger when she picked up a milk bottle the top of which was broken. Blood poisoning followed from which the death resulted. Defendant milk company was held liable. Compare this case with *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N.W. 157, 23 L.R.A. (N.S.) 876 (1907), where the defendant, soap manufacturer, negligently allowed a needle to become imbedded in a cake of soap which plaintiff purchased from a dealer. Serious injuries resulted from the use of the soap but the plaintiff was denied recovery, the court holding *as a matter of law* that the injury was an unusual and *remote consequence* of the negligence. It was said that the manufacturer would only be liable for the injuries which might be reasonably anticipated. The decision in *Koehler v. Waukesha Milk Co.* attempts to reconcile these two cases by a statement that the *Hasbrouck* case did not fall within the exceptions of the now famous rule of *Winterbottom v. Wright*, 152 Eng. Repr. 402, 10 M.&W. 109 (1842). But see, *Coakley v. Prentiss Wabers Stone Co.*, 182 Wis. 94, 195 N.W. 388 (1923); *Marsh Wood Products Co. v. Babcock & Wilcox*, 207 Wis. 209, 240 N.W. 392 (1932).



of the standard of care or negligence itself; second, the test for liability for the injury; and third, the test for liability for the consequences of the injury.<sup>36</sup> In *Osborne v. Montgomery*, however, the court apparently looked beyond the language of the *Koehler* case and considered the result reached. At any rate it used the decision as authority and advanced the theory that, "Foreseeability under our law as it now stands applies only to the question of negligence or the failure to use ordinary care and not to limit the liability for the consequences of the wrongful act."<sup>37</sup> There is some indication of apprehension that the rule in the *Koehler* case may have far reaching and too broad results.<sup>38</sup> But the "inclination" to remove foreseeability from the test for determining liability apparently had finally matured into a decision to remove it.

The Osborne decision justified the assumption that the proximate cause question in this state would be treated henceforth much more as a matter of law and less as a mixed problem of law and fact to be laid before the jury.<sup>39</sup> It justified the conclusion that the Supreme Court was advocating two very pertinent propositions. First, that the trial judge has a function which goes beyond mere guidance of the jury along a certain traditional path by means of instructions and patterns for special verdicts, and second, that it is a court function to determine whether " \* \* \* the interest which is sought to be vindicated is within the protection of the rule of law invoked."<sup>40</sup> Surely the "balancing of social interests" of which the court speaks in the *Osborne* decision gives the courts great leeway in the determination of liability after the standard of care has been determined.

The court's position, or rather what appeared to be court's position, has been materially altered by the language of the decision in the *Chester* case. Justice Owen, speaking for the court and criticising one of the questions of the special verdict for failing to effect a determination of the question of foreseeability stated, "In order for the company (defendant) to be liable it should have foreseen not merely that the valve would break, but that damage to the interests of another might probably result from such failure." A more definite negation of what was said in the *Osborne* case would be difficult to imagine. Farther on

<sup>36</sup> Note 32, supra. See also in this connection the instructions in *Le Beau v. Minneapolis, St. Paul & S. St. M. Ry. Co.*, supra.

<sup>37</sup> Justice Fowler concurring in the Osborne decision states, "It is in my opinion not advisable to revert to the method of submission formerly uniformly used which required the fact of causation to be so submitted as to associate the idea of physical causation with that of anticipation of injury with which it has no logical or rational connection and which made the idea of proximate cause so perplexing and misleading to juries."

<sup>38</sup> See, *Osborne v. Montgomery*, supra at p. 205. In this connection it is interesting to note the warning of the court in *Fisher v. Western Union Telegraph Co.*, supra. "It will be seen that in studying the subject and applying decided cases to avoid danger of going astray one must distinguish between the term *result* as applied to the injury and result as applied to the *proximate consequences* of the injury."

<sup>39</sup> See Note 7. Consider also this statement of the decision, "The fundamental idea of liability for wrongful acts is that *upon balancing the social interests* involved in each case, the *law determines* under the circumstances of a particular case that an actor should or should not become liable for the consequences of his conduct."

<sup>40</sup> Green, "Rationale of Proximate Cause."

in the opinion in the *Chester* case the following statement is made, "While it is true that in the vast majority of cases reasonable anticipation of some injury to the interests of others is all that is necessary to establish actionable negligence or proximate cause, there are cases in which reasonable anticipation should be limited to a particular type of injury and this is one of them."<sup>41</sup> If the court had deliberately set out to revert back to doctrines formerly accepted but at the time of this decision modified or discarded, it could hardly have done so more efficiently. Considering that the court was, "not disposed to say as a matter of law that the negligence was not the proximate cause of the damages complained of" it is difficult to accept this decision as one falling in the same category with that in *Fox v. Koehnig*<sup>42</sup> and it is equally difficult to reconcile it with the decision in *Koehler v. Waukesha Milk Co.*<sup>43</sup>

It must be conceded that the reasoning of the *Koehler* and *Osborne* cases might have paved the way for an effort to impose liability without any relationship of cause and effect whatsoever.<sup>44</sup> It is submitted, however, that with the functions of judge and jury properly balanced and understood, the question of causal relationship can be stripped of the elements of law, logic, metaphysics and speculation with which it has been weighted down and can be made *simply one of fact*. As such the jury has to pass upon it only when reasonable persons might differ. Likewise, the reasoning of these cases would have eventually brought forth the complaint that the judge would be led to invade the province of the jury in difficult cases.<sup>45</sup> However, under the present doctrine this very thing happens quite frequently when the jury, forced to make the decision as to legal liability, is confused by the mingling of the factual and the legal problem. The usual procedure is for the Supreme Court to pass upon what the jury has already decided and to reverse its decision, with the result that the litigation is extended over a much longer period than necessary and the expense to the litigants is permitted to mount accordingly. If the invasion (if it may be said to be an invasion) by the court was made earlier in the trial, at least much time and money would be saved all the parties concerned.

These objections which *might have been made* to the situation which was presumed to exist prior to the *Chester* decision are more or less speculative. Objections to the situation as it is presumed to exist now can be more certain. There seems to be authority for the statement that foreseeability or reasonable anticipation is an element of proximate cause, and there seems to be authority for the statement that it is not. There appears to be support for the theory that a negligent act will carry liability for all natural consequences whether

<sup>41</sup> See Note 28.

<sup>42</sup> See Note 4. Consideration must be given to the fact that a statute was involved in this situation. Sec. 172.01, Wis. Stats.

<sup>43</sup> The distinction between the rule of primary liability for injuries and secondary liability for the proximate consequences of the injuries provides the only basis for reconciling the two holdings. What the court might say to the contention that the damages in the *Chester* case are in a direct line of causation which was unbroken by any intervening force is matter for speculation. See Note 18.

<sup>44</sup> See, Recent Decision, 6 Wis. Law Rev. 178 (1931).

<sup>45</sup> See, *Monaghan v. Northwestern Fuel Co.*, supra; *Fox v. Koehnig*, supra.

foreseeable or not, as well as for the theory that the court will draw the line at the point where the consequences become unusual or extraordinary. There is a basis for the theory that *in certain cases* foreseeability is limited to a *certain type* of injury. From the viewpoint of the attorneys who must practice before the courts of the state the situation is at least undesirable. Obviously the difficult cases, those involving large sums of money, or so-called borderline cases will always be appealed to the Supreme Court, but in view of the confusing and conflicting doctrines existing, the attorney will be unable and unwilling to advise his client as to the advantage of an appeal in negligence cases where the decision turns on the question of proximate cause. An appeal, under the circumstances, takes on all the elements of the traditional "taking chances with another jury."

CLIFFORD A. RANDALL.