LEGAL CAUSE.*

II.

THE "SUBSTANTIAL FACTOR" TEST.

Professor Smith proposed, as "a general rule which, although confessedly imperfect, is nevertheless better than any of the tests hitherto in common use," that "defendant's tort must have been a substantial factor in producing the damage complained of." He claimed no great definiteness for this rule; and he recognized that there is much conflict in the authorities, and that his rule would impose liability in many cases in which they have usually refused to impose it.

Professor Smith's test allows room for the operation of most of the considerations which seem to influence the courts in deciding questions of legal cause; but I believe that several of these considerations may be differentiated, and that, as applied to many situations, his test misses not only the authorities but an average sense of justice. I believe it to be erroneous, from both points of view, to suggest that nothing affects

*The first installment of this article appeared in the issue of March, 1924, of the UNIVERSITY OF PENNSYLVANIA LAW REVIEW at page 211. (72 U. OF PA. L. REV. 211.)
121 25 HARV. L. REV. 309.
legal cause except the degree in which an act is a substantial factor in producing a result. Professor Smith recognized, as an exception to this rule, that "Where two tort-feasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result," each is liable, although the damage would have occurred just the same if his tort had not been committed. On the other hand, suppose D wounds A, and A contracts scarlet fever from the person to whom he applies for treatment; the wound, which led A to seek the treatment, would seem to be a very substantial factor in subjecting him to the disease, but the wound has been held not a legal cause of the disease, and this result seems just. Again, D leaves a pit dangerously exposed, and X intentionally thrusts A into it; D's act is a very substantial factor in producing the harm, but the law does not hold him responsible, and this decision also probably agrees with an average sense of justice.

**Justice as the Test.**

The question, what is the law of causation for, is fundamental. D has done an act; his doing it is legally culpable, and culpable toward P; and harm of a sort which the law recognizes has in fact been caused to P by the act, in the sense that harm has occurred which, but for the act, would not have occurred. Why should not D be liable for the whole harm? Very commonly he is not; very often the law refuses to recognize him as the cause, for legal purposes, of the whole harm. As the law of evidence excludes from consideration much that is evidential, the law of causation excludes much that is consequential. Is this simply arbitrary, or is there some good reason for it, and if so, what reason?

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122 25 Harv. L. Rev. 312.
123 Bush v. Com., 78 Ky. 268 (1880).
According to Professor Beale, the purpose of the doctrines of legal cause is speed; according to Judge Cooley, certainty. Doubtless the requirements of speed and certainty have some tendency in some cases to cut off some consequences from legal view; but it is submitted that this is a small part of the story. The reason underlying the run of doctrines and decisions on legal cause I believe to be simply a desire to reach a result which is in some sense just. Courts refuse to recognize all actually-caused consequences as legally caused, not chiefly because of doubt as to what is actually caused nor because there are only twenty-four hours in the day, but because it would seem unfair in many cases, and monstrous in some, to hold people responsible for all consequences which actually result from their wrongful acts. D sells dynamite to a small boy; the boy's parents take it away from him, but later give it back to him, and he explodes it and is hurt. It is clear by a preponderance of the evidence, it is even clear beyond a reasonable doubt, that the boy would not have been hurt if D had not sold him the dynamite; therefore, Cooley's reason for relieving defendants of liability does not apply. And the facts are simple and quickly proved; therefore Professor Beale's reason does not apply. Yet...
D is not liable, because not a legal cause. The intervention, after the danger which the defendant created appeared to be over, of the boy's parents, makes it seem unjust to hold D.

The fact that the rules of legal cause are intended to produce a just result, rather than to save time or avoid uncertainty, is emphasized by the attitude of the law toward what may be called alternative causes; i.e., causes each of which, without the concurrence of the other, would have been sufficient to produce the result. In general, "a defendant's tort cannot be considered a legal cause of plaintiff's damage, if that damage would have occurred just the same even though the defendant's tort had not been committed." But, by exception, "where two tort-feasors are simultaneously operating independently of each other, and the separate tortious act of each is sufficient in and of itself to produce the damaging result," each is liable. It would be shocking to our sense of justice to relieve two wrongdoers of liability on the ground that both are responsible. So, if D's wrongful act and the innocent act of another, or D's wrongful act and a natural force, were, each alone, sufficient to produce the damage, D's act is not a legal cause of the damage; but if D's wrongful act and the wrongful act of another were, each alone, sufficient to produce the damage, D's act (and also the other) is a legal cause. Yet D's act stands in the same logical relation to the result, whether the other actor is a wrongdoer, an innocent person, or a thunderstorm. The likelihood of the result may be the same; its directness or indirectness is the

not have occurred but for the other, is a relatively simple question; so simple, in fact, that there is seldom any dispute over it. On the other hand, whether one event is a legal consequence of another is often a question of much doubt and difficulty. The very problem of legal cause is the problem when to disregard consequences which demonstrably were caused, in a logical sense, by given acts.

127 Carter v. Towne, 103 Mass. 507 (1870); Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647 (1908); Professor Beale in 33 Harv. L. Rev. 656.

128 Professor Smith, 25 Harv. L. Rev. 312.

129 Ibid.

130 Cook v. Minn. R. Co., 98 Wis. 624, 74 N. W. 561 (1898); Miller v. Northern Pacific Ry. Co., 24 Idaho 567, 135 Pac. 845 (1913).
same; the difficulties of proof, if any, are the same; and the burden on the court's time is the same. But our sense of justice demands the imposition of liability when the harm would not have happened but for the wrongful action of human beings, while it does not make the same demand when the harm would have been produced by an innocent person, or a natural force, if there had been no wrongful human action. And this discrimination can probably be rationalized in terms of social interest. If the wrongful acts of D and X were each sufficient to cause the harm, to hold each responsible for the harm, and thereby discourage similar acts, tends directly to prevent the occurrence of similar harm; on the other hand, if D's wrongful act and X's innocent act, or D's wrongful act and a natural force, were each sufficient to cause the harm, to hold D responsible and thereby discourage acts similar to his would tend less strongly to prevent the occurrence of similar harm, as it would have no effect on innocent acts and natural forces.

Again, why should the wrongfulness of the action of X, while it tends to make D liable when the acts of D and of X are alternative causes, tend to relieve D of liability when the concurrence of D's act and the subsequent act of X was necessary to the result? For no severely logical reason; the two legal phenomena are reconcilable, if at all, only by reference to our free and independent sense of justice and—perhaps—to the interests of society.

Causes each of which, without the concurrence of the other, would have been sufficient to produce the result.

Cf. p. 363ff below.

"Small faults are often the occasion of serious consequences; and if we pursued the strict path of logic, we should hold him who in any way contributes to a loss responsible for all that follows in consequence of his acts. But such a rule would often work great hardship. Considering, therefore, the shortcomings of human beings, the law does not charge a person with all the possible consequences of a wrongful act, ignores remote causes, and looks only to the proximate causes." (Lemos v. Madden, 28 Wyo. 1, 200 Pac. 791, 793 [1921].) "The practical question for a jurist is whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tort-feasor should be held liable to compensate the plaintiff." (Jeremiah Smith, 25 Harv. L.
Usually, of course, a court's conception of justice does not consciously involve a balancing of interests such as Dean Pound has made familiar to his students. Frequently the sort of justice which the court aims at is simply "fairness between the parties"; but, as Dean Pound has pointed out, "questions of 'legal cause' or 'remoteness' are often used by the courts subconsciously to cover a balancing of other interests against the individual interest." 184 Cases may be cited which flatly contradict any attempt at summarizing the law of causation. I suggest the following substitute for Professor Smith's substantial-factor rule in much the same spirit in which I understand him to have suggested that rule; that is, as conforming to a larger proportion of the actual decisions than any of the more definite tests which have been proposed, and as indicating the direction in which the law should move and is probably moving:

A legal cause is a justly-attachable cause; (or) a legal consequence is a justly-attributable consequence; (or) a legal cause is a cause which stands in such a relation to its consequence that it is just to give legal effect to the relation: meaning by "just," not merely fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved.185

Rev. 104.) "Perhaps . . . no precise rule can be laid down" as to what causes "isolate" the defendant's cause, "and the question must be put in the general form: what in good sense and reasonableness must be considered the real effective cause? In other words, would it be on the whole just and reasonable to hold the actor responsible for a consequence of his conduct that would not have happened but for the intervention of such a cause?" (Henry T. Terry, 28 Harv. L. Rev. 10, 20, 21.)

28 Harv. L. Rev. 360.

Confessedly this is indefinite. But it is no more indefinite than negligence. And it is no more indefinite than Professor Smith's test of causation; while I submit that it is quite as close to the cases, besides having a more direct relation to justice and a stronger tendency to promote it. From one point of view the proposed test is more definite than the substantial-factor test. It is equally true of both that their application to concrete cases depends upon individual taste and feeling; but the judgment of a particular individual that it is just to treat A's act as a cause means a fairly definite thing—that, in that individual's judgment, it ought to be treated as a cause; while the judgment even of a particular individual that A's act is a substantial factor in producing a result means nothing definite or clear.
VARIOUS INTERESTS MAY BE SERVED BY FINDING A SUFFICIENT
CAUSAL CONNECTION BETWEEN ACT AND HARM; VARIOUS OTHERS, BY REFUSING TO FIND IT. WHILE THE INDIVIDUAL INTERESTS OF ONE PARTY (IN A CIVIL CASE) WILL NORMALLY BE SERVED BY FINDING THE RELATION, AND THE INDIVIDUAL INTERESTS OF THE OTHER PARTY BY DENYING IT, THE QUESTION IN WHICH DIRECTION THE SOCIAL INTEREST LIES IS Seldom CLEAR AND USUALLY COMPLICATED. THE SOCIAL INTEREST IN THE GENERAL SECURITY IS FREQUENTLY, BUT NOT ALWAYS, BEST SERVED BY FINDING THE RELATION; THE SOCIAL INTEREST IN THE INDIVIDUAL HUMAN LIFE WILL SOMETIMES BE BEST SERVED BY FINDING IT AND SOMETIMES BY DENYING IT; THE SOCIAL INTEREST IN THE ADVANCEMENT OF KNOWLEDGE, AND GENERAL PROGRESS, WHILE IT WILL FREQUENTLY HAVE NO BEARING ON THE CASE, WILL SOMETIMES COUNT IN ONE DIRECTION AND SOMETIMES IN THE OTHER. THE CONSIDERATIONS TO BE WEIGHED ARE INDEFINITE IN NUMBER AND VALUE, AND THE BALANCE THAT IS STRUCK IS NECESSARILY ROUGH.

IT IS SOMETIMES URGED THAT JUSTICE BETWEEN THE PARTIES TO A CIVIL CASE IS ALWAYS ON THE SIDE OF HOLDING THE DEFENDANT—WHO BY HYPOTHESIS HAS DONE A WRONG—RESPONSIBLE FOR ALL THE ACTUAL CONSEQUENCES OF HIS WRONG, SINCE THE ALTERNATIVE IS TO LEAVE THE INNOCENT PLAINTIFF TO BEAR SOME OF THEM.

186 Since this article was written, Professor Bohlen has shown me an unpublished paper of his in which he has suggested an analogous explanation of legal cause. Speaking of the law of torts, he says: "... the wrong must not only be a causa sine qua non or necessary antecedent of the harm, but in order that the wrong may be the legally proximate cause of the violation of the right, the causal connection must be so close that the person guilty of the wrong should be regarded as responsible for the violation of the right, which in fact results from it. The principles, if any, which determine how close a causal connection must be to render the wrongdoer liable for the violation of a right, which in fact results therefrom, are confused and conflicting. They appear to be a compromise between two conflicting ideas of the function of tort actions, the one that it is to punish the wrongdoer, the other that it is to do distributive justice by shifting the loss already caused by the defendant's wrong from the plaintiff to the defendant... Even the same court may at different times lean to the one point of view or to the other, and to this extent its decisions must necessarily be conflicting. As a general rule, however, such principles—if one may dignify them by such a name—as are applied are a more or less instinctive compromise, between the logical implications of the two points of view."

This argument has force; but it is not unanswerable. One answer is that as a matter of fact our ideas of justice do not, in a multitude of concrete cases, require or permit the holding of the wrongdoer for all the consequences which actually follow from his wrong. Suppose D negligently (or even, as in *People v. Elder*, 1 intensionally) knocks A down, and, before A can get up, X seizes the opportunity to kill him by a kick in the face. Probably few of us would think it just to hold D for the death. Or D by negligent driving runs down and injures A, who thereupon postpones a trip on which he was setting out and returns home for treatment; A’s son next day contracts scarlet fever, which is communicated to A and leads to his death. In each of these cases it is clear that D’s act was an actual cause of the death; that is, but for D’s act the death would not have occurred; but in neither case was it a legal cause. Do not current ideas of fairness agree with the law in refusing to hold the defendant? In many of the cases in which actual causation is present but legal causation absent, the question of justice is more doubtful and would be answered differently by different individuals, but it is probable that in the great majority of such cases a large proportion of people would think the result just.

Nor is it impossible to rationalize this feeling that it is not always just to hold a man responsible for all the actual consequences of his wrongful acts. We all have to take chances, including the chance of being injured by the acts of others. If we are injured by an act which is not negligent or otherwise wrongful, we have to bear the loss, even though the action which injured us was taken for the defendant’s own pleasure and under no sort of necessity, and even though it created—as most action creates—some risk of harm. The social interest in the individual human life, and particularly in the freedom of individual action, seems to be served by this arrangement. The gains to

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100 Mich. 515, 59 N. W. 237 (1894).

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the defendant and to society which result from the defendant's immunity seem to outweigh the loss to the plaintiff. But suppose it is found that the act which injured us was wrongful. It now seems best to impose upon the actor the burden of some of the consequences of his act; but it does not follow that it is best to impose upon him the burden of all the consequences which may fortuitously occur. One consideration to the contrary is the possibility of error. It is artificial to ignore the fact that the defendant may not have acted, or acted wrongfully; the plaintiff may not have suffered harm; or the plaintiff's harm may not be in any way traceable to the defendant's wrong;—although all these issues have been found in favor of the plaintiff. But even assuming perfect certainty in regard to those matters (and the certainty, in many cases, is very great), still it does not follow that it is best to impose upon the wrongdoer the burden of all the consequences of his act. Considering the social interest in the freedom of individual action, along with the other social interests involved, it may well be best to strike some sort of compromise, in which the actor is charged with some of the more normal and direct consequences, and the burden of the more abnormal and indirect ones is left where it falls; and that, in a general way, is what the law does. Suppose the defendant's wrong is a negligent wrong. If the victim of an act which is in no degree negligent, but also in no degree necessary, should bear the whole of the loss which happens to fall upon him, what is to show that the victim of an act which is in some degree negligent should bear none of the loss? If the circumstances under which two acts are done differ so slightly that one act is barely negligent while the other barely misses being negligent, would it seem reasonable to charge the doer of the one with 100 per cent. of the consequences, however remote or remarkable, while the doer of the other is charged with none of the consequences, however immediate and normal? Can so slight a change in the premise support so vast a difference in the conclusion?
Why should the circumstance that an act falls on one side or the other of the line which the law has more or less arbitrarily fixed in respect to wrongfulness, make in all cases all the difference between a 100 per cent. liability for consequences and an entire absence of liability for consequences? If there are other considerations besides the wrongfulness of the act which affect our answer to the question, for what consequences is it just to hold the defendant, should they not also affect the answer to the question, for what consequences is he legally liable? I submit that there are many such considerations; such as the defendant’s intent, the nature of his wrong, the number, character and likelihood of the forces which intervened between his act and the harm complained of, the extent to which time and space intervened, and, above all, the likelihood of the harm.

Even from the point of view of the individuals concerned, leaving society out of account, the system of legal cause as it exists may in some measure be justified as a sort of mutual insurance. The advantage to the plaintiff of a stiffer rule would not be unmixed. The average plaintiff is but little less likely to commit wrongs—negligent wrongs at least—than the average defendant; or to see it made to appear that a wrong, which he did or did not in fact commit, caused harm which was not in fact suffered. The plaintiff today may be the defendant tomorrow. It is not only better for the defendant and for society that his responsibility should stop somewhere; it will occasionally be as well for the plaintiff to forego recovery for a part of the harm which he has suffered today and escape an unlimited and ruinous liability tomorrow, as to be made whole today and ruined tomorrow.

**FORESEEABILITY OR “PROBABILITY” OF RESULT.**

Except only the defendant’s intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result as its foreseeability; and no other consideration so largely influences the courts. It is
common to say that legal consequences are "natural and probable" consequences; that a wrongdoer is a legal cause of "those consequences that ought to have been foreseen by a reasonably prudent man," and of no others. This is only measurably true. It has been pointed out above that, in cases of every sort, some kind and degree of foreseeability is sometimes required; whether the result was produced by defendant with a good deal of directness or through an intervening force caused by defendant's force or through a force which intervened after defendant's force had "come to rest." It has been pointed out that the general idea of foreseeability or risk may be analyzed into more particular ideas (what degree of risk, what sort of risk, risk apparent to whom and at what time); that courts sometimes require a very precise sort of foreseeability and a high degree of risk, but are sometimes satisfied with a very general sort of foreseeability and a slight degree of risk; so that the only moderately definite proposition on the subject which approximates universal validity is a narrow one substantially to the effect that if, from D's own point of view at the time he acted, his act produced such a risk as should deter a reasonable person, that the very chain of events which actually supervened would cause the very loss which occurred, D has legally caused the loss. But in the great majority of cases it seems just to treat D as a cause, and the law does so accordingly, if from the point of view of a reasonable man with D's information his act produced a substantial risk that a result of

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141 P. 220 above.
142 P. 226ff above.
143 P. 231ff above.
144 P. 233 above.
145 P. 237 above.
146 P. 232 above.
147 "As much as observation . . . would disclose to a well-informed man, plus any knowledge which the wrongdoer himself had." (Professor Bingham, 9 Col. L. Rev. 141.)
148 "Probable" in this connection, according to Jeremiah Smith, does not mean more likely than not, but "rather 'not unlikely'; or, more definitely,
the same general character as that which was actually produced, would be produced; but this is not always sufficient and, as Professor Bohlen, Professor Smith and Professor Beale have shown, it is not always necessary. Other considerations tending to show the justice or injustice of treating the defendant's act as a cause may turn the scale; but the influence upon the court of the likelihood or unlikelihood of the result is almost always very great. The greater and the more specific the risk, the stronger is the tendency to find legal cause.

The foreseeability of a consequence has, particularly in the case of negligent wrongs, much to do with one's feeling about the justice of holding the defendant. If a layman is confronted with a case in which D's act produced peculiar consequences, he is likely to say that D should not be held, and to offer as his reason the fact that D could not be expected to anticipate such consequences. And the relation between this feeling and the social interest is fairly clear. If conduct of a given sort is unlikely to cause harm, it follows that, though it has caused

'such a chance of harm as would induce a prudent man not to run the risk'; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen." 25 HARV. L. REV. 116. These alternative formulations are by no means identical in meaning. There may be such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen, and yet the circumstances in which the defendant is placed may be such that a prudent man would run the risk.

"In order that a consequence should be probable it is not necessary that the precise consequence that actually happens in all its details should have been probable, nor that it should be connected with its cause by the precise chain of causation that was probable. It need only be of such a general character as might reasonably have been foreseen." Henry T. Terry, 28 HARV. L. Rev. 18.

"... the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical. Undoubtedly they must both relate to the same persons or class of persons, and to the same subject matter, i.e., to an infringement of the same right in the plaintiff; but these requirements are consistent with wide variations as to the mode of bringing about the harm, and the precise nature and extent of the harm." Jeremiah Smith, 25 HARV. L. Rev. 238.

10 P. 233 above.

harm on a particular occasion, society has no interest in discouraging similar conduct, and the only social interest which can ordinarily weigh against the defendant is the interest of the community in restoring the individual plaintiff to his previous condition; while if conduct not only has caused harm but is of a sort which is likely to cause it, it follows that to hold the defendant, whether civilly or criminally, will tend to promote the general security, and frequently other social interests as well, by discouraging similar conduct of the defendant or others in the future. If the wrongfulness of the defendant’s act consists in its negligence, some harm must have been more or less likely to result from it; yet if the harm which has resulted is different from that which was likely to result, there is no close relation between the seriousness of the harm and the seriousness of the social interest in discouraging the conduct, and to make the defendant bear the whole burden of the harm is likely to overprotect that social interest and under-protect others, particularly the social interest in the freedom of individual action.

Yet other circumstances may make it just, in a particular case, to treat a defendant as the legal cause of an unforeseeable result, or as not the cause of a foreseeable one. That harm was foreseeable as possible, or even likely, is not conclusive even with respect to negligence; it is sometimes reasonable to take a chance. Why should it be conclusive with respect to causa-

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152 Cf. the considerations suggested above, p. 349, in support of the proposition that defendants ought not to be held for all consequences of their acts.

It has been said that to limit a defendant’s liability to reasonably foreseeable consequences “is to say that I may contemplate doing an injury to my neighbor, may contemplate the extent to which he may suffer by the wrong which I am about to commit, and that, if I use ordinary prudence and judgment in the calculation, the innocent sufferer must bear the risk of error—a doctrine as callous in its morality as it is absurd in its logic.” (A. A. Boggs, Proximate Cause in the Law of Torts, 44 Am. L Rev. 88, 97.) But in the ordinary negligent wrong, one does not “contemplate doing an injury” at all; the negligence frequently consists in, or results from, the very failure to contemplate it; and if the defendant intends the injury, foreseeability is immaterial (p. 357 below), while, if his act is criminal or consciously wrongful, the importance of foreseeability is much reduced.
tion? If the defendant has acted wrongfully, and created a risk, which ought to have deterred him, that the very harm which was in fact caused would be caused, it will practically always seem just to hold him for the harm; but if he created only a moderate (though a substantial) risk that some slight harm of the same broad general character as that which was in fact caused, would be caused, and the harm that was caused was very peculiar, or remarkably extensive, or both, it will not by any means always seem just to hold him. The cases which refuse to treat the presence of some risk as conclusive against the defendant in respect to causation, are therefore quite defensible.  

Criminal, Intentionally Wrongful, and Reckless Acts.

From the point of view of the social interest, it would seem that the law should attach responsibility for more remote and unlikely consequences when defendant's act is criminal, or consciously wrongful, than when it is merely negligent; since it is specially advantageous to society to discourage such acts. And there is abundant evidence of such a tendency in the law. The tendency is noticed, for example, by Jeremiah Smith, who disapproves of it (disapproves, that is, of any greater leniency in cases of negligent wrongs than of others). The same tendency is noticed by Street.  

138 Cf. p. 233 above.  

"In particular cases it seems not unjust that defendant should not be responsible for specific consequences to which a certain wrong of a third person has contributed, even though that wrong and its particular effects were 'probable' results of defendant's wrong." Professor Bingham, 9 Col. L. Rev. 143.  

134 "Courts frequently hold a wrongdoer liable for an improbable consequence in cases where defendant's conduct was not only tortious but ... 'illegal' in the sense of being criminal, especially if the crime were of some magnitude. ... Courts frequently hold a wrongdoer liable for improbable consequences in cases where his act was intentional and was consciously wrong; even though the act was not criminal, and though the specific result which followed was not intended." Courts "do not always so hold, nor are jurists unanimously agreed as to whether they should so hold. But the tendency seems to be in favor of such holding." (25 Harv. L. Rev. 230, 231, 232.)  

134 "... as the wrongful act which is alleged to have caused the damage increases in moral obliquity or in illegality, the legal eye reaches fur-
It would seem to follow also that the law should attach responsibility for more remote and unlikely consequences when defendant's negligent act misses due care by a wide margin than when it misses it by a narrow margin. Except in connection with certain statutes which directly require the consideration of degrees of negligence, it has become good practice to repudiate the idea that there are such degrees; and doubtless the wrongfulness of an act does not often depend upon any distinction between slight, ordinary, and gross negligence. It remains true, as a matter of simple fact, that it is possible for one's conduct to fall short of reasonable care by a wide margin or by a narrow margin. As it has sometimes been expressed, there may be in a given case forty precautions, all of which a reasonable person would take: the defendant may neglect one of them, or he may neglect them all. Though he has acted negligently in either case, it remains possible for the law to recognize the difference between the two cases by taking a longer view of legal cause in the second case than in the first. Though there seems to be little tendency in the cases to recognize expressly the propriety of this distinction, it is submitted that there is a real tendency to act upon it. If it is negligent under given circumstances to drive an automobile faster than twenty miles an hour, is it not safe to say that a court will tend in a doubtful case (and causation cases are frequently doubtful) to hold a man who has driven at sixty miles for consequences which it would not charge to one who has driven at twenty-one miles? This tendency is evidenced by the cases in which the defendant's recklessness is emphasized incidentally to a decision that his act is a legal cause of the damage.

ther and will declare damage to be proximate which in other connections would be considered remote. . . . That in wanton trespass or in assault and battery, for instance, legal causation reaches further than in a wrong of mere inadvertence or negligence cannot be questioned." (Foundations of Legal Liability, Vol. 1, p. 111.)
DEFENDANT'S INTENTION.

If the defendant intended to produce the very result which he succeeded in producing, it is clear and familiar that he is a legal cause of the result, however remote and remarkable the result may be; for the reason, evidently, that this seems just. "Any intended consequence of an act is proximate. It would plainly be absurd that a person should be allowed to act with an intention to produce a certain consequence, and then when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate." 158

It is extremely rare to find a suggestion to the contrary. Such a suggestion is made, however, as to one case, by Sir James Stephen in his Digest of the Criminal Law. In Article 219, "Killing defined," is this statement: "A tells B facts about C in the hope that the knowledge of these facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this article." It is submitted that it is more orderly to treat the question raised by these facts as being whether A's act is wrongful, or whether it is privileged, not whether it is a legal cause of the result. Perhaps A has a privilege of telling the truth, available when he is prosecuted for murder as well as when he is sued for libel. It seems unfortunate to admit an exception to what is probably the only specific rule regarding legal cause which is fairly capable of being treated as free from exception.

Has an intention not to produce a given result a bearing on the question whether an act did, in a legal sense, produce it? Courts have sometimes been influenced by this negative intention in deciding questions of legal cause favorably to the defendant. In the leading case of Commonwealth v. Campbell, 157 in which it was decided that a rioter was not responsible for the death

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157 7 All. 541 (Mass. 1863), cf. note 73 above.
of a person killed by a soldier in resisting the rioters, the court said: "Certainly that cannot be said to be an act of a party in any just sense, or any sound legal principle, which . . . is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him. . . ." While no good reason appears for attaching such great weight to this sort of consideration, and it seems better to support Commonwealth v. Campbell, if at all, on other grounds, the consideration may fairly be given some weight in a doubtful case.

The bearing upon the social interest of the defendant's intention seems plain. Acts which are intended to cause harm tend to produce it; the social interest in discouraging them is therefore evident. Conversely, acts which are intended not to produce harm have less tendency to produce it than merely indifferent acts.

**Defendant's Motive.**

The defendant's motive in acting as he did (as distinguished from his intention to produce the damage in question) is not commonly treated as having any bearing on legal cause; but it may in some cases have a bearing on what is felt to be the justice of holding the defendant for a particular consequence, and it is accordingly inevitable that courts should sometimes be influenced by this consideration. The suggestion is made by Professor Bingham 158 in discussing Guille v. Swan 159 in relation to Scholes v. Railway Co. 160 In the Guille case, defendant went up in a balloon, and was held responsible for the damage done by a crowd which rushed upon plaintiff's land when defendant unintentionally came down there; in the Scholes case, a railway engine fell from defendant's line into plaintiff's garden, because of defendant's negligence, and defendant was held not responsible

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158 9 Col. L. Rev. 31, note.
159 19 Johns. 381 (N. Y. Sup. Ct. 1822).
for the damage done by the crowd (except as to efforts to get the engine out). "The view of the judge in the Scholes case is not necessarily inconsistent with the decision in Guille v. Swan. The difference in the occupations which led up to the respective torts is an important consideration. The trespasses involved in Scholes v. Co. were caused by negligence of defendant's servants in prosecution of its important public calling. . . . The defendant in Guille v. Swan was engaged in what the Court no doubt considered a foolhardy venture tending only to gratify the curious and idle. . . ." 181 A court would not be human if it were never influenced to take a long or a short view of a problem of causation by its opinion of the necessity, propriety, or advantage of the defendant's general activity incidentally to which the wrong was done.

The bearing of this sort of consideration on the social interest is obvious.

**LOGICAL DIRECTNESS: INTERVENING FORCES.**

It has been pointed out above that the criterion of logical directness is indefinite 182 and frequently inconclusive; that an indirect consequence is very often a legal consequence 183 and a direct consequence is sometimes not a legal consequence.164 Yet it hardly needs demonstration that the greater or less directness with which harm follows from an act—in other words, the number and conspicuousness of the contributing forces that intervene between the act and the harm—strongly affects our sense of justice and so the law. It is true that the word "proximate" is much used in a merely conventional sense, but it is not always so used; and every case and every discussion in which it is said, otherwise than in a merely conventional sense, that a man is respon-

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181 9 Col. L. Rev. 31, note.
182 P. 214.
183 P. 216. Yet, as has also been pointed out above (p. 236), courts occasionally hold that the mere intervention of the act of a third party between D's act and P's injury relieves D of liability.
184 P. 220.
sible for the "proximate" consequences of his acts, and not for the "remote" consequences, testifies to (though it overstates) the importance of directness.

And there is a real relation between directness and the social interest. The more directly—whether logically, or in time and space—harm follows from an act, the greater (other things being the same) is the tendency of such acts to cause such harm, since the occurrence of the harm is the less likely to have depended in the particular case upon unusual combinations of intervening circumstances; and the greater, accordingly, is the interest of society in discouraging like acts, in order to prevent the recurrence of like harm. On the other hand, the more remote the consequence, the more the social interest in security is served—as by a statute of limitations—if the law refuses to go back to the cause and make it responsible. Also, the possibility of going wrong on the question whether there was actual causation tends to be least when the apparent causal relation is closest. Finally, the interest of the plaintiff in getting compensation from the defendant tends to be strongest when the causation is most direct, as there is then the least likelihood of there being some other wrongdoer against whom the plaintiff can recover.

On the other hand, logical directness is no more conclusive as a matter of justice than it is as a matter of law. D ejects P from a house in zero weather; P lies where D drops him, and is frozen; but warmth and shelter are abundant and obvious in the neighborhood. Professor Beale in an article published some years ago declined to hold D as a legal cause of P's exposure after he might have got shelter. This seems just, and is probably law. Yet a clearer case of direct causation could hardly be imagined; D put P into a cold place and P froze there.

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165 Recovery for Consequences of an Act, 9 Harv. L. Rev. 80, 85.
166 Cf. Hendrickson v. Com., 85 Ky. 281, 3 S. W. 166 (1887); State v. Preslar, 48 N. C. 421 (1856).
167 It may be suggested that a sounder analysis of such cases is to the effect that legal cause is present, but the defendant escapes because the plaintiff is guilty of something like contributory negligence; but this can scarcely explain criminal cases like those just cited.
Perhaps some cases in which the victim might easily have avoided the harm are almost the only ones in which it would seem clearly unjust to hold the defendant for results which follow with the highest conceivable degree of directness from his wrongful act; but in some cases in which the degree of directness is comparatively high, it seems more just to relieve the defendant, although there was no opportunity for the victim to save himself. Suppose D, a chauffeur, drives his car over a small flat box. This is negligent toward A, a passenger, in that it is likely to give him a slight jolt. But the box contains a high explosive, which explodes and kills A. Would it be reasonable or just to hold D responsible for the death? 168

It is submitted that an average sense of fairness hardly tolerates holding a defendant for consequences of the first seriousness which are utterly astonishing, even though they are produced pretty directly. And no argument is necessary to show that it would not be just to relieve defendants in all cases from responsibility for consequences which are indirect. If a consequence is intended, for example, or is extremely likely though not intended, few would question that it should ordinarily be treated as legally caused, however indirectly it is brought about.

Other attributes of intervening forces, besides their number and conspicuousness, bear upon legal cause. While it is not usually held to be indispensable to legal cause that the particular means by which the result is brought about be foreseeable, 168 the greater or less foreseeability of the means frequently influences the decision. The foreseeability of the result, and the other circumstances, remaining the same, the readiness of courts to hold defendants for ultimate results varies with the foreseeability of the intervening action. 169

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169 Cf. note 149 above.
169 Several of the cases stated above, p. 233, illustrate this. Innocent and foreseeable intervening action "does not necessarily break the causal connection." If the intervening action is wrongful, "it gradually came to be admitted that the earlier tort-feasor is liable in cases where the
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This tendency also probably corresponds to our ideas of justice. If a moderately foreseeable result is produced by an altogether unforeseeable means, it may or may not be just to hold the defendant for the result, but it is less likely to seem just than if the means also are foreseeable. D negligently knocks down A in the street. It is more or less likely that the team of X will run over A before he can get up. A is not, in fact, run over, but is struck and injured, as he is getting up, by a quantity of snow and ice discharged upon him from the roof of a nearby house. The result is the risked result—personal injuries to A; but the means is not the risked means. Is it not much less clear that D ought to be held for the injuries than if they had been produced by A's being run over?

The foreseeability of the means by which the harm is produced has much the same bearing on the social interest as the foreseeability of the harm itself. The advantage to society of discouraging conduct like the defendant's depends, not on the harm which it happens to produce on a particular occasion, but on the harm which it is likely to produce. If the means are unforeseeable, the harm itself, though it be of the same general sort as the harm that was risked, is likely to differ greatly from it in degree; in which case there is little relation between the extent of the harm which the plaintiff has suffered and the extent of the social interest in discouraging the act which the defendant has done; and that interest may be over-protected (relative to other interests involved) if the burden of the plaintiff's harm is imposed on the defendant.

170 "The decided though perhaps not unanimous tendency of modern authority is to make the liability of the original actor depend . . . upon this—whether or not, in view of the surrounding circumstances, and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable." Professor Bohlen, 21 Harv. L. Rev. 236, note.

171 Probably few courts would hold D for the injuries in the case first put, though most would hold him in the other case.
It has been said by some writers that if the defendant's act caused (or, "actively" caused) the intervening action, his act is always a legal cause of what results from the intervening action. This statement is criticized above, and it is pointed out that there is a strong tendency on the part of the courts to require that the intervening action be lawful, and also that the intervening action and its effects be in some sort foreseeable, notwithstanding the fact that the defendant's act "actively caused" the intervening action. Yet the extent to which the intervening forces were caused by the defendant's act is one of the considerations which count. For example, the courts tend to insist less upon finding foreseeability in the intervening force and in the ultimate harm, when the intervening force is brought into operation by the defendant's act than when his act merely enables it to take effect to the plaintiff's damage. This tendency also probably corresponds to prevailing ideas of justice. The defendant's act is likely to seem to have more to do with the ultimate result—to be, in Professor Smith's phrase, a more "substantial factor" in producing it—in the one case than in the other. Probably chance has, on the average, less to do with producing the result, and it is therefore more important to discourage conduct like the defendant's, in the one case than in the other.

Again, the intentional wrongfulness, and still more the criminality, which, as characteristics of the defendant's act, tend to lengthen the reach of legal cause, as characteristics of the intervening action tend to shorten it. These two tendencies are consistent. The greater and more striking the impropriety of an act, the more just it seems to attach to it responsibility for con-
sequences, and the less significant appear the other causes which contributed, as a matter of fact, to the result.

A municipality maintains an excavation dangerously near to the traveled part of a street or sidewalk. If X negligently forces P into the excavation, the city is responsible; but if X produces the same result intentionally, the city is not responsible.

Courts have sometimes gone to great lengths in relieving the original actor of liability where the intervening action was criminal or intentionally wrongful, notwithstanding the very considerable likelihood of the intervening action.

X threatened D with a bomb. D, in order to shield himself, moved P to a position between X and D. X threw the bomb, and P was injured. Held, inter alia, that D's act was not a legal cause of the injury, as the independent act of X intervened after D's act.

D, a sheriff, had X in custody under an indictment charging X with assault with a deadly weapon upon P. D negligently let X escape, and X made a further assault upon P. Held, inter alia, that D's act was not a legal cause of the second assault.

The “Lusitania” sailed into waters known to be infested with German submarines, after the German government had announced its intention of sinking her if she did so. Held, the action of the vessel was not a legal cause of the loss of life that resulted when she was sunk, because the independent illegal act of the submarine intervened.

To allow such weight to the mere circumstance that the intervening action was criminal seems unreasonable. It is also unusual. Sometimes little or no weight is given to the criminality of the intervening act.

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177 Hullinger v. Worrell, 83 Ill. 220 (1876).
D sold liquor knowing that the buyer intended to resell in violation of law. Held, D was guilty of aiding and abetting in the resale.\(^{17a}\)

D negligently collided with P's agent, making him unconscious and spilling the goods from his wagon. A bystander stole the goods. Held (5 judges dissenting) the accident was a legal cause of the theft, because the theft was foreseeable as likely and occurred promptly.\(^{180}\)

In \textit{Fottler v. Moseley}\(^{181}\) in which D fraudulently induced P not to dispose of certain corporate stock, the subsequent embezzlement by a corporate officer, for the consequences of which D was held responsible, was not even particularly likely.

The modern tendency is clearly away from any fixed rule relieving the original actor of liability in every case in which the intervening action was criminal. Professor Bohlen has said:

"The decided, though perhaps not unanimous, tendency of modern authority is to make the liability of the original actor depend not upon the negligence or even intentional wrongfulness of the subsequent act of a third party, . . . but rather upon this,—whether or not, in view of the surrounding circumstances, and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable."\(^{182}\)

It does not follow, however, that the tendency to attach somewhat greater weight to the intervention of intentionally wrongful than to the intervention of merely negligent action will disappear. It will probably remain, because it probably agrees with prevailing ideas of justice. Here, too, something (though perhaps not much) can be done in the way of rationalizing our sense of justice in terms of the social interest. The interest of the injured person in being compensated, and of society in seeing


\(^{180}\) Brower v. N. Y. C. & H. R. R. Co., 91 N. J. L. 190, 103 Atl. 166 (1918).

\(^{181}\) 185 Mass. 563, 70 N. E. 1040 (1904); stated above, p. 239.

\(^{182}\) 21 HARV. L. REV. 236, note.
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him compensated, can frequently be well protected without holding the original wrongdoer, if criminal or intentionally wrongful action of a third person intervened. The interest of society in discouraging criminal or intentionally wrongful conduct is likely to be best served by denying a recovery against the original wrongdoer (who may have been merely negligent), since a judgment against him reduces the likelihood that the intervening wrongdoer can and will be made to answer. And, while the intervention of criminal or intentionally wrongful conduct is sometimes foreseeable, usually it is not, so that the character of the intervening act bears more or less on the likelihood both of the intervening act itself and of the ultimate harm.

I submit that, as Henry T. Terry suggested was perhaps the case, "... no precise rule can be laid down" as to what are "isolating" causes, "and the question must be put in the general form ... would it be on the whole just and reasonable to hold the actor responsible for a consequence of his conduct that would not have happened but for the intervention of such a cause?" 183

DIRECTNESS IN TIME AND SPACE.

A hard and fast test of legal cause based on directness or remoteness in time or space is neither sense nor law. As Professor Beale points out, if A sends poisoned candy across the continent, or strikes a blow which causes death long after, the intervention of the miles or of the months does not necessarily relieve him of responsibility. 184 The New York Court of Appeals, in a series of cases beginning with the Ryan case, 185 has applied sharp geographic limits to liability for the spread of fire; but these cases appear to stand practically alone.

183 28 Harv. L. Rev. 21.
184 33 Harv. L. Rev. 642. Cf., however, the old rule that "A person is not deemed to have committed homicide, although his conduct may have caused death. ... When the death takes place more than a year and a day after the injury causing it." Sir James Stephen, Digest of Criminal Law, Art. 221.
From the fact that nearness or remoteness in time or space is not normally or as a matter of law conclusive of the presence or absence of the relation of legal cause, it does not follow that such nearness or remoteness is never conclusive; it may well be conclusive occasionally and as a matter of fact. As Professor Smith said, "No doubt these elements are often important to be considered in determining the question of fact as to the existence of such relation." Similarly, Judge Cardozo, speaking for the New York Court of Appeals, has said that it is "impossible . . . to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does."

Cases which, like that just cited, emphasize the effect of intervening space upon legal cause are comparatively rare, but

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Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918). The court held that the spatial remoteness of an insured boat from an explosion due to fire, put outside the contemplation of the parties to the fire insurance policy an injury to the boat arising from the concussion which the explosion produced. As in any contract case, the question before the court was not whether the damage was legally caused by the fire, but "how far the parties to this contract intended us to go"; not whether the causal connection was such as the law contemplated, but whether it was such as the parties contemplated. But the opinion declares that "alike in contract and in tort, contiguity or remoteness in space may determine either the existence or the measure of liability." This is far from saying that distance is always, or usually, or even often, conclusive.

Professor Beale vigorously takes issue with Judge Cardozo; on the ground, if I understand him, that nearness and remoteness in time or space do not count at all, and can never determine the presence or absence of the relation of legal cause. (33 Harvard Law Review 642.) But in the application of the general rules which Professor Beale proposes, nearness and remoteness in time and space must often count heavily, by determining whether defendant's force came to rest "in a dangerous position" (p. 650), making defendant liable, or "in a position of apparent safety" (p. 651), making defendant immune. Compare the following quotation from an earlier article of Professor Beale's: "Where A gave to B (an innocent party) poison to be administered to C, and B put the poison on a shelf in C's sick-room, where D found it and gave it to C, A is properly chargeable with the administration of it to C. But if B had thrown it on a dust-heap, where E a year afterward had found it and innocently administered it to C, the force of A's act would have been spent before E found the poison, and A would not have been chargeable with the administration to C." (9 Harvard Law Review 85.)
cases which emphasize the effect of intervening time are not uncommon; and the principle involved is the same.

D negligently started a fire, which spread to P's premises. In holding D liable, the court said, by way of distinguishing the New York case of *Hoffman v. King*,\(^{188}\) that in that case "the fire had burned two days, and passed over more than two miles of country, before reaching the plaintiff's land. We do not mention these facts, however, as determinative; for, in the true logical view, neither time nor distance nor both are conclusive of the remoteness of the damages, but are proper elements to be looked to, in the particular circumstances of each case, in arriving at a conclusion as to whether the damages are ... the proximate or remote consequence of the defendant's act."\(^{185}\)  

D negligently started a fire, which spread to P's premises. In holding D liable, the court said: "It is contended by the plaintiff in error that the damages are too remote ... It is shown by the testimony that a strong wind was blowing at the time the fire was set, that it spread rapidly from the place where started until it reached the property destroyed, that it was a continuous burning; the destruction of the property in controversy was therefore the direct and natural result of the escape of fire from the engine."\(^{180}\)

D, a contractor, erected a heavy cornice at the top of a building so badly that its fastenings rotted and rusted. The owner of the building negligently failed to inspect and remove the cornice; and it fell upon A and killed him. Held, *inter alia*, D's negligence was not a legal cause of the death, because the negligence of the owner of the building, and the passage of some considerable time, intervened between D's act and the accident. "We do not think that counsel for the plaintiff would claim that ... tin roofs and nails rust out and wood work rots overnight. It takes a considerable period of time, probably some years, for such rusting and rotting as to render these materials useless or insufficient for building purposes."\(^{191}\)

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\(^{185}\) 160 N. Y. 618, 55 N. E. 401 (1899).  
\(^{188}\) Ala. & Vicksburg Ry. Co. v. Barrett, 78 Miss. 432, 28 So. 820 (1900).  
\(^{180}\) Burlington & Mt. R. R. v. Westover, 4 Neb. 268 (1876).  
\(^{191}\) Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919).
D collided with P’s agent, making him unconscious and spilling the goods from P’s wagon. A bystander promptly stole the goods. Held, the accident was a legal cause of the theft, because it was likely that the goods would be stolen. “Again, strictly speaking, the act of the thieves did not intervene between defendant’s negligence and plaintiff’s loss; the two causes were to all practical intent simultaneous and concurrent; it is rather a case of a joint tort than an intervening cause.”

D negligently inflicted personal injuries on A, which led to his insanity and ultimately to his suicide. Held, the original injury was not a legal cause of the suicide. “The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months’ disease and medical treatment to the original accident on the railroad.”

D railroad negligently shunted cars between P’s cattle and their keepers, which “infuriated” the cattle. In holding D liable for the destruction of some of the cattle, which were found dead or dying some hours later on another part of the line, Lord Cairns said: “Everything that occurred or was done . . . must be taken to have occurred or been done continuously: the cattle rushed on in a state of fury, passed along the occupation road, charged the fence of the garden, and so got on to the railway, and were ultimately killed.”

Is not Judge Cardozo right when he says that “life and experience tell us” that distance counts? Do not the time and space

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192 Brower v. N. Y. C. R. R., 91 N. J. L. 190, 103 Atl. 166 (1918).
193 Scheffer v. Washington, etc., Ry., 105 U. S. 249 (1881). The time element is usually overlooked in discussions of this case; but in Salsedo v. Palmer, 278 Fed. 92 (C. C. A. 2d, 1921), Mayer, Circ. J., dissenting, says of the Scheffer case: “The conclusion is based upon the proposition that the court construed the suicide as being too remote in point of fact and of time from the original accident, and also as not a result naturally and reasonably to be expected from an injury which was caused not by deliberate acts, but by a negligent act.”
194 Sneesby v. Lancashire & Yorkshire Ry., L. R. 1 Q. B. D. 42 (Ct. Ap., 1875). Cf. the opinion of Quain, J., on this case in the Queen’s Bench: “In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act, as by the lapse of time, for instance.” L. R. 9 Q. B. 268 (1874); quoted by Pollock, Torts (11 ed.), p. 35.
between act and consequence affect our judgment of the propriety of imposing liability? With the passage of time, the apparent risk usually diminishes. If P's goods are stolen immediately after D exposes them, the risk of theft appears to have been considerable and the propriety of holding D responsible seems fairly clear; but if the goods lie about for a week and then are stolen, the risk of theft appears to have been slighter, and the propriety of holding D more doubtful. With the passage of time, an act is likely to become so buried under later events that it strikes us as having nothing substantial to do with the ultimate injury; it ceases to be, in Professor Smith's phrase, a "substantial factor." What is true of time is sometimes equally true of space. "A tort very remote in time or space may have practically spent its force and may not have been potentially operative at the time of the harm; or its effect may have been infinitesimal." 105

The reluctance of the law, and of our sense of justice, to impose liability when much time has elapsed between the act and the consequence, is illustrated by the old rule of criminal law that "A person is not deemed to have committed homicide, although his conduct may have caused death . . . When the death takes place more than a year and a day after the injury causing it." 106 Statutes of limitations are familiar expressions of the same broad tendency; a long lapse of time between D's act and its consequence, like a long lapse between either and P's suit,

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105 Professor Smith, 25 Harv. L. Rev. 109, 110.

"Can a consignee recover against a negligently delaying carrier for damage happening to goods a year after their delivery, upon the allegation that, but for the detention, the goods would have been sold and would not have been exposed to a cyclone twelve months later? Probably not. In general, a jury could not reasonably find that the effect of the delay appreciably continued so long and that the delay was a substantial factor in subjecting plaintiff to the loss. In cases not so extreme, the evidence may sometimes justify the submission of the question of fact to a jury; but no mathematical line can be drawn. The nearer the happening of the damage comes to the time of the defendant's delay, the more apt will the jury be to find a causative relation under our test. They are still more likely to find causative relation when the loss occurs during the delay and while the goods are still in the defendant's custody; but we do not regard either of these elements as legally essential to liability." (Ibid., p. 323.)

106 Stephen, Digest of Criminal Law, Art. 221.
tends to persuade us that the best thing for the law to do with
the situation is to let it alone. The social interest in the general
security is likely to weigh in the defendant's favor.

Finally, this same tendency is closely analogous to, and fre-
quently indistinguishable from, the tendency to attach impor-
tance to "logical" directness of causation. Results which strike
us as relatively direct logically, are usually (though not always)
relatively direct in time and space. There is little reason, from
the point of view of the authorities or of justice, for giving con-
clusive effect to the one sort of directness and no effect at all to
the other. Both are significant; neither is conclusive.

LEGAL CAUSE AND THE JURY.

It would be impossible to formulate all the considerations
that may, on occasion, affect a reasonable man's response to the
question whether a given act should be treated as the cause of a
given event. Except in one or two rather narrow classes of cases,
no generalizations about legal cause can be relied upon to give a
just result; and except in such cases, no generalizations can be
relied upon to give a legal result. With the question of causation
as with other questions of fact, good sense requires that large
latitude be left to the judgment and intuition of the trier of the
fact; the limit of this latitude is the point beyond which the judg-
ment and intuition of the court tell it that a reasonable man
would not go. To bind the trier to find the fact, in each case, in
the way that experience may have approved in more or less com-
parable cases, is much like binding him always to prefer, as be-
tween witnesses, the disinterested to the interested, the educated
to the ignorant, the well to the sick. The proposed rules would
frequently contradict each other, and, even if they all pointed in
one direction, other considerations equally reasonable, and in-

197 I do not mean to suggest that courts always look at the matter in
this way. On the contrary, courts frequently refuse to permit findings on
causation which are entirely reasonable, because they do not agree with
the finding or because the finding conflicts with some arbitrary rule.
tuition as well, might point clearly in the opposite direction and be clearly entitled to respect.

What is to be said to a jury?

It is submitted that substantially the following propositions (as far as the evidence makes them pertinent) might properly and usefully be embodied in instructions to a jury:

1. A legal cause is a justly-attachable cause. A legal consequence of an act is an event which is justly attributable to the act.

2. Except when the separate act of either of two wrongdoers would have been sufficient, without the other, to produce the event, an event is not a legal consequence of an act if it would have happened without the happening of the act.

3. If the actor intended the event, and the event would not have happened without the happening of the act, the event is a legal consequence of the act.

4. But an event which was not intended is frequently not a legal consequence of an act, although it would not have happened without the happening of the act.

5. "Just" means, not merely fair as between the parties, but socially advantageous, as serving, directly and indirectly, the most important of the competing individual and social interests involved. In deciding whether it is just to attribute an unintended harmful event to a particular act without which the harm would not have happened, you may consider any circumstances which you think pertinent, but you should not neglect the following considerations:

(a) The character of the act. If the act was a crime, or intentionally wrongful, this tends to make it just to treat it as a cause of the harm. If the act was negligent, a marked failure to use reasonable care tends more strongly than a slight failure to make it just to treat the act as a cause of the harm. If the act was negligent, the necessity, propriety or public advantage of the course of conduct incidentally to which the act was done, may be considered as having some tendency to make it unjust to treat the act as a cause of the harm.
(b) The risk of the harm. If, on the basis of the information which A had, or reasonably ought to have had, when he acted, his act produced such a risk as should have deterred a reasonable person, that events closely similar to those which supervened would cause harm closely similar to that which occurred, the act is a legal cause of the harm. The presence of this kind and degree of foreseeability is conclusive, regardless of other considerations. If on the basis of the information which A had, or reasonably ought to have had, his act produced a substantial risk that harm of the same general character as that which occurred, would occur, this tends strongly to make it just to attribute the harm to the act; but if other considerations point strongly in the opposite direction, you may find that the act did not cause the harm although foreseeability of this kind and degree was present. If the act produced no substantial risk of harm of the same general character as that which occurred, this tends strongly to make it unjust to treat the act as a cause of the harm; but if other considerations point strongly in the opposite direction, you may find that the act did cause the harm. A greater risk tends more strongly than a less risk, and a more specific risk more strongly than a more general one, to make it just to treat the act as the cause of the harm. If between the act and the harm there was an interval during which the risk created by the act had apparently ceased (or substantially ceased) to exist, this tends strongly to make it unjust to attribute the harm to the act.

(c) Logical directness and intervening forces. The more directly the act appears to have produced the harm—that is, the fewer and the less striking the contributing forces which intervened between act and harm—the more just it is to attribute the harm to the act. As between an intervening event which would, and one which would not, have occurred without the happening of the act, the first tends more strongly than the second to make it unjust to attribute the harm to the act. Criminal or consciously wrongful intervention has a greater tendency than negligent intervention, and negligent intervention has a slightly greater tendency
than innocent or irresponsible intervention, to make it unjust to attribute the harm to the act. But neither the presence nor the absence of intervention in any form or amount is conclusive: it is often just to attribute harm to an act although there was much intervention, and it is sometimes unjust to attribute harm to an act although there was very little intervention. Intervention which was, in specie or in its general nature, foreseeable as not unlikely, has far less tendency to make it unjust to attribute the harm to the act than intervention which was not foreseeable; and the greater and the more specific the risk of the intervention, the less the tendency to make it unjust to attribute the harm to the act.

(d) Directness in time and space. The less the time and space which intervened between act and harm, the more just it is to treat the act as a cause of the harm.

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