that he or she has sued the actor or actors who caused the injury. Hymowitz v. Eli Lilly and Company highlights the differences between alternative liability and modified alternative liability. It also treats apportionment of responsibility under the unusual circumstances of the case. Black v. Abex considers how similar the products of a number of manufacturers must be in order to subject them to modified alternative liability claims.

HYMOWITZ v. ELI LILLY AND COMPANY

541 N.Y.S.2d 941 (1989)

WACHTLER, C.J.

Plaintiffs in these appeals allege that they were injured by the drug diethylstilbestrol (DES) ingested by their mothers during pregnancy. They seek relief against defendant DES manufacturers. . . .

The history of the development of DES and its marketing in this country has been repeatedly chronicled. Briefly, DES is a synthetic substance that mimics the effect of estrogen, the naturally formed female hormone. It was invented in 1937 by British researchers, but never patented.

In 1941, the Food and Drug Administration (FDA) approved the new drug applications (NDA) of 12 manufacturers to market DES for the treatment of various maladies, not directly involving pregnancy. In 1947, the FDA began approving the NDAs of manufacturers to market DES for the purpose of preventing human miscarriages; by 1951, the FDA had concluded that DES was generally safe for pregnancy use, and stopped requiring the filing of NDAs when new manufacturers sought to produce the drug for this purpose. In 1971, however, the FDA banned the use of DES as a miscarriage preventative, when studies established the harmful latent effects of DES upon the offspring of mothers who took the drug. Specifically, tests indicated that DES caused vaginal adenocarcinoma, a form of cancer, and adenosis, a precancerous vaginal or cervical growth.

Although strong evidence links prenatal DES exposure to later development of serious medical problems, plaintiffs seeking relief in court for their injuries faced two formidable and fundamental barriers to recovery in this State; not only is identification of the manufacturer of the DES ingested in a particular case generally impossible, but, due to the latent nature of DES injuries, many claims were barred by the Statute of Limitations before the injury was discovered. [The statute of limitations issue has now been resolved by a change in the relevant statute.]

The identification problem has many causes. All DES was of identical chemical composition. Druggists usually filled prescriptions from whatever was on hand. Approximately 300 manufacturers produced the drug, with companies entering and leaving the market continuously during the 24 years that DES was sold for pregnancy use. The long latency period of a DES injury compounds the identification problem; memories fade, records are lost or destroyed, and witnesses die. Thus the pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to discover this fact until many years after ingestion, at which time the information is not available. . . .

The present appeals are before the court in the context of summary judgment motions. In all of the appeals defendants moved for summary judgment dismissing the

complaints because plaintiffs could not identify the manufacturer of the drug that allegedly injured them. . . . The trial court denied all of these motions. . . . The Appellate Division affirmed in all respects and certified to this court the questions of whether the orders of the trial court were properly made. We answer these questions in the affirmative.

In a products liability action, identification of the exact defendant whose product injured the plaintiff is, of course, generally required. In DES cases in which such identification is possible, actions may proceed under established principles of products liability. The record now before us, however, presents the question of whether a DES plaintiff may recover against a DES manufacturer when identification of the producer of the specific drug that caused the injury is impossible. . . .

[T]he accepted tort doctrines of alternative liability and concerted action are available in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible. However, we agree with the near unanimous views of the high State courts that have considered the matter that these doctrines in their unaltered common-law forms do not permit recovery in DES cases.

The paradigm of alternative liability is found in the case of Summers v. Tice, (33 Cal. 2d 80, 199 P.2d 1). In Summers, plaintiff and the two defendants were hunting, and defendants carried identical shotguns and ammunition. During the hunt, defendants shot simultaneously at the same bird, and plaintiff was struck by bird shot from one of the defendants' guns. The court held that where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, "the burden is upon each such actor to prove that he has not caused the harm" (Restatement [Second] of Torts §433B[3]. The central rationale for shifting the burden of proof in such a situation is that without this device both defendants will be silent, and plaintiff will not recover; with alternative liability, however, defendants will be forced to speak, and reveal the culpable party, or else be held jointly and severally liable themselves. Consequently, use of the alternative liability doctrine generally requires that the defendants have better access to information than does the plaintiff, and that all possible tortfeasors be before the court. It is also recognized that alternative liability rests on the notion that where there is a small number of possible wrongdoers, all of whom breached a duty to the plaintiff, the likelihood that any one of them injured the plaintiff is relatively high, so that forcing them to exonerate themselves, or be held liable, is not unfair.

In DES cases, however, there is a great number of possible wrongdoers, who entered and left the market at different times, and some of whom no longer exist. Additionally, in DES cases many years elapse between the ingestion of the drug and injury. Consequently, DES defendants are not in any better position than are plaintiffs to identify the manufacturer of the DES ingested in any given case, nor is there any real prospect of having all the possible producers before the court. Finally, while it may be fair to employ alternative liability in cases involving only a small number of potential wrongdoers, that fairness disappears with the decreasing probability that any one of the defendants actually caused the injury. This is particularly true when applied to DES where the chance that a particular producer caused the injury is often very remote. Alternative liability, therefore, provides DES plaintiffs no relief.

Nor does the theory of concerted action, in its pure form, supply a basis for recovery. This doctrine, seen in drag racing cases, provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in

"a common plan or design to commit a tortious act" (Prosser and Keeton, Torts §46, at 323 [5th ed. 1984]). As . . . the present record reflects, drug companies were engaged in extensive parallel conduct in developing and marketing DES. There is nothing in the record, however, beyond this similar conduct to show any agreement, tacit or otherwise, to market DES for pregnancy use without taking proper steps to ensure the drug's safety. Parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim. Thus this theory also fails in supporting an action by DES plaintiffs.

In short, extant common-law doctrines, unmodified, provide no relief for the DES plaintiff unable to identify the manufacturer of the drug that injured her. This is not a novel conclusion; in the last decade a number of courts in other jurisdictions also have concluded that present theories do not support a cause of action in DES cases. Some courts, upon reaching this conclusion, have declined to find any judicial remedy for the DES plaintiffs who cannot identify the particular manufacturer of the DES ingested by their mothers. Other courts, however, have found that some modification of existing doctrine is appropriate to allow for relief for those injured by DES of unknown manufacture.

We conclude that the present circumstances call for recognition of a realistic avenue of relief for plaintiffs injured by DES. . . .

Indeed, it would be inconsistent with the reasonable expectations of a modern society to say to these plaintiffs that because of the insidious nature of an injury that long remains dormant, and because so many manufacturers, each behind a curtain, contributed to the devastation, the cost of injury should be borne by the innocent and not the wrongdoers. This is particularly so where the Legislature consciously created these expectations by reviving hundreds of DES cases. Consequently, the ever-evolving dictates of justice and fairness, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES.

We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action. We turn then to the question of how to fairly and equitably apportion the loss occasioned by DES, in a case where the exact manufacturer of the drug that caused the injury is unknown.

The past decade of DES litigation has produced a number of alternative approaches to resolve this question. Thus, in a sense, we are now in an enviable position; the efforts of other courts provided examples for contending with this difficult issue, and enough time has passed so that the actual administration and real effects of these solutions now can be observed. With these useful guides in hand, a path may be struck for our own conclusion. . . .

A [narrow] basis for liability, tailored . . . closely to the varying culpableness of individual DES producers, is the market share concept. First judicially articulated by the California Supreme Court in Sindell v. Abbott Labs. [607 P.2d 924 (1980)], variations upon this theme have been adopted by other courts. In *Sindell*, the court synthesized the market share concept by modifying the Summers v. Tice alternative liability rationale in two ways. It first loosened the requirement that all possible

wrongdoers be before the court, and instead made a "substantial share" sufficient. The court then held that each defendant who could not prove that it did not actually injure plaintiff would be liable according to that manufacturer's market share. The court's central justification for adopting this approach was its belief that limiting a defendant's liability to its market share will result, over the run of cases, in liability on the part of a defendant roughly equal to the injuries the defendant actually caused.

In the recent case of Brown v. Superior Ct., 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470, the California Supreme Court resolved some apparent ambiguity in Sindell v. Abbott Labs., and held that a manufacturer's liability is several only, and, in cases in which all manufacturers in the market are not joined for any reason, liability will still be limited to market share, resulting in a less than 100% recovery for a plaintiff. Finally, it is noteworthy that determining market shares under Sindell v. Abbott Labs. proved difficult and engendered years of litigation. After attempts at using smaller geographical units, it was eventually determined that the national market provided the most feasible and fair solution, and this national market information was compiled. . . .

Turning to the structure to be adopted in New York, we heed both the lessons learned through experience in other jurisdictions and the realities of the mass litigation of DES claims in this State. Balancing these considerations, we are led to the conclusion that a market share theory, based upon a national market, provides the best solution. As California discovered, the reliable determination of any market smaller than the national one likely is not practicable. Moreover, even if it were possible, of the hundreds of cases in the New York courts, without a doubt there are many in which the DES that allegedly caused injury was ingested in another State. Among the thorny issues this could present, perhaps the most daunting is the spectre that the particular case could require the establishment of a separate market share matrix. We feel that this is an unfair, and perhaps impossible burden to routinely place upon the litigants in individual cases. . . .

Consequently, for essentially practical reasons, we adopt a market share theory using a national market. We are aware that the adoption of a national market will likely result in a disproportion between the liability of individual manufacturers and the actual injuries each manufacturer caused in this State. Thus our market share theory cannot be founded upon the belief that, over the run of cases, liability will approximate causation in this State. Nor does the use of a national market provide a reasonable link between liability and the risk created by a defendant to a particular plaintiff. Instead, we choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. Use of a national market is a fair method, we believe, of apportioning defendants' liabilities according to their total culpability in marketing DES for use during pregnancy. Under the circumstances, this is an equitable way to provide plaintiffs with the relief they deserve, while also rationally distributing the responsibility for plaintiffs' injuries among defendants.

To be sure, a defendant cannot be held liable if it did not participate in the marketing of DES for pregnancy use; if a DES producer satisfies its burden of proof of showing that it was not a member of the market of DES sold for pregnancy use, disallowing exculpation would be unfair and unjust. Nevertheless, because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's

injury. It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.

Finally, we hold that the liability of DES producers is several only, and should not be inflated when all participants in the market are not before the court in a particular case. We understand that, as a practical matter, this will prevent some plaintiffs from recovering 100% of their damages. However, we eschewed exculpation to prevent the fortuitous avoidance of liability, and thus, equitably, we decline to unleash the same forces to increase a defendant's liability beyond its fair share of responsibility. . . .

Accordingly, in each case the order of the Appellate Division should be affirmed.

NOTES TO HYMOWITZ v. ELI LILLY AND COMPANY

1. ***Identifying Defendants.*** The causation problem in *Hymowitz* is similar to that in the alternative liability cases. In *Hymowitz* each defendant was negligent, but some did not cause harm to the plaintiff (because the plaintiff's mother could not have taken pills made by every manufacturer). In Summers v. Tice, the classic alternative liability case, and in cases following that rule, only one negligent defendant harms the plaintiff, but the plaintiff does not know which one. Why are the plaintiffs unable to use the but-for test for causation to identify defendants whose conduct was related to their injuries? How do the DES cases and Summers v. Tice compare in this regard?

2. ***Alternative Liability.*** Because the identification problems are so similar, the court first considered the alternative liability theory, which shifts the burden of proof to the defendants when the plaintiff cannot identify which defendant caused the harm, all defendants engaged in tortious conduct, all defendants were included in the suit, and all defendants' conduct presented the same risk. Evaluating these requirements of the alternative liability doctrine, why does traditional alternative liability fail to provide a pro-plaintiff solution to the DES situation?

The *Hymowitz* court noted that in a case like Summers v. Tice, the likelihood of imposing responsibility on a defendant who actually did cause harm is "relatively high," but that in DES cases that likelihood is less. Does the court provide a quantitative explanation of how high the likelihood should be in order for alternative liability to be fair? Would being wrong about one out of two defendants be different from being wrong about ten out of twenty defendants?

3. ***Concerted Action.*** If the defendant drug manufacturers agreed to manufacture and market their products in the same negligent way, they might be held to have acted in concert. The *Hymowitz* court found no evidence of an agreement. Would either of the other bases for the concerted action doctrine found in Restatement (Second) of Torts §876(b) or (c) apply in this case?

4. ***Apportionment of Liability.*** The *Hymowitz* court states that each defendant's liability will be "several only." In multiple-defendant cases, as will be seen in Chapter 8, some states make each liable defendant jointly responsible for the plaintiff's full damages. The plaintiff cannot collect more than the full amount but can choose which defendant will pay. This rule is called *joint and several liability.* Other states apply *several liability,* making each defendant responsible for only an individual share of the plaintiff's total damages. In a lawsuit to which *Hymowitz* applied, how would it

affect the amount of damages a plaintiff could recover if she did not sue all of the defendants who might have caused her harm?

5. ***Relevant Market.*** The damages amount for which each defendant is individually liable is based on shares of the relevant market, so the definition of the market is highly important. Courts take different approaches to reflect the geographic scope of the market, whether the manufacturers sell to particular types of customers, and the defendants' ability to exclude themselves from the relevant market by proving that they did not sell in the geographic market or to customers like the plaintiff.

In Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984), a defendant's liability was based on the amount of risk it created that a plaintiff would be harmed by DES, with market shares treated as relevant to determining shares of risk.

In Martin v. Abbott Labs., 689 P.2d 368 (Wash. 1984), defendants were permitted to exculpate themselves by showing that they did not manufacture the DES that harmed a plaintiff. Unexculpated defendants were treated as having equal market shares totaling 100 percent, but each defendant could rebut that presumption. If a defendant did exculpate itself, shares of remaining defendants were increased to provide a total recovery to the plaintiff.

How does the *Hymowitz* approach differ from these earlier efforts?

Statute: INFANCY, INSANITY

N.Y. C.P.L.R. 208 (2002)

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. . . .

Statute: ACTIONS TO BE COMMENCED WITHIN THREE YEARS . . .

N.Y. C.P.L.R. 214(4), (5) (2002)

The following actions must be commenced within three years: . . .

5. an action to recover damages for a personal injury. . . .

Statute: CERTAIN ACTION TO BE COMMENCED WITHIN THREE YEARS OF DISCOVERY

N.Y. C.P.L.R. 214-c(1), (2), (6) (2002)

1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.

2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. . . .

6. This section shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six, except that this section shall not be applicable to any act, omission or failure:

(a) which occurred prior to July first, nineteen hundred eighty-six, and

(b) which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and

(c) an action for which was or would have been barred because the applicable period of limitation had expired prior to such date.

NOTES TO STATUTES

1. *Statute of Limitations in* Hymowitz. The defendants offered two defenses in *Hymowitz*. The first was that the plaintiff could not identify which defendant had caused the harm. This issue was resolved by adoption of the modified alternative liability rule and market share liability. The second defense was that the statute of limitations had run. According to the New York statute of limitations, N.Y. C.P.L.R. 214, personal injury actions must be brought within three years of the time "the cause of action accrues." In New York, the action generally accrues when the defendant breaches a duty to the plaintiff, causing harm to the plaintiff. New York C.P.L.R. 208 modified that rule for children, allowing them to bring actions up to three years from the time when they reach the age of 21.

Mindy Hymowitz was born on December 11, 1954, and reached the age of 21 in 1975. She alleged that she developed cancer as a result of prenatal exposure to DES taken by her mother in 1954. Mindy Hymowitz's cancer symptoms first appeared in 1979. She had been damaged by her mother's exposure to DES, but the symptoms did not appear until Ms. Hymowitz was 24 or 25. Under the rules in N.Y. C.P.L.R. 214 and 208, she could not sue after she reached the age of 24. Because she did not discover the injury in time to sue, she was barred from recovery.

In 1986, the New York Legislature passed specific "revival" legislation extending the statute of limitations for plaintiffs who had injuries resulting from exposures to DES, asbestos, tungsten-carbide, chlordane, and polyvinyl chloride and whose right to sue had expired because of the general statute of limitations. Mindy Hymowitz sued immediately after this revival statute was passed.

2. *Statutes of Limitations Based on Discovery.* Many states' statutes of limitations start the time clock after the time of discovery of the injury by the plaintiff rather than the time the injury occurs. See Chapter 7, Defenses, where statutes of limitations are discussed in detail. When the New York Legislature adopted the revival statute allowing Mindy Hymowitz to sue, it also adopted a "discovery rule" for some types of injuries, codified in N.Y. C.P.L.R. 214-c, above. The law governing the period of time in which one must bring suit in New York continues to evolve. In 2002, a New York trial

court held that N.Y. C.P.L.R. 214-c was preempted, in part, by federal law. See Ruffing ex rel. Calton v. Union Carbide Corp., 746 N.Y.S.2d 798 (N.Y. Sup. 2002). Why does that New York statute not apply to Mindy Hymowitz's claim?

Perspective: Shifting Burden of Scientific Proof

Plaintiffs often have difficulty proving that a drug or other product has a dangerous side effect. The manufacturer is in a much better position than the plaintiff to organize and support the kind of epidemiological research necessary to demonstrate those side effects. In alternative liability cases and modified alternative liability cases, courts shift the burden of proof with respect to causation to the defendants, all of whom engaged in tortious conduct to someone, to prove they did not cause the harm to the particular plaintiff. A similar rule could apply to manufacturers of products. Courts could shift the burden of proof of causation in cases involving injuries from harmful products to the manufacturers, who can better conduct the research. Do the same equitable justifications that support shifting the burden of proof in alternative and modified alternative liability cases support this proposal? See generally Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 Vand. L. Rev. 1011 (2001).

BLACK v. ABEX CORP.

603 N.W.2d 182 (N.D. 1999)

KAPSNER, J.

Rochelle Black appeals from a summary judgment dismissing her wrongful death and survival claims premised upon market share or alternative liability against numerous asbestos manufacturers. Concluding Black has failed to raise a genuine issue of material fact which would preclude summary judgment, we affirm.

Rochelle Black's husband, Markus, served in the Air Force as an auto mechanic from 1971 to 1986. He died of lung cancer in 1991. Black sued forty-eight asbestos manufacturers, alleging her husband's death had been caused by his occupational exposure to asbestos-containing products. Included in her complaint were claims based upon market share and alternative liability. . . .

Black asserts the district court erred in dismissing her claims based upon market share liability. She argues market share liability is a viable tort theory under North Dakota law and its application is appropriate under the facts of this case.

The genesis of market share liability lies in the California Supreme Court's decision in Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980). In *Sindell*, the court held that women who suffered injuries resulting from their mothers' ingestion of the drug DES during pregnancy could sue DES manufacturers, even though the plaintiffs could not identify the specific manufacturer of the DES each of their respective mothers had taken. The court fashioned a new form of liability which relaxed traditional causation requirements, allowing a plaintiff to recover upon showing that she could not identify the specific manufacturer of the DES

which caused her injury, that the defendants produced DES from an identical formula, and that the defendants manufactured a "substantial share" of the DES the plaintiff's mother might have taken. The court held each defendant would be liable for a proportionate share of the judgment based upon its share of the relevant market, unless it demonstrated it could not have made the product which caused the plaintiff's injury.

The essential elements of market share liability are summarized in W. Page Keeton et al., Prosser and Keeton on the Law of Torts, §103, at 714 (5th ed. 1984):

> The requirements for market-share liability seem to be: (1) injury or illness occasioned by a fungible product (identical-type product) made by all of the defendants joined in the lawsuit; (2) injury or illness due to a design hazard, with each having been found to have sold the same type product in a manner that made it unreasonably dangerous; (3) inability to identify the specific manufacturer of the product or products that brought about the plaintiff's injury or illness; and (4) joinder of enough of the manufacturers of the fungible or identical product to represent a substantial share of the market.

The overwhelming majority of courts which have addressed the issue have held market share liability is inappropriate in cases alleging injury from exposure to asbestos. The most oft-cited rationale is that asbestos is not a fungible product, as evidenced by the wide variety of asbestos-containing products, the varying types and amounts of asbestos in those products, and the varying degrees of risk posed by those products. The leading treatise recognizes:

> [I]t can reasonably be argued that it would not be appropriate to apply this fungible product concept to asbestos-containing products because they are by no means identical since they contain widely varying amounts of asbestos.

Prosser, supra, §103, at 714.

Black essentially concedes market share liability is inappropriate in a "shotgun" asbestos case, where the plaintiff is alleging injury from exposure to many different types of asbestos products. Black asserts, however, market share liability may be appropriate when the plaintiff seeks to hold liable only manufacturers of one type of asbestos-containing product. Relying upon Wheeler v. Raybestos-Manhattan, 8 Cal. App. 4th 1152, 11 Cal. Rptr. 2d 109 (1992), Black asserts she should be allowed to proceed in her market share claims against the manufacturers of asbestos-containing "friction products," including brake and clutch products. In *Wheeler*, the California Court of Appeal held a plaintiff could proceed on a market share theory against manufacturers of asbestos-containing brake pads. The court overturned the trial court's order granting a nonsuit in favor of the manufacturers, concluding the plaintiff's offer of proof sufficiently alleged that the brake pads, although not identical, were "fungible" because they contained percentages of asbestos within a "restricted range" of between forty and sixty percent and posed nearly equivalent risks of harm.

Black requests that we recognize market share liability as a viable tort theory under North Dakota law. Black further requests that we follow *Wheeler* and hold that automotive "friction products," including asbestos-containing brake and clutch products, are sufficiently fungible to support a market share claim. . . .

This Court has never addressed whether market share liability is recognized under North Dakota tort law. Other courts faced with the question have reached varying

conclusions on the general availability of this novel remedy. We find it unnecessary to resolve this general issue because we conclude, assuming market share liability were recognized in this state, summary judgment was still appropriate based upon the record in this case.

The dispositive question presented is whether Black has raised a genuine issue of material fact on the issue of fungibility. Market share liability is premised upon the fact that the defendants have produced identical (or virtually identical) defective products which carry equivalent risks of harm. Accordingly, under the market share theory, it is considered equitable to apportion liability based upon the percentage of products each defendant contributed to the entire relevant market.

This reasoning hinges, however, upon each defendant's product carrying an equal degree of risk. As the Supreme Court of Oklahoma explained in Case [v. Fiberboard Corp., 743 P.2d 1062, 1066 (Okla. 1987)]:

> In the *Sindell* case, and those following it, it was determined that public policy considerations supporting recovery in favor of an innocent plaintiff against negligent defendants would allow the application of a theory of liability which shifted the burden of proof of causation from plaintiff to defendants. However, as previously stated, that theory was crafted in a situation where each potential defendant shared responsibility for producing a product which carried with it a singular risk factor. The theory further provided that each potential defendant's liability would be proportional to that defendant's contribution of risk to the market in which the plaintiff was injured. This situation thus provided a balance between the rights of the defendants and the rights of the plaintiffs. A balance being achieved, public policy considerations were sufficient to justify the application of the market share theory of liability.

Similar reasoning was employed by the Supreme Court of Ohio in Goldman [v. Johns-Manville Sales Corp., 514 N.E.2d 691, 701 (1987)]:

> Crucial to the *Sindell* court's reasoning was this fact: there was no difference between the risks associated with the drug as marketed by one company or another, and as all DES sold presented the same risk of harm, there was no inherent unfairness in holding the companies accountable based on their share of the DES market.

Numerous other courts have stressed the importance of a singular risk factor in market share cases.

Unless the plaintiff can demonstrate that the defendants' products created a "singular risk factor," the balance between the rights of plaintiffs and defendants evaporates and it is no longer fair nor equitable to base liability upon each defendant's share of the relevant market. The rationale underlying market share liability, as developed in *Sindell,* is that it did not matter which manufacturer's product the plaintiff's mother actually ingested; because all DES was chemically identical, the same harm would have occurred. Thus, any individual manufacturer's product would have caused the identical injury, and it was through mere fortuity that any one manufacturer did not produce the actual product ingested. Under these circumstances, viewing the overall DES market and all injuries caused thereby, it may be presumed each manufacturer's products will produce a percentage of those injuries roughly equivalent to its percentage of the total DES market. As the *Sindell* court recognized, "[u]nder this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." *Sindell,* 163 Cal. Rptr. 132, 607 P.2d at 937.

In order to prevail on its market share claims, Black would therefore have to demonstrate that the asbestos-containing "friction products" her husband was exposed to carried equivalent degrees of risk. Black asserts this problem has been "disposed of" by the holding in *Wheeler*. Although *Wheeler* recognized that non-identical products may give rise to market share liability if they contain roughly equivalent quantities of a single type of asbestos fiber, the court did not hold that all asbestos-containing friction brake products in all cases will be considered fungible. In fact, the court in *Wheeler* indicated that such products must carry a nearly equivalent risk of harm to support market share liability. Furthermore, *Wheeler* was a reversal of a nonsuit based upon an offer of proof made by the plaintiff. The court stressed its holding was narrow: the plaintiffs had not proven the elements of a market share case, but were merely being afforded the opportunity to prove it. Clearly, *Wheeler* does not serve as evidence of fungibility and equivalent risks of harm of the products in this case.

Black points to uncontroverted evidence in this record that the four remaining defendants produced friction products which contained between seven and seventy-five percent asbestos fibers. This is a far greater range than the forty to sixty percent the *Wheeler* court considered "roughly comparable" for purposes of fungibility under *Sindell*. It is closer to the fifteen to one-hundred percent range which the Supreme Court of Ohio held precluded market share liability as a matter of law. It seems obvious that a product which contains seventy-five percent asbestos would create a greater risk of harm than one which contains only seven percent. Absent introduction of expert evidence demonstrating that in spite of the differences the products would produce equivalent risks of harm, application of market share liability would be inappropriate.

Black failed to present competent, admissible evidence from which a fact finder could determine the "friction products" her husband was exposed to carried equivalent risks of harm and were fungible under *Sindell*. Accordingly, summary judgment was appropriate. . . .

NOTES TO BLACK v. ABEX CORP.

1. ***Elements of Modified Alternative Liability.*** The court in Black v. Abex Corp. refers to a treatise to identify the four elements of modified alternative liability, also called market share liability. Compare these to the four elements of regular alternative liability described in Summers v. Tice and Burke v. Schaffner. One difference is the area of activity to which this theory applies. While alternative liability is a general rule applying to a broad range of activities, modified alternative liability has been applied only to cases involving unreasonably dangerous products. Aside from that difference, how are the elements changed?

2. ***Fungibility of Products and Market Share Liability.*** The court in Black v. Abex Corp. declined to apply the modified alternative liability theory because the requirement that the products of the different manufacturers be fungible was not met. Even though all of the defendant manufacturers made friction brake products containing asbestos, the composition of the products was different. The different amounts of asbestos in the different manufacturers' products meant that the products created different risks for users. Compare this to the DES case, where all manufacturers used the same formula for the drug.

3. ***Problem: Modified Alternative Liability.*** In Shackil v. Lederle Laboratories, 561 A.2d 511 (N.J. 1989), the infant plaintiff developed brain damage from an injection of diphtheria-pertussis-tetanus vaccine, commonly known at DPT vaccine. The parents sued 13 years later, when they became aware of the link between the pertussis portion of the vaccine and the brain damage. After this lapse of time, the manufacturer of the vaccine, which was assumed to have been defective, could not be identified.

Each manufacturer of DPT made the vaccine by a different process that was protected by patent or trade secret law and was separately licensed by the Food and Drug Administration. Most used a "whole cell" manufacturing process for the pertussis portion, which causes serious adverse reactions once in every 110,000 cases. One used a "split cell" process that reduced those risks. Any one of the manufacturers might have been the source of the vaccine injected into the plaintiff.

Should modified alternative liability apply to this case? Should the doctrine apply just to the manufacturers of the whole-cell vaccine?

Perspective: Fungibility and Market Share Liability

One way in which modified alternative liability cases differ from alternative liability cases is that all of the defendants who could have caused the harm to the plaintiff are not included in the lawsuit in a modified liability case. A rule of joint liability, which made either defendant in Summers v. Tice liable for the entire amount of the plaintiff's damages, could be imposed in modified alternative liability cases, but it does not seem as fair. In an industry with 50 or 200 manufacturers, one small firm might have to foot the bill for all the rest. It seems that a larger producer, whose similar product injured more people, should pay more than the small producer. Contribution rules do not reallocate all of the losses in proportion to sales because all of the producers may not have been included in the suit and may be unavailable to sue. Even if they are available, an even division of the liability would not apportion damages in proportion to the probability that each caused the harm. Market share liability cleverly resolves this problem. How is the fungibility requirement, the rule that each defendant created similar risks, related to the fairness of the market share solution?

F. Liability for Lost Chance of Recovery or for Increased Risk of Eventual Harm

Because scientific knowledge is always increasing, plaintiffs have become able to present more and more detailed evidence about causation, particularly in medical malpractice cases. Experts can testify that a doctor's deviation from the professional standard deprived a patient of a small chance of recovery or has placed the patient in some small peril of a future adverse consequence. The ability to prove this type of fact by a preponderance of the evidence has required tort law to confront issues that were unknown in an earlier time—when no expert was able to testify, for example, about a very sick person that a certain type of intervention would have changed the likelihood of death from, say, 80 percent to 60 percent.

Cases where a doctor acts negligently but the patient would likely have suffered some ultimate harm even with good medical treatment pose serious problems under typical causation doctrines. Under traditional principles, a plaintiff could recover only by proving that the adverse consequence (for example, death or disability) was caused by the doctor's error. This meant that where there was a more than 50 percent chance that the adverse consequence would have happened in the absence of the doctor's mistake, the doctor would be free from liability. If the patient's ultimate consequence was likely, by a preponderance of the evidence, to have happened regardless of the doctor's conduct, the doctor's conduct was not treated as a cause of that condition.

In Lord v. Lovett, the plaintiff could not prove that the defendant's alleged malpractice deprived her of a better than 50 percent chance of recovery. The decision explains the main approaches various courts have taken to this problem and adopts a common resolution that allows recovery for "loss of a chance" situations. An excerpt from Albert v. Shultz treats the question of whether the damages awarded for loss of a partial chance of recovery should be related to the size of the chance that the defendant's negligence destroyed. Petriello v. Kalman allows recovery for a predicted consequence of the defendant's conduct, even though the predicted likelihood of that occurrence is small.

LORD v. LOVETT

770 A.2d 1103 (N.H. 2001)

NADEAU, J.

The plaintiff, Belinda Joyce Lord, appeals the Superior Court's (Perkins, J.) dismissal of her "loss of opportunity" action against the defendants, James Lovett, M.D., and Samuel Aldridge, M.D. We reverse and remand.

The plaintiff suffered a broken neck in an automobile accident on July 22, 1996, and was treated at the Lakes Region General Hospital by the defendants. She contends that because the defendants negligently misdiagnosed her spinal cord injury, they failed both to immobilize her properly and to administer steroid therapy, causing her to lose the opportunity for a substantially better recovery. She alleges that she continues to suffer significant residual paralysis, weakness and sensitivity.

Upon learning that the defendants intended to move to dismiss at the close of the plaintiff's case, the trial court permitted the plaintiff to make a pre-trial offer of proof. She proffered that her expert would testify that the defendants' negligence deprived her of the opportunity for a substantially better recovery. She conceded, however, that her expert could not quantify the degree to which she was deprived of a better recovery by their negligence.

Following the plaintiff's offer of proof, the defendants moved to dismiss on two grounds: (1) New Hampshire law does not recognize the loss of opportunity theory of recovery; and (2) the plaintiff failed to set forth sufficient evidence of causation. The trial court dismissed the plaintiff's action on the basis that her case is "clearly predicated on loss of . . . opportunity" and that "there's no such theory permitted in this State." This appeal followed. . . .

The loss of opportunity doctrine, in its many forms, is a medical malpractice form of recovery which allows a plaintiff, whose preexisting injury or illness is aggravated by the alleged negligence of a physician or health care worker, to recover for her lost

opportunity to obtain a better degree of recovery. See Delaney v. Cade, 255 Kan. 199, 873 P.2d 175, 178 (Kan. 1994); King, *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine,* 28 U. Mem. L. Rev. 491, 492-93 (1998).

Generally, courts have taken three approaches to loss of opportunity claims.

The first approach, the traditional tort approach, is followed by a minority of courts. According to this approach, a plaintiff must prove that as a result of the defendant's negligence, the plaintiff was deprived of at least a fifty-one percent chance of a more favorable outcome than she actually received. Once the plaintiff meets this burden, she may recover damages for the entire preexisting illness or condition.

Under this approach, a patient whose injury is negligently misdiagnosed, but who would have had only a fifty percent chance of full recovery from her condition with proper diagnosis, could not recover damages because she would be unable to prove that, absent the physician's negligence, her chance of a better recovery was at least fifty-one percent. If, however, the patient could establish the necessary causal link by establishing that absent the negligence she would have had at least a fifty-one percent chance of a better outcome, not only would the patient be entitled to recover, but she would be awarded damages for her entire injury. This approach has been criticized as yielding an "all or nothing" result.

The second approach, a variation of the traditional approach, relaxes the standard of proof of causation. The causation requirement is relaxed by permitting plaintiffs to submit their cases to the jury upon demonstrating that a defendant's negligence more likely than not "increased the harm" to the plaintiff or "destroyed a substantial possibility" of achieving a more favorable outcome.

Under this approach, the patient would not be precluded from recovering simply because her chance of a better recovery was less than fifty-one percent, so long as she could prove that the defendant's negligence increased her harm to some degree. The precise degree required varies by jurisdiction. Some courts require that the defendant's negligence increase the plaintiff's harm by any degree, while other courts require that the increase be substantial. As in the traditional approach, once the plaintiff meets her burden, she recovers damages for the entire underlying preexisting condition or illness rather than simply the loss of opportunity. This approach "represents the worst of both worlds [because it] continues the arbitrariness of the all-or-nothing rule, but by relaxing the proof requirements, it increases the likelihood that a plaintiff will be able to convince a jury to award full damages." King, *"Reduction of Likelihood" Reformulation,* 28 U. Mem. L. Rev. at 508.

Under the third approach, the lost opportunity for a better outcome is, itself, the injury for which the negligently injured person may recover. As with the second approach, a plaintiff may prevail even if her chances of a better recovery are less than fifty-one percent. The plaintiff, however, does not receive damages for the entire injury, but just for the lost opportunity.

In other words, if the plaintiff can establish the causal link between the defendant's negligence and the lost opportunity, the plaintiff may recover that portion of damages actually attributable to the defendant's negligence.

Under this approach, "by defining the injury as the loss of chance . . . , the traditional rule of preponderance is fully satisfied." Perez v. Las Vegas Medical Center, 107 Nev. 1, 805 P.2d 589, 592 (Nev. 1991).

We agree with the majority of courts rejecting the traditional "all-or-nothing" approach to loss of opportunity cases, and find the third approach most sound. The third approach permits plaintiffs to recover for the loss of an opportunity for a better outcome, an interest that we agree should be compensable, while providing for the proper valuation of such an interest.

> The loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition. Preexisting conditions must, of course, be taken into account in valuing the interest destroyed. When those preexisting conditions have not absolutely preordained an adverse outcome, however, the chance of avoiding it should be appropriately compensated even if that chance is not better than even.

King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences,* 90 Yale L.J. 1353, 1354 (1981).

Accordingly, we hold that a plaintiff may recover for a loss of opportunity injury in medical malpractice cases when the defendant's alleged negligence aggravates the plaintiff's preexisting injury such that it deprives the plaintiff of a substantially better outcome. . . .

[D]efendant Lovett argues that we should not recognize the plaintiff's loss of opportunity injury because it is intangible and, thus, is not amenable to damages calculation. We disagree.

First, we fail to see the logic in denying an injured plaintiff recovery against a physician for the lost opportunity of a better outcome on the basis that the alleged injury is too difficult to calculate, when the physician's own conduct has caused the difficulty. Second, "we have long held that difficulty in calculating damages is not a sufficient reason to deny recovery to an injured party." Third, loss of opportunity is not inherently unquantifiable. A loss of opportunity plaintiff must provide the jury with a basis upon which to distinguish that portion of her injury caused by the defendant's negligence from the portion resulting from the underlying injury. This can be done through expert testimony just as it is in aggravation of pre-existing injury cases.

We decline to address the defendants' arguments disputing the sufficiency of the plaintiff's evidence because the trial court has not yet considered the issue. The trial court limited its ruling to the legal question of whether New Hampshire recognizes the loss of opportunity doctrine. We likewise limit our holding to that question. . . .

Reversed and remanded.

ALBERTS v. SCHULTZ

975 P.2d 1279 (N.M. 1999)

FRANCHINI, Chief J.

. . . There are many theories as to the calculation of pecuniary damages for loss of chance. We conclude that damages should be awarded on a proportional basis as determined by the percentage value of the patient's chance for a better outcome prior to the negligent act. . . .

In loss-of-chance cases, most courts apportion damages by valuing the chance of a better result as a percentage of the value of the entire life or limb. See, e.g., Boody v. United States, 706 F. Supp. 1458, 1465-66 (D. Kan. 1989); McKellips v. Saint Francis

Hosp., Inc., 741 P.2d 467, 476 (Okla. 1987). For example, the value of a patient's fifty-percent chance of survival is fifty percent of the value of their total life. If medical malpractice reduced that chance of survival from fifty to twenty percent, that patient's compensation would be equal to thirty percent of the value of their life. See, e.g., Gordon v. Willis Knighton Med. Ctr., 661 So. 2d 991, 1000 (La. Ct. App. 1995) ("percentage probability of loss" applicable whether chance of survival is greater than or less than fifty percent). In another example, the value of a plaintiff's twenty-percent chance of saving a limb is twenty percent of the value of the entire limb. If that plaintiff lost the entire twenty-percent chance of saving the limb, their compensation would be twenty percent of the value of that limb. Thus, the percentage of chance lost is multiplied by the total value of the person's life or limb. See, e.g., Delaney, 873 P.2d at 187; Roberts v. Ohio Permanente Med. Group, Inc., 76 Ohio St. 3d 483, 668 N.E.2d 480, 484 (Ohio 1996); Graham v. Willis-Knighton Med. Ctr., 699 So. 2d 365, 373 (La. 1997) (lost chance valued by jury at twenty to thirty-three percent of $470,000, which was total value of limb).

The valuation of life, limb, and lost chances is necessarily imprecise. Just as causation is proved by probabilities, the value of the loss must be established by fair approximations, based on the kinds of proof that courts commonly use when making such determinations. . . .

NOTES TO LORD v. LOVETT AND ALBERTS v. SHULTZ

1. ***Burden of Proof: Legal Cause of Plaintiff's Death.*** Under the loss of a chance doctrine adopted in Lord v. Lovett, would the plaintiff have to prove that her paralysis was more likely than not caused by the delay in diagnosis? To what factual proposition would the court apply the more likely than not (preponderance of the evidence) standard?

2. ***Alternative Approaches to the Plaintiff's Causation Problems in Loss of a Chance Cases.*** Understanding the approaches to whether there is recovery for loss of a chance involves three factors: (1) what the court identifies as the compensable harm; (2) what the plaintiff must prove; and (3) what damages are awarded. How would each of these factors apply in each of the three approaches described by the Lord v. Lovett court?

PETRIELLO v. KALMAN

576 A.2d 474 (Conn. 1990)

SHEA, A.J.

In this medical malpractice action, . . . the jury . . . returned a verdict for the plaintiff, Ann Petriello, in her action against the named defendant, Roy E. Kalman, a physician. . . . The . . . defendant . . . has appealed. . . . The principal issue in that appeal is whether the trial court correctly instructed the jury that the plaintiff could be awarded compensation for an increased risk of future injury. We conclude that the trial court was correct in giving such an instruction.

The jury could reasonably have found the following facts from the evidence. [Because the defendant was negligent in his performance of a procedure on the

plaintiff, corrective surgery was required, leaving the plaintiff with an 8 to 16 percent increased risk of future bowel adhesions and obstructions.]

In *Healy* [v. White, 173 Conn. 438, 378 A.2d 540 (1977)], we affirmed our adherence to the prevailing all or nothing standard for compensating those who have either suffered present harm and seek compensation as if the harm will be permanent, or have suffered present harm and seek compensation for possible future consequences of that harm. In essence, if a plaintiff can prove that there exists a 51 percent chance that his injury is permanent or that future injury will result, he may receive full compensation for that injury as if it were a certainty. If, however, the plaintiff establishes only a 49 percent chance of such a consequence, he may recover nothing for the risk to which he is presently exposed. Although this all or nothing view has been adopted by a majority of courts faced with the issue,[2] the concept has been severely criticized by numerous commentators. By denying any compensation unless a plaintiff proves that a future consequence is more likely to occur than not, courts have created a system in which a significant number of persons receive compensation for future consequences that never occur and, conversely, a significant number of persons receive no compensation at all for consequences that later ensue from risks not rising to the level of probability. This system is inconsistent with the goal of compensating tort victims fairly for all the consequences of the injuries they have sustained, while avoiding, so far as possible, windfall awards for consequences that never happen.

In seeking to enforce their right to individualized compensation, plaintiffs in negligence cases are confronted by the requirements that they must claim all applicable damages in a single cause of action and must bring their actions no "more than three years from the date of the act or omission complained of." General Statutes §52-584. Under these circumstances, no recovery may be had for future consequences of an injury when the evidence at trial does not satisfy the more probable than not criterion approved in *Healy*, despite a substantial risk of such consequences. Conversely, a defendant cannot seek reimbursement from a plaintiff who may have recovered for a future consequence, which appeared likely at the time of trial, on the ground that subsequent events have made that consequence remote or impossible. Our legal system provides no opportunity for a second look at a damage award so that it may be revised with the benefit of hindsight. In cases presenting similar problems, some courts "have liberalized the rules for causal proof so that any substantial chance of future harm might be sufficient to permit a recovery." D. Dobbs, R. Keeton, D. Owen & W. Keeton, Torts (5th Ed. Sup. 1988) §30, p.26. Further, some courts have counteracted the strict application of the rule of probability in proving damages "where the *fact* of damage has been established and the question to be decided is the *extent* of that damage." 4 F. Harper, F. James & O. Gray, Torts (2d ed.) §25.3, p.509.

If the plaintiff in this case had claimed that she was entitled to compensation to the extent that a future bowel obstruction was a certainty, she would have been foreclosed from such compensation solely on the basis of her experts' testimony that the

[2] "The traditional American rule . . . is that recovery of damages based on future consequences may be had only if such consequences are 'reasonably certain.' . . . To meet the 'reasonably certain' standard, courts have generally required plaintiffs to prove that it is more likely than not (a greater than 50% chance) that the projected consequence will occur. If such proof is made, the alleged future effect may be treated as certain to happen and the injured party may be awarded full compensation for it; if the proof does not establish a greater than 50% chance, the injured party's award must be limited to damages for harm already manifest." Wilson v. Johns-Manville Sales Corporation, 684 F.2d 111, 119 (D.C. Cir. 1982).

likelihood of the occurrence of a bowel obstruction was either very remote or only 8 to 16 percent probable. Her claim, however, was for compensation for the increased risk that she would suffer such an obstruction sometime in the future. If this increased risk was more likely than not the result of the bowel resection necessitated by the defendant's actions, we conclude that there is no legitimate reason why she should not receive present compensation based upon the likelihood of the risk becoming a reality. When viewed in this manner, the plaintiff was attempting merely to establish the extent of her present injuries. She should not be burdened with proving that the occurrence of a future event is more likely than not, when it is a present risk, rather than a future event for which she claims damages. In our judgment, it was fairer to instruct the jury to compensate the plaintiff for the increased risk of a bowel obstruction based upon the likelihood of its occurrence rather than to ignore that risk entirely. The medical evidence in this case concerning the probability of such a future consequence provided a sufficient basis for estimating that likelihood and compensating the plaintiff for it.

This view is consistent with the Second Restatement of the Law of Torts, which states, in §912, that "[o]ne to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit." Damages for the future consequences of an injury can never be forecast with certainty. With respect to awards for permanent injuries, actuarial tables of average life expectancy are commonly used to assist the trier in measuring the loss a plaintiff is likely to sustain from the future effects of an injury. Such statistical evidence does, of course, satisfy the more likely than not standard as to the duration of a permanent injury. Similar evidence, based upon medical statistics of the average incidence of a particular future consequence from an injury, such as that produced by the plaintiff in this case, may be said to establish with the same degree of certitude the likelihood of the occurrence of the future harm to which a tort victim is exposed as a result of a present injury. Such evidence provides an adequate basis for measuring damages for the risk to which the victim has been exposed because of a wrongful act.

The probability percentage for the occurrence of a particular harm, the risk of which has been created by the tortfeasor, can be applied to the damages that would be justified if that harm should be realized. We regard this system of compensation as preferable to our present practice of denying any recovery for substantial risks of future harm not satisfying the more likely than not standard. We also believe that such a system is fairer to a defendant, who should be required to pay damages for a future loss based upon the statistical probability that such a loss will be sustained rather than upon the assumption that the loss is a certainty because it is more likely than not. We hold, therefore, that in a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur.

Applying this holding to the facts of this case, we conclude that the trial court correctly instructed the jury that the plaintiff could be awarded compensation for the increased likelihood that she will suffer a bowel obstruction some time in the future. The court's instruction was fully in accord with our holding today. The court first set forth the defendant's duty toward the plaintiff and then instructed the jury that: "If you find the defendant negligent and that such negligence was a substantial factor in

increasing the plaintiff's risk of an intestinal blockage then the plaintiff is entitled to compensation for this element of damage." This instruction was a correct statement of the applicable law of causation and advised the jurors to award damages only if they were satisfied that there existed a causal relationship between the defendant's actions, the plaintiff's present injury and the increased risk to which she was exposed. Under these circumstances, we conclude that the trial court's instructions correctly allowed this issue to be considered by the jury.

The judgment of the trial court is affirmed.

NOTES TO PETRIELLO v. KALMAN

1. ***Burden of Proof and Increased Risk of Harm.*** In Petriello v. Kalman, the plaintiff seeks recovery for an increased chance of a bad result in the future. Traditional doctrines have allowed recovery only if a plaintiff shows that the probability of the harm occurring is greater than 50 percent. What probability of future harm did the plaintiff allege?

2. ***Statute of Limitations and Single Cause of Action Rule.*** The Petriello v. Kalman court referred to the statute of limitations and the single cause of action rule. Statutes of limitations control how long a plaintiff is permitted to wait to sue, either after the occurrence of an injurious event or after the plaintiff's discovery of the injury. In the *Petriello* case, a three-year period (beginning with the date of the injury) applied. The single cause of action rule requires that a plaintiff seek damages for all the consequences of a defendant's conduct in one lawsuit. What reasons justify these two restrictions?

3. ***Accuracy of Compensation.*** If the plaintiff actually does suffer the possible future consequence, will tort law have provided her with enough money to deal with it? If the plaintiff never suffers that consequence, what justification can there be for tort law having awarded her money on the chance that it would occur?

4. ***Discovery Rule and Future Injury.*** For some cases in some states, a "discovery" rule prevents the statute of limitations period from beginning to run until a victim knows or reasonably should know of the injury. This possibility of suing for actually incurred damages at a future time would make the *Petriello* approach less persuasive. See, e.g., Mauro v. Raymark Industries, Inc., 561 A.2d 257 (N.J. 1989) (victims with greater than 50 percent likelihood of future harm may recover full damages; victims with a lower likelihood are barred at present but may sue in the future if injury occurs).

CHAPTER 6

LIMITS ON LIABILITY: DUTY AND PROXIMATE CAUSE

I. Introduction

The Role of Duty and Proximate Cause. A defendant's negligent act can be a cause in fact of infinite harmful consequences. For example, an electrician might install a light fixture negligently. The fixture might give someone a shock. That person might be knocked out and suffer a broken bone and therefore fail to go to a friend's house to give the friend a promised ride to a library. The friend might therefore fail a medical school test and lose a job as a graduate assistant in a research lab. The lab's work might be slowed up, and so on. Some other person might see the immediate victim get the shock and might suffer an emotionally debilitating response to it. Tort law devotes considerable attention to separating the many harms a defendant's conduct causes into two categories: (1) harms the defendant should be required to pay for and (2) harms whose costs the victims should bear themselves.

It is commonly said that to recover damages a tort plaintiff must prove duty, breach, cause, and damages. Tort law limits the liability of defendants with policy-based doctrines related to both the duty and the cause elements. Even if a defendant has acted tortiously and was the cause-in-fact of a plaintiff's harm, the defendant will not be liable if a court rules that the defendant did not owe a duty to the plaintiff or that the defendant's act was not a proximate cause of the plaintiff's harm.

Because proximate cause doctrines and certain duty doctrines represent responses to the same problem — putting some limits on actors' tort liability — this chapter discusses both types of doctrines. They are introduced in Palsgraf v. Long Island Railway Co., probably tort law's most famous case. The circumstances of the plaintiff's injury were highly unusual, so deciding whether the defendant railroad might be responsible was difficult. The majority opinion, by Justice Cardozo, decided that regardless of causation issues, a lack of duty owed by the defendant to the plaintiff should resolve the case. The dissenting opinion by Justice Andrews rejected this duty analysis and proposed a range of approaches to proximate cause. The dissent explores the main dilemmas of proximate cause doctrine. An analysis of the majority and dissenting opinions highlights the fact that limiting the range of a defendant's liability can be accomplished through doctrines related to either duty or causation.

PALSGRAF v. LONG ISLAND RAILWAY CO.

162 N.E. 99 (N.Y. 1928)

CARDOZO, C.J.

[Appeal from a judgment of the Appellate Division of the Supreme Court . . . affirming a judgment in favor of plaintiff entered upon a verdict.]

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." Pollock, Torts (11th ed.) p.455. The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions. . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury." McSherry, C.J., in West Virginia Central & P.R. Co. v. State, 96 Md. 652, 666, 54 A. 669, 671 (61 L.R.A. 574). . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk? The passenger

far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, are not even of the same order. The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." Munsey v. Webb, 231 U.S. 150, 156. Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril. Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to *A* resulting by misadventure in injury to *B*. These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct

would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent. . . .

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary. There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e.g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

ANDREWS, J. (dissenting). . . .

. . . The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept — the breach of some duty owing to a particular person or to particular persons? Or, where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to involve the probability of harm to the plaintiff standing many feet away whatever might be the case as to the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis, we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence. . . .

But we are told that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be not which is owed to the plaintiff himself and not merely to others." Salmond Torts (6th ed.) 24. This I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there — a wrong to the public at large. Such [is] the language of the street. Such [is] the language of the courts when speaking of contributory negligence. Such again and again their language in speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. As was said by Mr. Justice Holmes many years ago: "The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." Spade v. Lynn & Boston R.R. Co., 52 N.E. 747, 748. Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect *A*, *B*, or *C* alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not

exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. . . .

In the well-known *Polhemis* Case, Scrutton, L.J., said that the dropping of a plank was negligent, for it might injure "workman or cargo or ship." Because of either possibility, the owner of the vessel was to be made good for his loss. The act being wrongful, the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is.

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself—not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or, if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp

water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source. . . .

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result. When a lantern is overturned, the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration — the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind. . . .

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him; if it exploded and injured one in the immediate vicinity, to him. . . . Mrs. Palsgraf was standing some distance away. How far cannot be told from the record — apparently 25 or 30 feet, perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief, "It cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result — there was here a natural and continuous sequence — direct connection. The only intervening cause was that, instead of blowing

her to the ground, the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

NOTES TO PALSGRAF v. LONG ISLAND RAILWAY CO.

1. *Duty and Proximate Cause as Liability-Limiting Elements.* Justice Cardozo based his decision against Ms. Palsgraf on an analysis of duty. Even if there is negligence ("in the air"), that is not enough to support liability. For Justice Cardozo, proximate cause was irrelevant, because if there is no duty to the plaintiff, there can never be any liability to the plaintiff regardless of causation. Justice Andrews would have used a proximate cause analysis to limit liability because he concluded that the defendant did owe a duty to Ms. Palsgraf. What is the difference between the two judges' rules for when one actor has a duty to another?

2. *Factors Relevant to Legal Cause.* Justice Andrews identified as many as nine factors to be considered in legal causation (the exact number is hard to say because many overlap): (1) but-for cause, (2) natural and continuous sequence between cause and effect, (3) substantial factor, (4) directness without too many intervening events, (5) attenuation, (6) likelihood of injury, (7) foreseeability, (8) remoteness in time, and (9) remoteness in space. He considered the explosion to be a but-for cause of the harm to Mrs. Palsgraf, to be a direct cause, with only one intervening event (the falling of the scales), occurring in a natural and continuing sequence, and a substantial factor. The harm was foreseeable and not too remote in time or space.

Generally courts consider selected factors when analyzing causation but not all of them together. Cases in this chapter show the usual practice of focusing on only one or two factors. Consider, however, that many of these factors are related. Is an act likely to be a direct cause, for instance, if it is unlikely to produce the harm and is remote in time or space? The answer depends on the particular facts of each case.

3. *Foreseeability and Hindsight.* In Justice Andrews's analysis, the foreseeability of injury would be evaluated on the basis of information available after the defendant has acted. Specifically, he wrote that "given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform." This use of hindsight has not usually been followed. The Restatement (Second) of Torts, in §435 comment d, took the position that if the result of a defendant's conduct seems highly extraordinary in hindsight, the conduct should not be considered a proximate cause of the result.

Perspective: Duty as a Question of Law

Following the approach suggested by Justice Cardozo, the existence of a duty is based on the foreseeability of the type of harm that occurred to the type of plaintiff who was injured. Duty is a question of law, which means that the judge rather than the jury decides whether a duty exists. Professor Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law; Descriptive Theory and the Rule of Law*, 54 Vand. L. Rev. 1039, 1062 (2001), suggests looking at duties not as creations of judges but as "social obligations derived from the community's accepted ways of doing things":

> Community standards of coordinating behavior may be developed so that certain goods can be achieved by some, or certain evils can be avoided by others, if everyone follows the practice. For example, if everyone drives on the left, collisions can be avoided and everyone can get where they are going more quickly and safely. Everyone engaged in the practice understands what those purposes are. For the practice to give rise to a claim of wrong, therefore, the plaintiff must be within the group of those whose interests the practice was developed to protect, and the hazard by which he was harmed must be one that the practice was developed to avoid.

The judge's role is to recognize the "community's coordinating conventions or practices." The "[p]laintiff is wronged if she is harmed when the defendant breaches a social convention whose purpose is to protect people like the plaintiff from that kind of harm." Id.

Applying community standards to complex questions in particular cases may be the type of function best assigned to a jury. Since the issue of proximate cause is almost always treated as a question for the jury, an alternative to Justice Cardozo's rule would assume that an actor owes a duty to the whole world and treat the question of whether the plaintiff and harm were foreseeable as part of the jury's consideration of proximate cause.

II. Duty

Identifying Duties. Justice Cardozo's *Palsgraf* opinion is consistent with recognizing a duty to all whom one's conduct might foreseeably injure. The Andrews opinion articulates a duty owed to everyone, with foreseeability treated as one of many components of a causation analysis once a defendant's negligence has been established. Modern courts use a number of techniques to identify duties. Hegyes v. Unjian Enterprises, Inc. is based on foreseeability where a defendant's conduct has created a risk. Dykema v. Gus Macker Enterprises, Inc., links duty to the relationship between a plaintiff and defendant, where someone other than the defendant has created a risk. Graff v. Beard and Eisel v. Board of Education of Montgomery County examine multiple factors to decide whether to recognize a duty in circumstances where precedents had not required an actor like the defendant to exercise reasonable care with respect to the type of risk and type of plaintiff present in each case. Chapter 11 offers a

fuller treatment of special duty rules, but *Hegyes, Dykema, Graff,* and *Eisel* are presented here to highlight the way a duty analysis can accomplish some of the same purposes served by the proximate cause inquiry.

HEGYES v. UNJIAN ENTERPRISES, INC.

286 Cal. Rptr. 85 (Cal. Ct. App. 1992)

FRED WOODS, Associate Justice.

. . . On January 24, 1989, plaintiff Cassondra Hegyes (hereinafter "Hegyes" or "plaintiff") filed her complaint [alleging] that the corporate defendant, Unjian Enterprises, Inc., dba Office Supply Company (hereafter "defendant"), was the owner of a passenger vehicle involved in an automobile accident on July 4, 1985, while it was being operated by defendant's employee, Donald George. Lynn O'Hare Hegyes (hereinafter "O'Hare") was allegedly injured in that accident. It is claimed that, as a result of that accident, O'Hare was fitted with a lumbo-peritoneal shunt.

In 1987, O'Hare became pregnant with plaintiff. During that pregnancy, the fetus compressed the lumbo-peritoneal shunt and, in order to avoid further injury to O'Hare, plaintiff was delivered 51 days premature, by Cesarean section on October 31, 1987. Plaintiff alleged that the personal injuries she sustained were a proximate result of the negligence of defendants.

On or about November 1, 1989, defendant served its demurrer to plaintiff's complaint. . . .

Defendant's demurrer challenged the sufficiency of plaintiff's complaint on several grounds, one of which was the absence of any legal duty of care. Defendant contended that no legal duty was owed by defendant to plaintiff under the facts presented since claims for preconception negligence involve a special "physician-patient" relationship which gives rise to a duty to the subsequently conceived "foreseeable" fetus. In the absence of such a special relationship, defendant contended that a legal duty had never been found under California law. . . .

After considering the arguments of counsel, the trial court sustained the demurrer without leave to amend on the ground that recognition of such a cause of action would "be an unwarranted extension of a duty of care." [The plaintiff appealed.]

This appeal presents a single issue, which may be framed as follows: Does a negligent motorist owe a legal duty of care to the subsequently conceived child of a woman who is injured in an automobile accident? . . .

While the question of whether one owes a duty to another must be decided on a case by case basis, every case is governed by the rule of general application that persons are required to use ordinary care for the protection of those to whom harm can be reasonably foreseen. This rule not only establishes, but limits, the principle of negligence liability. The court's task in determining duty is to evaluate "whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced" such that liability may appropriately be imposed upon the negligent party. *Ballard v. Uribe,* 715 P.2d 624 (1986).

Applying that standard to the aforementioned "special relationship" cases where a duty was found to exist, the birth of a handicapped child was arguably a "likely result" of the defendant's professionally negligent conduct. In this case, however, that standard leads to a different result. Defendant's conduct was not "likely to result"

in plaintiff's conception or birth, let alone her alleged injuries nearly three years after the car accident. Unlike a medical professional's conduct which is directly and intentionally related to whether a child is conceived or born, such conception or birth is not a reasonably foreseeable result of the operation of a car.

This doctrine was fully expounded in the landmark case of *Palsgraf v. Long Island R. Co.* (1928) 162 N.E. 99. . . .

In narrowing the area of actionable causation, Chief Justice Cardozo drew the line at foreseeability. Negligence must be a matter of some relation between the parties, some duty, which could be founded only on the foreseeability of some harm to the plaintiff in fact injured. . . .

Thus, despite the broad maxim that for every wrong there is a remedy, the courts and legislature of this state have decided that *not* all injuries are compensable at law. Plaintiff's alleged injuries must necessarily fall within that category. A motorist cannot reasonably foresee that his or her negligent conduct might injure a child subsequently conceived by a woman several years after a car accident.

Even accepting, arguendo, that it is foreseeable that a woman of child bearing years may some day have a child, there are areas of foreseeable harm where legal obligation still does not arise. It must be admitted that there existed the bare *possibility* that the injury complained of in this case could result from the acts of defendant. However, the creation of a legal duty requires more than a mere possibility of occurrence since, through hindsight, everything is foreseeable.

Judicial discretion is an integral part of the duty concept in evaluating foreseeability of harm. That sentiment is best evidenced by the following comment by Dean Prosser: "In the end the court will decide whether there is a duty on the basis of the mores of the community, 'always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.' " Prosser, Palsgraf Revisited (1953) 52 Mich. L. Rev. 1, 15.

Thus, the concept of legal duty necessarily includes and expresses considerations of social policy. The trial court's determination with respect to those considerations have merit and rationality, and we so find. [The judgment is affirmed.]

NOTES TO HEGYES v. UNJIAN ENTERPRISES, INC.

1. ***Foreseeability as a Limit on Duty.*** Following the *Palsgraf* approach, the court in *Hegyes* found that a person in the position of the negligent driver could not reasonably anticipate that his bad driving would cause an injury to a child born more than two years later, even though the driver's conduct was a cause-in-fact of that injury. The entire chain of causation (bad driving, need for a shunt, danger to O'Hare's health during pregnancy, early delivery of the plaintiff) is irrelevant. The jury has no opportunity to decide whether the car driver's negligence was a proximate cause of the baby's injuries once the court decides that the baby's injuries were not foreseeable.

2. ***Prenatal Negligence and Foreseeable Harm.*** When negligent conduct that harms a child occurs before a child's conception or birth, recovery against the negligent actor is sometimes allowed. For example, if the harm is caused by negligent genetic counseling of the child's parents or by negligent treatment of the child's mother while she is pregnant, harm to the child is treated as foreseeable. See the discussion of "wrongful birth" and "wrongful life" claims in Chapter 11.

DYKEMA v. GUS MACKER ENTERPRISES, INC.

492 N.W.2d 472 (Mich. Ct. App. 1992)

KELLY, J.

Plaintiffs, Lee Dykema and Linda Dykema, appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

In July 1988, defendant Gus Macker Enterprises, Inc., organized and conducted the Gus Macker basketball tournament. . . . The tournament was held outdoors on the public streets of Belding, Michigan. Spectators were charged no admission fee and were free to move about and watch the various basketball games in progress. On July 10, 1988, Lee Dykema attended the tournament as a nonpaying spectator. . . . At approximately 4:30 p.m., a thunderstorm struck the area. During the storm, the winds were blowing in excess of forty miles an hour. Plaintiff, while running for shelter, was struck by a falling tree limb and paralyzed.

Plaintiff argues that because of the special relationship that existed between Gus Macker Enterprises, Inc. (hereafter defendant), the organizer of the outdoor basketball tournament, and himself, a spectator at the tournament, defendant was under a duty to warn plaintiff of the approaching thunderstorm. We acknowledge that this is an issue of first impression in Michigan, and hold that defendant was under no duty to warn plaintiff of the approaching thunderstorm.

In order to assert negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff. The term "duty" has been defined as "essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." Moning v. Alfono, 400 Mich. 425, 438-439; 254 N.W.2d 759 (1977). The general rule is that there is no duty to aid or protect another. However, there is a limited exception to this rule. A duty may be found if there is a special relationship between the plaintiff and the defendant. Some generally recognized "special relationships" include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee. The rationale behind imposing a legal duty to act in these special relationships is based on the element of control. In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself.

In order to determine whether a "special relationship" giving rise to a legal duty to act does exist in a particular case, this Court has held that it is necessary to

> balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. . . . Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant.

[Roberts v. Pinkins, 171 Mich. App. 648, 652-653; 430 N.W.2d 808 (1988).] If a trial court determines that, as a matter of law, the defendant owed no duty to the plaintiff, summary disposition is properly granted in the defendant's favor under MCR 2.116(C)(8).

Our review of the record indicates that no special relationship existed between plaintiff and defendant. Contrary to plaintiff's argument, plaintiff and defendant were not engaged in a business invitee-invitor relationship at the time of plaintiff's accident. Plaintiff was not on the land where the basketball tournament was being held in connection "with business dealings" of defendant. In support of this conclusion, we note that plaintiff paid no admission fee to observe the tournament, and no contractual or business relationship was shown to exist between plaintiff and defendant. Nor do we perceive any other type of special relationship from which a duty to warn could arise with regard to inclement weather. There is no indication in the record that plaintiff entrusted himself to the control and protection of defendant. Further, there is no indication that, pursuant to his relationship with defendant, plaintiff lost the ability to protect himself. Plaintiff was free to leave the tournament at any time, and his movements were not restricted by defendant. He was able to see the changing weather conditions by looking at the sky and was able to seek shelter as the storm approached. Clearly, plaintiff did not entrust himself to the control and protection of defendant, with a consequent loss of control to protect himself. Because no special relationship existed between plaintiff and defendant, defendant was under no duty to warn plaintiff of the approaching thunderstorm. . . .

Affirmed.

NOTES TO DYKEMA v. GUS MACKER ENTERPRISES, INC.

1. ***Special Relationships as Sources of Duty.*** The *Dykema* court contrasted the facts of its case with a number of types of relationships that are typically treated as creating duties. Those cases, involving common carriers and their passengers, innkeepers and their guests, employers and their employees, landlords and their tenants, and businesses and their customers, have all been recognized as giving rise to duties in many common law decisions.

2. ***Attributes of Special Relationships that Support Recognition of Duty.*** Even if the *Dykema* court had decided that the plaintiff and defendant did have some type of special relationship, that would not be enough to support finding that a duty existed. The court noted that an analysis of many societal considerations would have to be made in order to see whether, even in the case of a special relationship, imposing a duty would be sensible. For instance, those relationships supporting the finding of a duty also involve plaintiffs who have given themselves over to (or have been placed in) the care of defendants.

3. ***Problem: Duty and Special Relationship.*** The plaintiffs attended a showing of a movie at a movie theater in a shopping mall. At the conclusion of the movie, the plaintiffs left the theater using a door that opened directly into the parking area. They drove a short distance and then encountered flash floods, which a severe rainstorm had caused near the theater. The manager of the theater had learned about the dangerous weather during the showing of the movie but had taken no steps to warn patrons. In this situation, should a court recognize a duty to warn of bad weather? See Mostert v. CBL & Associates, 741 P.2d 1090 (Wyo. 1987).

GRAFF v. BEARD

858 S.W.2d 918 (Tex. 1993)

CORNYN, J.

We are asked in this case to impose a common-law duty on a social host who makes alcohol available to an intoxicated adult guest who the host knows will be driving. For the reasons given below, we decline to do so. Accordingly, we reverse the judgment of the court of appeals and render a take-nothing judgment. Houston Moos consumed alcohol at a party hosted by the Graffs and Hausmons, and allegedly left in his vehicle in an intoxicated condition. En route from the party, Moos collided with a motorcycle, injuring Brett Beard. Beard sued both Moos and his hosts for his injuries. The trial court ultimately dismissed Beard's claims against the hosts for failure to state a cause of action. An en banc divided court of appeals reversed the trial court's judgment and remanded the case, holding for the first time in Texas jurisprudence that social hosts may be liable to third parties for the acts of their intoxicated adult guests.

Under the court of appeals' standard, a social host violates a legal duty to third parties when the host makes an alcoholic beverage available to an adult guest who the host knows is intoxicated and will be driving. In practical effect, this duty is twofold. The first aspect of the host's duty is to prevent guests who will be driving from becoming intoxicated. If the host fails to do so, however, a second aspect of the duty comes into play—the host must prevent the intoxicated guest from driving.

The legislatures in most states, including Texas, have enacted dram shop laws that impose a statutory duty to third parties on commercial providers under specified circumstances. . . . Because the dram shop statute applies only to commercial providers, however, it does not govern the duty asserted in this case. . . .

Deciding whether to impose a new common-law duty involves complex considerations of public policy. We have said that these considerations include " 'social, economic, and political questions,' and their application to the particular facts at hand." Among other factors, we consider the extent of the risk involved, "the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." We have also emphasized other factors. For example, questions of duty have turned on whether one party has superior knowledge of the risk, and whether a right to control the actor whose conduct precipitated the harm exists. See e.g., Seagram v. McGuire, 814 S.W.2d 385 (Tex. 1991) (declining to recognize a legal duty of an alcohol manufacturer to warn consumers against danger of alcoholism because the risk is common knowledge); *Greater Houston Transp. Co.*, 801 S.W.2d at 525 (citing Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1984); Restatement (Second) of Torts §315 (1965) (noting that no general duty exists to control the conduct of others)).

Following our decisions in *Seagrams* and *Otis Engineering Corp.*, we deem it appropriate to focus on two tacit assumptions underlying the holding of the court of appeals: that the social host can reasonably know of the guest's alcohol consumption and possible intoxication, and possesses the right to control the conduct of the guest. Under Texas law, in the absence of a relationship between the parties giving rise to the right of control, one person is under no legal duty to control the conduct of another, even if there exists the practical ability to do so. For example, in *Otis Engineering Corp.*

we held that an employer breached a duty of care to the public when he directed an intoxicated employee to drive home and the employee caused a fatal car crash. While we noted that there is no general duty to control the conduct of another, we recognized a duty in that instance because of the employer's authority over the employee. 668 S.W.2d at 309. As we later explained in *Greater Houston Transportation Co.*, our decision in *Otis* was premised on "the employer's *negligent exercise of control* over the employee," rather than on a general duty to prevent intoxicated individuals from driving. 801 S.W.2d at 526 (emphasis in original).

Instead of focusing on the host's right of control over the guest, the court of appeals conditioned a social host's duty on the host's "exclusive control" of the alcohol supply. The court defined "exclusive control," however, as nothing more than a degree of control "greater than that of the guest user." Under the court's definition, at a barbecue, a wedding reception, a back-yard picnic, a pachanga, a Bar Mitzvah — or a variety of other common social settings — the host would always have exclusive control over the alcohol supply because the host chooses whether alcohol will be provided and the manner in which it will be provided. The duty imposed by the court of appeals would apparently attach in any social setting in which alcohol is available regardless of the host's right to control the guest. Thus, as a practical matter, the host has but one choice — whether to make alcohol available to guests at all.

But should the host venture to make alcohol available to adult guests, the court of appeals' standard would allow the host to avoid liability by cutting off the guest's access to alcohol at some point before the guest becomes intoxicated. Implicit in that standard is the assumption that the reasonably careful host can accurately determine how much alcohol guests have consumed and when they have approached their limit. We believe, though, that it is far from clear that a social host can reliably recognize a guest's level of intoxication. First, it is unlikely that a host can be expected to know how much alcohol, if any, a guest has consumed before the guest arrives on the host's premises. Second, in many social settings, the total number of guests present may practically inhibit the host from discovering a guest's approaching intoxication. Third, the condition may be apparent in some people but certainly not in all. . . .

This brings us to the second aspect of the duty implicit in the court of appeals' standard: that should the guest become intoxicated, the host must prevent the guest from driving. Unlike the court of appeals, however, we cannot assume that guests will respond to a host's attempts, verbal or physical, to prevent the guests from driving. . . .

Ideally, guests will drink responsibly, and hosts will monitor their social functions to reduce the likelihood of intoxication. Once a guest becomes impaired by alcohol to the point at which he becomes a threat to himself and others, we would hope that the host can persuade the guest to take public transportation, stay on the premises, or be transported home by an unimpaired driver. But we know that too often reality conflicts with ideal behavior. And, given the ultimate power of guests to control their own alcohol consumption and the absence of any legal right of the host to control the guest, we find the arguments for shifting legal responsibility from the guest to the host, who merely makes alcohol available at social gatherings, unconvincing. As the common law has long recognized, the imbiber maintains the ultimate power and thus the obligation to control his own behavior: to decide to drink or not to drink, to drive or not to drive. We therefore conclude that the common law's focus should remain on the drinker as the person primarily responsible for his own behavior and best able to avoid the foreseeable risks of that behavior.

We accordingly reverse the judgment of the court of appeals and render judgment that Beard take nothing.

[Dissenting opinion omitted.]

NOTES TO GRAFF v. BEARD

1. ***Specificity of Duties.*** A court may recognize a general standard of care, such as a duty to act reasonably, or it may provide a more precise description of one's obligations in a particular setting. The degree of specificity may affect a court's analysis of the consequences of recognizing a duty.

In *Graff*, the Texas Court of Appeals recognized a "duty to third parties when the host makes an alcoholic beverage available to an adult guest who the host knows is intoxicated and will be driving." The Texas Supreme Court elaborated on that general description, stating that such a duty would require a host to prevent guests from becoming intoxicated and would require a host to prevent an intoxicated guest from driving. The court of appeals' version of this duty would have been applied by juries using a reasonable person test and might or might not have required the types of conduct the Texas Supreme Court described. The supreme court's vision of how hosts would be required to act to satisfy a duty apparently contributed to that court's assessment of the impracticality of such a duty.

2. ***Social Factor Analysis.*** When courts consider development of new duties, they often evaluate the possible duty in terms of various social factors. The *Graff* court noted, among others, foreseeablity of injury, the utility of an actor's conduct, and the burden of prevention. Of the factors presented by the court, which most strongly support its conclusion?

Statute: CIVIL LIABILITY FOR SOCIAL HOSTS

New Jersey Statutes Annotated 2A: 15-5.6 (1998)

a. This act shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages.

b. A person who sustains bodily injury or injury to real or personal property as a result of the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages may recover damages from a social host only if:

(1) The social host willfully and knowingly provided alcoholic beverages either:

(a) To a person who was visibly intoxicated in the social host's presence; or

(b) To a person who was visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and

(2) The social host provided alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and

(3) The injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host.

Statute: CIVIL LIABILITY OF PERSONS PROVIDING ALCOHOLIC BEVERAGES

Alaska Statutes §04.21.020(a) (2001)

(a) A person who provides alcoholic beverages to another person may not be held civilly liable for injuries resulting from the intoxication of that person unless the person who provides the alcoholic beverages holds a license authorized under [Alaska statutes] or is an agent or employee of such a licensee and

(1) the alcoholic beverages are provided to a person under the age of 21 years . . . unless the licensee, agent, or employee secures in good faith from the person a signed statement, liquor identification card, or driver's license . . . that indicates that the person is 21 years of age or older; or

(2) the alcoholic beverages are provided to a drunken person . . .

NOTES TO STATUTES

1. ***Duty of Care for Social Hosts Who Provide Alcohol.*** Graff v. Beard represents the strong majority view on this issue. An early opinion imposing a duty of care on social hosts in the alcohol-serving context was Kelly v. Grinnell, 476 A.2d 1219 (N.J. 1984). The New Jersey statute limits that duty in a variety of ways.

2. ***Dramshop Acts.*** The Alaska statute applies to persons with licenses to sell alcohol. It establishes that they owe a duty to people who are injured by intoxicated patrons. Statutes of this kind are known as dramshop acts. They apply only when a server continues to provide alcohol to a person who is drunk. Many states have adopted dramshop acts to overcome arguments by victims that liability should rest only on the intoxicated person. These statutes do not excuse the intoxicated person from liability. Instead, they make both the licensee *and* the intoxicated person potentially liable for the injuries.

3. ***Knowledge of Drunkenness.*** While this Alaska statute may appear to create liability whenever the person to whom alcohol is served is drunk, state statutes (including Alaska's) require proof of some knowledge on the part of the server. Common approaches require proof that the server knew or should have known that the person was intoxicated or that the server sold to or served a person who the server knew or should have known would become intoxicated.

EISEL v. BOARD OF EDUCATION OF MONTGOMERY COUNTY

597 A.2d 447 (Md. 1991)

RODOWSKY, J.

The legal theory advanced by the plaintiff in this wrongful death and survival action is that school counselors have a duty to intervene to attempt to prevent a

student's threatened suicide. The specific question presented is whether the duty contended for may be breached by junior high school counselors who fail to inform a parent of suicidal statements attributed to the parent's child by fellow students where, when the counselors sought to discuss the subject, the adolescent denied ever making the statements. The circuit court granted summary judgment for the defendants, premised on the absence of any duty. As explained below, we shall hold that summary judgment was erroneously entered.

The decedent, Nicole Eisel (Nicole), was a thirteen year old student at Sligo Middle School in Montgomery County. She and another thirteen year old girl consummated an apparent murder-suicide pact on November 8, 1988. Nicole's father, Stephen Eisel (Eisel), brought the instant action. His amended complaint alleges negligence on the part of two counselors at Nicole's school, among others. . . .

The amended complaint avers that Nicole became involved in satanism, causing her to have an "obsessive interest in death and self-destruction." During the week prior to the suicide, Nicole told several friends and fellow students that she intended to kill herself. Some of these friends reported Nicole's intentions to their school counselor, Morgan, who relayed the information to Nicole's school counselor, Jones. Morgan and Jones then questioned Nicole about the statements, but Nicole denied making them. Neither Morgan nor Jones notified Nicole's parents or the school administration about Nicole's alleged statements of intent. Information in the record suggests that the other party to the suicide pact shot Nicole before shooting herself. . . .

Given the peculiar mix of factors presented, it is an open question whether there is a duty to attempt to prevent an adolescent's suicide, by reasonable means, including, in this case, by warning the parent. Therefore, we must analyze whether we should recognize a duty in this case.

A tort duty is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Jacques v. First Nat'l Bank, 515 A.2d 756, 759 (1986) (quoting Prosser & Keeton on the Law of Torts §53, at 358 (5th ed. 1984)). "[A]mong the variables to be considered in determining whether a tort duty should be recognized are:

> '[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.' "

Village of Cross Keys, Inc. v. United States Gypsum Co., 556 A.2d 1126, 1131 (Md. 1989) (quoting Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334, 342 (Cal. 1976)).

Foreseeability is the most important variable in the duty calculus and without it there can be no duty to prevent suicide. Here Nicole's suicide was foreseeable because the defendants allegedly had direct evidence of Nicole's intent to commit suicide. . . .

The degree of certainty that Eisel and Nicole suffered the harm foreseen is one hundred percent.

Nor would reasonable persons necessarily conclude that the harm ceased to be foreseeable because Nicole denied any intent to commit suicide when the counselors

undertook to draw out her feelings, particularly in light of the alleged declarations of intent to commit suicide made by Nicole to her classmates. . . .

The General Assembly has made it quite clear that prevention of youth suicide is an important public policy, and that local schools should be at the forefront of the prevention effort. A Youth Suicide Prevention School Programs Act (the Act) was enacted by Chapter 122 of the Acts of 1986. . . . The uncodified preamble to the Act states that "[t]he rate of youth suicide has increased more than threefold in the last two decades," and that "[o]ver 5,000 young Americans took their lives [in 1985], including over 100 young people in Maryland. . . ."

Nicole's school had a suicide prevention program prior to her death. Eisel requested that the Superintendent of Schools for Montgomery County produce "all published rules . . . or other written directives available as of November 1, 1988, to . . . counselors . . . or other school system staff relating to staff responses to alleged student intent to commit suicide." In response, the superintendent produced, inter alia, a memorandum dated February 18, 1987, from the office of the principal to the staff of Sligo Middle School on the subject of "Suicide Prevention." . . .

There is no indication in the Act that the Legislature intended to create a statutorily based cause of action against school counselors who negligently fail to intervene in a potential suicide. Nevertheless, holding counselors to a common law duty of reasonable care to prevent suicides when they have evidence of a suicidal intent comports with the policy underlying this Act.

[Closeness of connection between conduct and injury] is the proximate cause element of a negligence action considered on the macroscale of policy. Consideration is given to whether, across the universe of cases of the type presented, there would ordinarily be so little connection between breach of the duty contended for, and the allegedly resulting harm, that a court would simply foreclose liability by holding that there is no duty. . . .

The defendants say that the law considers suicide to be "a deliberate, intentional and intervening act which precludes a finding that a given defendant is responsible for the harm." Defendants cite McLaughlin v. Sullivan, 123 N.H. at 339, 461 A.2d at 125, where the court held that an attorney's alleged malpractice, in not requesting a stay of sentence or bail pending appeal in a criminal case, could not have been the proximate cause of the client's suicide in jail during the first day of confinement following conviction. Here, however, we deal with the relationship between an adolescent and school counselors who allegedly were informed that the adolescent was suicidal. Legally to categorize all suicides by adolescents as knowing and voluntary acts which insulate the death, as a matter of law, from all other acts or omissions which might operate, in fact, as causes of the death is contrary to the policy manifested by the Act. The Act does not view these troubled children as standing independently, to live or die on their own. In a failure to prevent suicide case, Maryland tort law should not treat an adolescent's committing suicide as a superseding cause when the entire premise of the Act is that others, including the schools, have the potential to intervene effectively. . . .

Moral blame as a factor to be weighed in deciding whether to recognize a legal duty in tort is less than an intent to cause harm. This factor considers the reaction of persons in general to the circumstances. Is it the sense of the community that an obligation exists under the circumstances? Certainly if classmates of Nicole found her lying on the floor of a lavatory, bleeding from slashed wrists, and those students told one or more

teachers of the emergency, society would be outraged if the teachers did nothing and Nicole bled to death. Here, the information allegedly received by the counselors involved intent, not a description of physical facts. The distinction does not form a bright line separating duty from the absence of duty. The youth suicide prevention programs provided for by the Act call for awareness of, and response to, emotional warning signs, thus evidencing a community sense that there should be intervention based on emotional indicia of suicide. . . .

The harm that may result from a school counselor's failure to intervene appropriately when a child threatens suicide is total and irreversible for the child, and severe for the child's family. It may be that the risk of any particular suicide is remote if statistically quantified in relation to all of the reports of suicidal talk that are received by school counselors. We do not know. But the consequence of the risk is so great that even a relatively remote possibility of a suicide may be enough to establish duty. We pointed out in Jacques v. First Nat'l Bank, 515 A.2d 756, 761 (1986), that "[a]s the magnitude of the risk increases, the requirement of privity is relaxed — thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury."

Moreover, when the risk of death to a child is balanced against the burden sought to be imposed on the counselors, the scales tip overwhelmingly in favor of duty. Certainly the physical component of the burden on the counselors was slight. Eisel claims only that a telephone call, communicating information known to the counselors, would have discharged that duty here. We agree.

The counselors argue that there are elements of confidentiality and discretion in their relationships with students that would be destroyed by the imposition of a duty to notify parents of all reports of suicidal statements. Confidentiality does not bar the duty, given that the school policy explicitly disavows confidentiality when suicide is the concern.

The defendants further point out that counselors are required to exercise discretion when dealing with students. Their discretion, however, cannot be boundless when determining whether to treat a student as a potential suicide. Discretion is relevant to whether the standard of conduct has been breached under the circumstances of a given case. Discretion does not create an absolute immunity, which would be the effect of denying any duty.

[With regard to community consequences of liability and insurability, statutes] allow a county board of education to "raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy or, if self-insured or a member of a pool . . . above $100,000." The Board participates in the Montgomery County self-insurance program. . . . Recognizing the duty contended for by Eisel in this case would not appear to have any substantial adverse impact on this legislative scheme, or on the community at large.

The Centers for Disease Control (CDC) in Atlanta has reported on a new survey of high school students, which revealed that twenty-seven percent "thought seriously" about suicide in the preceding year, and "one in 12 said they had actually tried." *The Sun* (Baltimore), Sept. 20, 1991, at 3A, col. 3. The CDC report noted that suicide rates among teenagers between fifteen and nineteen years old had quadrupled between 1950 and 1988. The General Assembly had similar numbers before it when it adopted the Act. "Changing social conditions lead constantly to the recognition of new duties."

Prosser & Keeton on The Law of Torts §53, at 359 (5th ed. 1984) (footnote omitted); see, e.g., B.N. v. K.K., 312 Md. 135, 538 A.2d 1175 (1988) (transmission of herpes).

Considering the growth of this tragic social problem in the light of the factors discussed above, we hold that school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent. On the facts of this case as developed to date, a trier of fact could conclude that that duty included warning Eisel of the danger.

[Judgment reversed and case remanded.]

NOTES TO EISEL v. BOARD OF EDUCATION OF MONTGOMERY COUNTY

1. ***Duty as a Limit on Liability.*** The trial court granted summary judgment to the defendant, holding that there was an "absence of any duty." Under that analysis, the defendant had no obligation to act reasonably in any of its actions that might have had a causal connection to the suicide of the plaintiff's decedent. The appellate court reversed, in a duty analysis that considered a range of factors to determine whether a type of defendant owes a duty to a type of plaintiff to act reasonably with regard to a type of harm. Does the appellate decision require a judgment for the plaintiff at trial?

2. ***Foreseeability.*** One of the factors analyzed by the appellate court is foreseeability. Just as Justice Cardozo considered whether Ms. Palsgraf was a reasonably foreseeable plaintiff in *Palsgraf,* Justice Rodowsky in *Eisel* held that it was foreseeable that the decedent would incur the harm she suffered. For Justice Cardozo, there is a duty if it is reasonably foreseeable to someone in the defendant's position that a person in the plaintiff's position will suffer the type of harm that actually occurred. The opinion in *Eisel* illustrates a broader range of considerations involved when a court faces a situation it has not previously confronted.

3. ***Burdens a Duty Would Impose.*** The *Eisel* court considered whether recognizing a duty in the circumstances of the case would cause significant burdens to those on whom the duty was imposed. It noted that something as inexpensive as a telephone call could satisfy the duty it recognized. That observation, along with consideration of other factors, led the court to conclude that a school system has a duty to attempt to prevent a suicide by reasonable means. In a future school suicide case, does a defendant school system automatically win if the defendant makes a phone call?

4. ***Problem: Is There a Duty?*** The plaintiff was riding a horse on a bridle path in a suburban area. Part of the bridle path was alongside a street. The driver of a garbage truck drove down the street, stopped the truck, and operated its noisy machinery to collect some garbage. The noise of the truck made the horse bolt, and the plaintiff was injured.

The plaintiff sought damages from the operator of the garbage truck. The defendant argued that the operator of a socially beneficial machine or apparatus who uses it for its intended purpose should have no duty to protect horses from fright and no duty for any consequences related to fright suffered by horses. Could the factors that the *Eisel* court enumerated support a court's adoption of the no-duty position suggested by the defendant? See Parsons v. Crown Disposal Co., 936 P.2d 70 (Cal. 1997).

Perspective: Duty and Foreseeable Risks

The debate over whether there is a duty to the whole world (Justice Andrews' position) or to people foreseeably harmed (Justice Cardozo's position) continued 74 years later, during the American Law Institute's drafting of the Restatement (Third) of Torts. Professor Richard W. Wright, *Extent of Legal Responsibility,* 54 Vand. L. Rev. 1071, 1093-1094 (2001), argues forcefully that the Restatement (Second) of Torts adopted the Cardozo view. He points to §281(b), which says that an actor is liable for an invasion of an interest of another if "the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included." Then he quotes the Restatement's comment c to this section:

> In order for the actor to be negligent with respect to the other, his conduct must create a recognizable (foreseeable) risk of harm to the other individually, or to a class of persons — as, for example, all persons within a given area of danger — of which the other is a member. If the actor's conduct creates such a recognizable (foreseeable) risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Professor Wright observes that this limitation to foreseeable plaintiffs cannot reasonably be construed as a limitation on proximate cause, as Justice Andrews preferred, quoting §430 comment a:

> The actor's conduct, to be negligent toward another, must involve an unreasonable risk of:
>
> (1) causing harm to a class of persons of which the other is a member and
> (2) subjecting the other to the hazard from which the harm results.

Until it has been shown that these conditions have been satisfied and that the actor's conduct is negligent, the question of the causal relation between it and the other's harm is immaterial.

The current draft of the Restatement (Third) of Torts §6 (Proposed Final Draft No. 1, April 26, 2005) reflects the result of intensive debates and close votes over the merits of Cardozo's and Andrews' opinions. Comment b states:

> Ordinarily, an actor whose conduct creates risks of physical harm to others has a duty to exercise reasonable care. Except in unusual categories of cases in which courts have developed no-duty rules, an actor's duty to exercise reasonable care does not require attention from the court.

That section, which applies to physical harm, identifies four elements of a prima facie claim of negligence: (1) failure to use reasonable care, (2) cause-in-fact, (3) physical harm, and (4) "harm within the scope of liability." This is consistent with Andrews's perspective. Section 7, however, acknowledges that policy reasons may justify denying or limiting liability in particular classes of cases.

The *Graff* and *Eisel* cases illustrate the use of policy considerations in particular classes of cases. Foreseeability of the plaintiff and the harm may be taken into account in analysis of the fourth element described above, much as Andrews limited liability in his proximate cause analysis.

III. Proximate Cause

A. Introduction

A torts plaintiff must do more than show that a defendant's conduct was a cause-in-fact of the plaintiff's harm. The plaintiff must also satisfy the requirement of *proximate cause*. This requirement expresses the law's policy judgment that in some cases it would be unfair to make defendants pay for all of the harms associated with their conduct. Proximate cause doctrines reflect the idea that the defendant's conduct and the plaintiff's harm must have a connection that is reasonably close in order to justify imposing liability on the defendant.

Complex Doctrines. While "proximate" literally means "near," "close," or "imminent," these definitions do not help in understanding proximate cause. In legal causation, "proximate" means that a defendant's act satisfies whatever policy criteria a jurisdiction uses to treat a harm a person causes as one the person must pay for, instead of as one that the person may inflict for free.

Courts have articulated three main approaches to proximate cause. The *directness* test treats a defendant's conduct that is a cause-in-fact of a plaintiff's harm as a proximate cause if there are no intervening forces between the defendant's act and the plaintiff's harm. The *foreseeability* test treats a cause-in-fact as a proximate cause if the plaintiff's harm was reasonably foreseeable. The *substantial factor* test treats a defendant's conduct as a proximate cause of a plaintiff's harm if the conduct is important enough, compared to other causes of the harm, to justify liability.

Simple Applications. In almost all cases, courts treat proximate cause as a question of fact for the jury. This limits appellate review. Courts will reject appeals on proximate cause grounds if the jury received proper instructions and some evidence supports the jury's verdict.

Further insulating proximate cause issues from judicial review is the practice of using fairly general jury instructions about proximate cause. In a great many states, the jury will be instructed that "a proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." See, e.g., Russell v. K-Mart Corp. 761 A.2d 1 (Del. 2000); Cruz-Mendez v. ISU/Insurance Servs., 156 N.J. 556 (1999); Torres v. El Paso Elec. Co., 172 N.M. 729 (1999). Note that this instruction is consistent, to varying extents, with the foreseeability test, the directness test, and the substantial factor test.

Understanding Proximate Cause in Practice. In each jurisdiction, the accepted doctrines of proximate cause are the background against which litigants

attempt to structure their cases and attempt to persuade juries. The doctrines are also the context in which an occasional jury decision may be subject to reversal. For these reasons, developing an understanding of the rival views is important.

B. Directness

Under the direct cause test, an act that is a cause-in-fact of an injury will be treated as a proximate cause of the injury if there is a direct connection between the act and the injury. Note that under this doctrine, even if the defendant's act is a but-for cause of the plaintiff's harm, the plaintiff may sometimes fail to establish proximate cause. In the language of some courts, an additional act subsequent to the defendant's can "break the chain of causation" or "divert" the force created by the defendant's negligence and "make the injury its own." *In re Polemis* is a classic British case applying a direct cause test. The opinions also consider whether another test, the foreseeability test, should be used. Laureano v. Louzoun is a modern American application of the directness test.

IN RE AN ARBITRATION BETWEEN POLEMIS AND FURNESS, WITHY & CO., LTD.

3 K.B. 560 (Ct. App. 1921)

[The owners of a Greek steamship, the Thrasyvoulos, sought damages for the total loss of the ship due to fire. The ship carried a cargo of cement and general cargo as well as benzine and petrol and iron to Casablanca. After arrival in Casablanca in July of 1917, a portion of the Thrasyvoulos' cargo was removed by stevedores sent on board by the people who had chartered the boat. On July 21, the stevedores placed heavy wooden planks across one of the ship's holds to serve as a platform while moving some of the cases of cargo. The cargo was raised using slings, which held the cases, and a winch, which raised and lowered the slings. There had been leakage of benzine or petrol into that hold, and there was a considerable amount of petrol vapor present.] In the course of heaving a sling of the cases from the hold, the rope by which the sling was being raised or the sling itself came into contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold, and the fall was instantaneously followed by a rush of flames from the lower hold, and this resulted eventually in the total destruction of the ship.

The owners contended (so far as material) that the charterers were liable for the loss of the ship; that fire caused by negligence [was a type of loss for which the charterers could be found liable under the terms of the charter], and that the ship was in fact lost by the negligence of the stevedores, who were the charterers' servants, in letting the sling strike the board, knocking it into the hold, and thereby causing a spark which set fire to the petrol vapour and destroyed the ship.

The charterers contended that fire however caused was [not the type of loss for which the charterers could be found liable]; that there was no negligence for which the charterers were responsible, inasmuch as to let a board fall into the hold of the ship could do no harm to the ship and therefore was not negligence towards the owners; and that the danger and/or damage were too remote — i.e., no reasonable man would have foreseen danger and/or damage of this kind resulting from the fall of the board.

[Arbitrators found that (1) the stevedores negligently caused the board to fall, which created a spark that ignited the petrol in the hold; (2) causing the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated; and (3) damages suffered by the owners amounted to £196,165. Sankey, J., affirmed the award, and the charterers appealed.]

BANKES L.J. . . .

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. . . . Given the breach of duty which constitutes the negligence, and given the damages as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

SCRUTTON L.J. . . .

The . . . defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. . . . To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. . . . In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damages either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. . . .

LAUREANO v. LOUZOUN

560 N.Y.S.2d 337 (N.Y. App. Div. 1990)

Memorandum by The Court. . . .

On January 21, 1985, the plaintiff, a tenant in the defendants' premises, arose from bed at approximately 5 a.m. and put two large pots of water on her stove to boil. While

in the process of pouring the boiling water from one pot into the other, the plaintiff banged the pots against each other, causing the boiling water to spill onto her knee and feet. The plaintiff commenced the instant action, alleging, inter alia, that the defendants' negligence in failing to provide heat and hot water to the premises and in failing to maintain the boiler in proper working condition caused the incident and her resulting injuries. The plaintiff further alleged that the defendants had constructive notice of the defective condition at least two weeks prior to the incident, as well as actual notice. The defendants moved for summary judgment on the ground that their conduct was not, as a matter of law, the proximate cause of the plaintiff's injuries. The trial court granted the motion holding that "[t]here was no connection of proximate cause between the lack of heat and the accident." We affirm.

The defendants' failure to provide heat and hot water to the premises was not the proximate cause, as a matter of law, of the injuries sustained by the plaintiff. While the defendants' conduct gave rise to the plaintiff's attempt to provide a substitute supply of heat, the act of boiling water was not the direct cause of the injuries. Rather, the intervening act of banging one pot against the other brought about the injuries sustained by the plaintiff. Those injuries would not have resulted from the failure to supply hot water alone, and cannot be classified as injuries normally to have been expected to ensue from the landlord's conduct.

NOTES TO IN RE POLEMIS AND LAUREANO v. LOUZOUN

1. ***Simplicity of the Direct Cause Test.*** Judicial opinions finding that an act is a *direct cause* of a plaintiff's harm usually involve situations where all would agree that the connection between the defendant's act and the plaintiff's harm was so close that the defendant should be liable. The direct cause test is, however, not limited to clear-cut cases. Laureano v. Louzoun demonstrates that the directness test can limit liability without any complicated analysis. In Laureano v. Louzoun, the court describes three acts: the landlord's inadequate operation of the apartment's heating system, the tenant's boiling of water, and the tenant's banging pots together. Was the landlord's act a direct cause of either one of the tenant's acts? Does the court make clear how it decides what effects are directly related to an actor's conduct and what effects are not directly related to it?

2. ***Liability for Unforeseen Harms.*** The directness approach may lead to liability for unexpected consequences, as *In re Polemis* illustrates. Dropping a wooden board into the hull of a ship might foreseeably cause a dent in the ship, but is a fire foreseeable? Arguing that other tests are unclear, an opinion in *Polemis* states that a negligent defendant must pay for damage related to negligent conduct "so long as the damage is in fact directly traceable" to that conduct. Does the opinion define "directly traceable"? How do the *Polemis* opinions justify placing the cost of the fire on an actor whose negligent conduct could have been expected to cause only a dent in the ship?

3. ***Problem: The Direct Cause Test.*** A ten-year-old boy picked up a metal box that contained some blasting caps while he was walking to school on a path near a mining company's facilities. A foreman employed by the mining company had thrown the box away, thinking that the caps inside it were empty. The boy's mother and father saw him play with the caps. After a few days, the boy traded the caps to another boy in exchange for writing paper. The other boy was seriously wounded when the caps

exploded as he played with them. How would the direct cause test treat the relationship between the foreman's conduct and the victim's injury? See Pittsburg Reduction Co. v. Horton, 113 S.W. 647 (Ark. 1908).

4. *Directness and Foreseeability.* The foreseeability concept shows up at the end of the court's discussion of direct cause in Laureano v. Louzoun. It is not unusual for a court to combine various tests for proximate cause, either intentionally or without apparent recognition that it has happened.

Statute: OCCUPATIONAL DISEASES; PROXIMATE CAUSATION

N.M. Stat. §52-3-32 (2002)

The occupational diseases defined in Section 52-3-33 NMSA 1978 shall be deemed to arise out of the employment only if there is a direct causal connection between the conditions under which the work is performed and the occupational disease and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. In all cases where the defendant denies that an alleged occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony. No award of compensation benefits shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists.

NOTE TO STATUTE

Special Rules for Special Circumstances. States sometimes adopt different cause rules for different purposes. New Mexico has adopted the following rule for proximate cause in routine cases: "[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about." Torres v. El Paso Electric Co., 987 P.2d 386, 396 (1999). Like many other states, New Mexico has adopted a different rule for workers' compensation cases — cases involving injuries arising out of employment. How is the New Mexico proximate cause rule for workers' compensation cases different from its proximate cause rule for routine cases?

Perspective: The Necessity of a Proximate Cause Doctrine

Because a multitude of antecedent events are logically and physically necessary to produce any tort victim's harm, the cause-in-fact test is a very blunt tool for deciding who should be liable to the victim:

The "but for" test does not provide a satisfactory account of the concept of causation if the words "in fact" are taken seriously. *A* carelessly sets his alarm one hour early. When he wakes up the next morning he has ample time before work and decides to take an early morning drive in the country. While on the road he is spotted by *B*, an old college roommate, who becomes so excited that he runs off the road and hurts *C*. But for the negligence of *A*, *C* would never have been injured, because *B* doubtless would have continued along his uneventful way. Nonetheless, it is common ground that *A*, even if negligent, is in no way responsible for the injury to *C*, caused by *B*.

Its affinity for absurd hypotheticals should suggest that the "but for" test should be abandoned as even a tentative account of the concept of causation. But there has been no such abandonment. Instead, it has been argued that the "but for" test provides a "philosophical" test for the concept of causation which shows that the "consequences" of any act (or at least any negligent act) extend indefinitely into the future. But there is no merit, philosophic or otherwise, to an account of any concept which cannot handle the simplest of cases, and only a mistaken view of philosophic inquiry demands an acceptance of an account of causation that conflicts so utterly with ordinary usage.

Once the "philosophical" account of causation was accepted, it could not be applied in legal contexts without modification because of the unacceptable results that it required. The concept of "cause in law" or "proximate" cause became necessary to confine the concept within acceptable limits.

See Richard A. Epstein, *A Theory of Strict Liability,* 2 J. Legal Stud. 151, 160 (1973).

C. Foreseeability

1. Linking Liability to Foreseeability

A number of courts reject the direct cause test and rely on a foreseeability test. When a defendant's conduct is a cause-in-fact of a plaintiff's harm, the foreseeability approach treats the conduct as a proximate cause of the harm if the possibility of that harm was within the range of risks that supported the original characterization of the defendant's conduct as negligent.

Tieder v. Little presents a typical application of the foreseeability test, showing that the test is not self-applying but that it involves descriptions of the type of harm the defendant risked and the type of harm that the plaintiff suffered. McCain v. Florida Power Corporation illustrates the relationship between the foreseeability tests for proximate cause and for duty.

TIEDER v. LITTLE

502 So. 2d 923 (Fla. Dist. Ct. App. 1987)

HUBBART, J. . . .

On January 7, 1983, at approximately 9:00 p.m., the plaintiffs' decedent, Trudi Beth Tieder, was struck by an automobile, pinned up against a brick wall, and killed

when the wall collapsed on her—as she walked out the front door of Eaton Hall dormitory on the University of Miami campus. At the time, two students were attempting to clutch-start an automobile in the circular drive in front of Eaton Hall—one student was pushing the car while the other student was in the car behind the wheel—when, suddenly, the student behind the wheel lost control of the car. The automobile left the circular driveway, lurched over a three-inch curb onto a grassy area, and traveled some thirty-three feet across the front lawn parallel to Eaton Hall. The automobile collided with an elevated walkway leading out of the front door of Eaton Hall, jumped onto the walkway, and struck the plaintiffs' decedent as she walked out the front door of the dormitory. The automobile continued forward, pinning the decedent against a high brick wall that supported a concrete canopy at the entrance to the dormitory. Because the wall was negligently designed and constructed without adequate supports required by the applicable building code, the entire wall came off intact from its foundation and crushed her to death. Dr. Joseph Davis, the Dade County Medical Examiner, averred by affidavit that in his opinion the decedent would not have died merely from the automobile impact; in his opinion, she died as a result of the brick wall falling intact and in one piece upon her. Two affidavits of professional engineers were also filed below detailing the negligent design and construction of the subject brick wall.

The plaintiffs Sheila M. Tieder and Richard J. Tieder, administrators of the estate of Trudi Beth Tieder, brought a wrongful death action against: (1) the owner and the operator of the automobile (not parties to this appeal), (2) Robert M. Little, the architect who designed the allegedly defective brick wall, and (3) the University of Miami, which caused the said brick wall to be erected and maintained. The amended complaint charged the defendant Little and the University of Miami with various acts of negligent conduct including negligence in the design and construction of the brick wall. The defendant Little moved to dismiss the complaint against him and urged that his alleged negligence was not, as a matter of law, the proximate cause of the decedent's death because the entire accident was so bizarre as to be entirely unforeseeable; the University of Miami moved for a summary judgment in its favor and made the same argument. The trial court agreed and granted both motions. . . . The plaintiffs appeal. . . .

At the outset, the "proximate cause" element of a negligence action embraces, as a sine qua non ingredient, a causation-in-fact test, that is, the defendant's negligence must be a cause-in-fact of the plaintiff's injuries. Generally speaking, Florida courts have followed a "but for" causation-in-fact test, that is, "to constitute proximate cause there must be such a natural, direct and continuous sequence between the negligent act [or omission] and the [plaintiff's] injury that it can be reasonably said that but for the [negligent] act [or omission] the injury would not have occurred." Pope v. Pinkerton-Hays Lumber Co., 120 So. 2d 227, 230 (Fla. 1st DCA 1960). . . .

In addition to the causation-in-fact test, the "proximate cause" element of a negligence action includes a second indispensable showing. This showing is designed to protect defendants from tort liability for results which, although caused-in-fact by the defendant's negligent act or omission, seem to the judicial mind highly unusual, extraordinary, or bizarre, or, stated differently, seem beyond the scope of any fair assessment of the danger created by the defendant's negligence. The courts here have required a common sense, fairness showing that the accident in which the plaintiff suffered his injuries was within the scope of the danger created by the defendant's

negligence or stated differently, that the said accident was a reasonably foreseeable consequence of the defendant's negligence.

It is not necessary, however, that the defendant foresee the exact sequence of events which led to the accident sued upon; it is only necessary that the general type of accident which has occurred was within the scope of the danger created by the defendant's negligence, or, stated differently, it must be shown that the said general-type accident was a reasonably foreseeable consequence of the defendant's negligence. For example, it has been held that injuries sustained by business patrons while attempting to escape from a fire in a cafeteria or a hotel were within the scope of the danger and a reasonably foreseeable consequence of the cafeteria or hotel's negligence in failing to have adequate fire exits — even though the exact sequence of events which led to the fire, namely, a mad arsonist setting the building aflame, was entirely unforeseeable. Concord Florida, Inc. v. Lewin, 341 So. 2d 242 (Fla. 3d DCA 1976). Moreover, it has long been held that "proximate cause" issues are generally for juries to decide using their common sense upon appropriate instructions, although occasionally when reasonable people cannot differ, the issue has been said to be one of law for the court.

Turning now to the instant case, we have no difficulty in concluding that the trial court erred in dismissing the complaint against the defendant Little and in entering a final summary judgment in favor of the University of Miami. This is so because the complaint sufficiently alleges the proximate cause element herein as to the defendant Little, and the record raises genuine issues of material fact with reference to the same element as to the defendant University of Miami.

Plainly, the alleged negligence in designing and constructing the brick wall adjoining the entrance way to Eaton Hall in this case was a cause-in-fact of the accident which led to the death of the plaintiffs' decedent. It is alleged that the said wall was designed and built with insufficient supports as required by the applicable building code so that, when it was impacted in this case, it fell over intact, and in one piece, on the decedent. Dr. Joseph Davis, the Dade County Medical Examiner, avers that in his opinion the decedent died as a result of the brick wall falling intact upon her. "But for" the negligent design and construction of the brick wall which led to its collapse in one piece, then, the decedent would not have died. A jury question is therefore presented on this aspect of the proximate cause element.

The foreseeability aspect of the proximate cause element is also satisfied in this case for the complaint dismissal and summary judgment purposes. The collapse of a brick wall resulting in the death of a person near such wall is plainly a reasonably foreseeable consequence of negligently designing and constructing such a wall without adequate supports in violation of applicable building codes — even though the exact sequence of events leading to the collapse of the wall — as in this case, the bizarre incident involving the clutch-started automobile leaving the circular driveway and striking the wall — may have been entirely unforeseeable. The general-type accident which occurred in this case — namely, the collapse of the brick wall resulting in the decedent's death — was entirely within the scope of the danger created by the defendants' negligence in designing and constructing the wall without adequate supports, and was a reasonably foreseeable consequence of such negligence. Just as injuries sustained by business patrons in attempting to escape a fire in a cafeteria or hotel was a reasonably foreseeable consequence of the cafeteria or hotel's negligence in failing to have adequate fire exits, even though the act of the arsonist in setting the building aflame was entirely unforeseeable — so too the death of the plaintiffs' decedent was entirely foreseeable in

this case even though the exact sequence of events leading to the collapse of the wall may have been unforeseeable. This being so, a jury issue is presented on the proximate cause element as pled in the complaint and revealed by this record. . . .

The final order of dismissal and the final summary judgment under review are both reversed and the cause is remanded to the trial court for further proceedings.

Reversed and remanded.

NOTES TO TIEDER v. LITTLE

1. ***Foreseeability Test for Proximate Cause.*** The *Tieder* court states that whether an injury "was a reasonably foreseeable consequence of the defendant's negligence" is the same as whether the injury "was within the scope of the danger created by the defendant's negligence." Note the similarity to Justice Cardozo's test for when there is a duty. What was the "scope of the danger" caused by the defendant's conduct in *Tieder*?

2. ***Degree of Generality in Describing Foreseeable Risks and Plaintiffs' Injuries.*** The plaintiff in *Tieder* had also alleged that the university was negligent in building the circular drive with an inadequate barrier around it. The lack of a barrier was a but-for cause because if there had been a barrier, the out-of-control car would not have pinned Tieder to the wall. How does the foreseeability analysis for proximate cause apply to the lack of a barrier and the injury caused by a falling wall? A highly precise and specific description of the risks related to an inadequate barrier would not involve physical injury due to a falling wall. A very general description, something like "injury to a human being," might find proximate causation in all cases. In the context of the inadequate barrier claim, how would lawyers for the plaintiff and defendant each characterize the risk the defendant created and the harm the plaintiff suffered?

3. ***Problem: Can an Unusual Accident Be Foreseeable?*** One afternoon, telephone company workers were repairing cables located under a road that was fairly far away from residences. The workers removed the cover of a manhole and entered a chamber nine feet deep under the road. They put up a canvas tent over the manhole and placed four red oil-burning lamps around the tent and their equipment. After dark, they left the worksite. They removed a ladder from the manhole and put it on the ground next to the tent. Two young boys then came to the tent and attempted to explore the manhole and underground chamber. One of the lamps was either knocked or dropped into the manhole and a violent explosion occurred. One of the boys suffered severe burning injuries, the most disabling of which were to his fingers, which were probably caused by his trying to hold on to and climb up the metal rungs of the ladder out of the manhole after the metal became intensely hot as a result of the explosion. The injured boy claimed that he had stumbled over the lamp and knocked it into the hole when a violent explosion occurred, and he himself fell in. When the lamp was recovered from the manhole, its tank was half empty and its wick-holder was completely out of the lamp. The explanation of the accident that was accepted was that when the lamp fell down the hole and was broken, some fuel escaped, and enough was vaporized to create an explosive mixture, which was detonated by the lamp's flame.

If the defendant's employees were negligent either in leaving the work site unattended or in locating the warning lamps, how would the foreseeability test treat liability for the injury to the boy's fingers? See Hughes v. Lord Advocate, 1 All E.R. 705 (1963).