Problems in the Application of Duty-Risk Analysis to Jury Trials in Louisiana

Mark Meyers
COMMENTS

PROBLEMS IN THE APPLICATION OF DUTY-RISK ANALYSIS TO JURY TRIALS IN LOUISIANA

Introduction

The acceptance and judicial evolution of legal rules of conduct are guided by the recognition that they are designed only to protect some persons under some circumstances against some risks. The development of tort law is characterized by the identification of such rules of conduct and the attempt to provide an analytical framework for determining which interests of the individual require protection and under what circumstances such protection should be afforded. That all interests are not extended unlimited protection is due to the countervailing necessity of preserving, because of the benefits to the collective whole, the freedom of individual human action. It is generally agreed that activity falling below a certain standard of care which causes injury to another should be punished, but in conjunction with this exists the common feeling that a man should not be held responsible for all consequences of his conduct no matter how attenuated the causal relation. The law, it seems, is geared towards striking "a more or less instinctive compromise between the logical implications of the two points

1. Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60, 73 (1956). Professor Malone's article contains invaluable insights into the mental processes involved in the disposition of a tort case, and for this reason will be referred to extensively in the course of this work.

2. L. Green, Rationale of Proximate Cause 6 (1927). Professor Green asserts: "At the foundation of every lawsuit, this problem of interests must necessarily arise." Id. Seldom is protection demanded for an interest which the jurisprudence has previously not had an opportunity to consider. The problem lies in ascertaining whether the interest should be accorded protection under a particular set of facts.

3. Edgerton, Legal Cause, 72 U. Pa. L. Rev. 211, 349 (1924). Courts simply refuse to recognize all actually-caused consequences because of the acute unfairness that this would entail. Holmes viewed the problem from an economic perspective as follows: "The public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor." O. Holmes, The Common Law 107 (1881).
of view." Judicial opinions reflect the constant juggling of the value of deterring the behavior with the justice of shifting the loss from the injured to the injurer.

Drawing the parameters of the rule of conduct so as to effect the proper balance is an issue with which the judicial system is destined to wrestle. Analytical tools are used to frame the issue in such a way as to provide for a clear focus on, and cogent articulation of, the considerations which of necessity are present in every case. Forty-nine states employ a language technique called "proximate cause." Like all legal phrases, "proximate cause" was originally intended as merely a term of art, but it has come to assume the role of a talismanic standard often imbued with a mystical outcome-determinative nature of its own. The degree to which a language technique captures the substantive considerations entering into the actual decisional calculus is an appropriate gauge of its analytical and communicative worth. Because an explanation of the rational process of judgment is obscured by the reflexive invocation of the phrase, "proximate cause" is sorely lacking as a language technique. Only Louisiana has sought to free itself from the "chrysalis of causation jargon" spun from the pens of appellate court decisions.

4. Edgerton, supra note 3, at 349 n.136.
5. L. Green, Judge and Jury 43-49 (1930). The term "language technique" refers to the adoption and consistent use of certain key terms for the purpose of communicating the mental process involved in judicial decision-making. Language techniques are not self-executing, but in directing the decision-making process they may be more or less successful in prompting consideration of what should be the dispositive factors. See notes 50-78, infra, and accompanying text.
6. Dean Green aptly observes:
   It is not that a scientific language device is not desirable. It is merely that too much emphasis has been put upon it, and too much expected of it. The attempt has been made and still is made to make language do the service of judging itself. There can be no such substitution. Words are the machinery by which the power of thought is handled, but if there is no such power put into them the words are lifeless. In the administration of law, both the judge who surrenders this power to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill.

L. Green, supra note 5, at 47. See Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633 (1920); Carpenter, Workable Rules for Determining Proximate Cause, 20 Cal. L. Rev. 229 (1932); Green, Are There Dependable Rules of Causation?, 77 U. Pa. L. Rev. 601 (1929); James & Perry, Legal Cause, 60 Yale L. Rev. 761 (1951).
7. Malone, Ruminations on Dixie Drive-it-Yourself v. American Beverage
late judges and legal scholars to envelop "proximate cause," by its relatively recent adoption of duty-risk analysis. The emphasis here is not only upon the implementation of a new language technique, but upon the restructuring of the judge-jury relationship with the hope of transforming torts jurisprudence into a more aggressive and efficient method of social engineering.8

Previous law review comments upon Louisiana appellate court decisions have hailed the advent of duty-risk as a triumph of reason over the tyranny of proximate cause rules.9 As yet, however, the feasibility of a specific application of this approach on the district court level has not been considered.10 With regard to the traditional allocation of judge-jury functions within the framework of proximate cause analysis and the language technique therein employed, it is the aim of this work to clarify the practical problems inherent in the implementation of duty-risk in Louisiana jury trials.

The Conceptual Framework of Duty-Risk

The chief proponent of duty-risk analysis, Dean Leon Green, has as a central tenet of his theory of torts litigation the definitive disjunction of the roles of fact-finder and law-maker. The task of law-making is to be reserved for the judge as the one most qualified to deal with the balancing of social interest.11 Under proximate cause, however, the jury is permitted to

8. L. Green, supra note 5; L. Green, supra note 2.
9. See Malone, supra note 7; Robertson, Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Assoc., Inc., 34 LA. L. REV. 1 (1973). These two articles are the definitive works on duty-risk in Louisiana. Both contain a concise explanation of duty-risk analysis and an assessment of the relative success of the appellate courts in applying the formula. Each scholar applauds the efforts of the Louisiana judiciary in attempting to raise the veil from the policy factors underlying tort law.
10. Robertson, supra note 9, at 15 n.30.
11. L. Green, supra note 5. See also Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV. 1014 (1928), wherein he states:
[I]t would be passing strange if the delimitation of the law's protection, duty vel non, is to be passed over to the jury. That would end any possible hope of law crystallization; there can be no such thing as statement or restatement of the law where the jury must pass judgment; the very purpose of jury trial is to
pass upon the fundamental policy issues regarding the limits of legal duty. Causation terminology is employed to encompass not only the factual issue of cause-in-fact, but also the distinct legal questions of duty and scope of duty. The judge's law-making function, that is, determining the existence of a rule of conduct and the precise interests protected, is, in effect, abdicated in favor of the jury; additionally, "proximate cause" is paraded as the objective determinant of liability rather than perceived as a subjective expression of the decision of whether the requirements for liability were met. Judicial opinions inevitably seem more legitimate if they evidence minimal human input in adhering to, or being deduced from, some external standard of justice, even though actual conclusions are arrived at through an individual perception and application of such external standard to the conflicting economic and social interests involved. Thus, that which constitutes "proximate

give a new deal in each case.

Id. at 1029.

12. For a discussion of the "factual" nature of the cause-in-fact issue, see notes 70-78, infra, and accompanying text.

13. Just exactly how distinct these components are, and the ramifications upon the judge-jury allocation, is the specific concern of this paper.

14. Comment, Proximate Cause in Louisiana, 16 La. L. Rev. 391, 397 (1956). The myriad attempts by courts and scholars to define the cause-for-which-liability-will-be-imposed, or proximate cause, as a self-executing formula where the facts of each case need only be plugged in to automatically reach the correct result, has, for the most part, been futile. The factors which enter into determining whether the defendant will be charged for the injury sustained vary with every case, and cannot be reduced to an all-inclusive or universally applicable test. Louisiana courts have expressed proximate cause strictly in terms of the temporal sequence ("that which immediately produces the effect, as distinguished from remote, mediate, or predisposing cause," Cruze v. Harvey & Jones, 134 So. 730, 731-32 (La. App. 2d Cir. 1931)), or by the quantitative dominance of the cause ("efficient cause—the cause that sets other acts in motion that produces the accident without an intervening and independent agency," Allen v. Louisiana Creamery, Inc., 184 So. 395, 397 (La. App. 1st Cir. 1938)), or by particular emphasis on the foreseeability of the consequences of the conduct ("the rule of law is that a party is responsible for the reasonably to be expected consequences of a negligent act," Stumpf v. Baronne Bldg., 16 La. App. 702, 704, 135 So. 100, 102 (Orl. Cir. 1931)), or, as viewed from hindsight, the logical probability of the consequence resulting ("it is no defense that the particular injurious consequence was unforeseen, improbable, and not to have been reasonably expected so long as it was the natural consequence of the negligence of defendant's servant," Atkins v. Bush, 141 La. 180, 187, 74 So. 897, 899 (1917)). It can be said that the flexibility of the formula was equal to the demands of justice.
cause" varies to the extent such perception by each individual trier varies. Purposive direction and uniformity are necessarily precluded.\textsuperscript{15}

Dean Green's contribution to negligence theory was to seize upon the acknowledged components of proximate cause—cause-in-fact and legal cause—and attempt to isolate their determination for analytical purposes. However, bound up with his duty-risk language technique is a modified view of the traditional allocation of power between the judge and the jury. Cause-in-fact is left for the jury to decide with the aid of minimal instructions, devoid of the intricate and confusing plethora of charges that have evolved to accommodate proximate cause,\textsuperscript{16} while legal cause is translated into a question of the scope of defendant's duty of care.\textsuperscript{17} The judge's function is to rule upon whether the interest asserted by plaintiff is entitled to protection against the hazard encountered as a result of defendant's act. He therefore withdraws from the jury's domain the consideration of the "proximity of the cause" and reserves for himself the job of reconciling the policy factors involved in determining the point at which liability ceases to follow consequences.\textsuperscript{18} Louisiana \textit{appellate} courts have,

\begin{enumerate}
\item Professor Edgerton expresses his skepticism as follows:
  \begin{quote}
  My thesis is that it neither is nor should be possible to extract from the cases rules which cover the subject and are definite enough to solve cases; that the solution of cases depends upon a balancing of considerations which tend to show that it is, or is not, reasonable or just to treat the act as the cause of the harm—that is, upon a balancing of conflicting interests, individual and social; that these considerations are indefinite in number and value, and incommensurable; that legal cause is justly attachable cause. I believe that, while logic is useful in the premises, it is inadequate; that intuition is necessary and certainty impossible.
  \end{quote}
  Edgerton, \textit{supra} note 3, at 211.
\item Direct cause, legal cause, efficient cause, superseding cause, intervening cause, remote cause, contributing cause—all these have served to increase the complexity of the language technique while adding little clarity or guidance to actual decision-making.
\item See generally L. Green, \textit{supra} note 5; L. Green, \textit{supra} note 2.
\item See the authorities cited in note 17, \textit{supra}. This is the most difficult aspect of the administration of justice in torts litigation. Since absolute protection is never accorded any interest, the court is confronted with this delicate inquiry in every case. Dean Green, who was highly responsible for directing judges' attention away from abstract formulas and toward concrete policy factors, explains the problem:
  \begin{quote}
  The hazards to which any interest is subjected are so numerous, and the reach
\end{enumerate}
through the use of the duty-risk language technique, been set free to elucidate their consideration of the policy factors held to be dispositive in a particular case. A hybrid terminology and/or reasoning, though, is occasionally employed. The question remains whether the advent of duty-risk will really mark a departure from the manner of handling torts litigation on the district court level. There is no problem of judge-jury allocation in the appellate courts; the appellate judge had the same control on review of the duty issue when proximate cause was employed as he now has under duty-risk. The change is simply in the adoption of a more effective language technique. But is modification of lower court litigation through the incorporation of both the language technique and the duty-risk division of labor between judge and jury really practical?

Most explanations of duty-risk utilize a four point model, concentrating on causation, duty, breach of duty, and damages. However, as will become evident later, these issues should not be treated as compartmentalized inquiries. Each spoke of the wheel draws more or less on the same evidentiary facts; all contribute to the configuration in which each part has meaning and significance by reason of its relationship to the whole and each other. Nevertheless, the following discussion of Green’s theory of duty-risk will conform to precedent and approach these problems seriatim. The language technique as reflective

of any rule which the plaintiff may invoke in its vindication is so poorly defined, and there are so few external guides to tell a court whether a particular hazard is within the range of the rule invoked, that the problem may well prove bewildering. Nevertheless, the court must determine it in every case, consciously or otherwise. . . . The most thoroughly explored and developed rule is without exact boundary and since conflicts between the multitudes of interests now recognized, as well as those being given recognition from time to time, are constantly arising, the boundaries of the rules which protect such interests are subject to constant readjustment. In making such adjustments, and in the recognition of risks as falling within the bounds of those rules, the courts fashion the law.

L. Green, supra note 2, at 12-14.

19. For example, in Ainsworth v. Treadway, 361 So. 2d 957 (La. App. 4th Cir. 1978), the court held that a certain statutory duty was not designed to guard against the risk to which the plaintiff was exposed. The inquiry was therefore for all practical purposes at an end. However, it seems that the court could not resist the pull of tradition when it further announced that the “gross intervening negligence [of a third party] . . . absolves [the defendant] from liability.” Id. at 962.

of the trier’s conceptualization in resolving a torts case will be explained here. The effect of a different allocation of power will be examined subsequently.

**Causation**

The first step in establishing a defendant’s liability is to identify him as one who set forces in motion which ultimately contributed to the plaintiff’s injury. Our empirical knowledge of cause and effect is the basis for ascertaining the existence of the minimal relationship between conduct and injury as a prerequisite to further inquiry. According to Green, the emphasis here is upon cause as a neutral issue, a natural phenomenon not subject to a metaphysical test. The quality of the defendant’s conduct is irrelevant; the focus is solely quantitative and divorced from normative judgments. Determining whether defendant’s conduct was the cause of the harm for the purposes of liability is relegated to another stage in the analysis dealing with the scope of the defendant’s duty.

In addition, causal relation is never presumed from the fact of injury or a showing that the defendant violated a general duty of due care. The risk imposed upon the plaintiff in a certain situation may well fall beyond the boundary of the duty breached. Judges often unwittingly encourage doctrinal inconsistency by attempting to ground causal relation on a specified act of negligence. Negligence, however, is not the conduct itself, but a conclusion of law with respect to the social value of such conduct in light of the hazard involved. “Negligence must be based on causal relation but causal relation can never be based on negligence in the air.”

---

21. Green, *The Causal Relation Issue in Negligence Law*, 60 Mich. L. Rev. 543, 546 (1962). In *Laird v. Travelers Insurance Co.*, 263 La. 199, 267 So. 2d 714 (1972), the Louisiana Supreme Court employed a “necessary ingredient” test in determining cause-in-fact. In truth, it is nothing more than the but-for test since the defendant’s conduct is seen as being an essential prerequisite to the injury occurring in the specific manner that it did.

22. In *Laird* it was said: “In resolving this question [of causation] we make no inquiry into whether the act was unlawful or negligent.” 263 La. at 210, 267 So. 2d at 717.


24. *Id.* at 551. The issue is often posited as “whether defendant’s negligence was a cause-in-fact of plaintiff’s injury.” Thus, our defunct proximate cause language
Duty

The question of "legal cause" comprises the second half of the proximate cause issue. An affirmative finding of cause-in-fact necessitates a policy appraisal of the social advantages of labelling this consequence as one for which society will hold the defendant responsible, and thus shifting the loss. Plaintiff must initially assert the interest injured as one entitled to protection before it is decided that defendant, under the circumstances, was one of those charged with a duty to protect it. Actually, to the extent the general duty of due care is narrowed to accommodate the specific conduct in question, a rule of law is constructed after the event occurred which was theoretically in force at the time of the occurrence. The narrowing process, or the determination whether the particular hazard encountered fell within the scope of defendant's duty, requires a broad, searching evaluation of several factors.

Foreseeability is the term generally used to direct the inquiry into this issue under proximate cause. That the defendant's conduct should reasonably have been expected to precipitate such harm as occurred is considered sufficient to impose liability. The scope of the defendant's obligation to protect the interest of the plaintiff under duty-risk does not conform to this micro-approach, but instead is broadened by sev-

---

22. L. GREEN, supra note 2, at 5-11; Green, supra note 11. Generally, individual interests subject to protection may be subdivided into rights of personality, property, and economic advantage. The law evolves not only by extending the limits of protection of a certain rule, but also by identifying interests within these subdivisions which will give rise to a rule of conduct protecting them against certain hazards. For instance, although the common law did not countenance damages for mental distress, it is now an accepted form of compensatory relief.
23. Green, supra note 11, at 1024-35.
24. W. PROSSER, supra note 25, at 250-70.

---
eral additional considerations more appropriate for the furthering of attractive social policies. One of Dean Green's major contentions is that the particular equities between the parties are often subjugated to the objectives of efficient administration of the judicial system and the promotion of the collective economic well-being. This macro-approach is more conducive to the actual law-making intrinsic to the adjudication of tort cases.

**Negligence**

Negligence, as a standard of civil liability, requires shifting the loss to the defendant if he has caused the plaintiff's injury and in so doing engaged in substandard conduct. The breach of the duty of care under both proximate cause and duty-risk formulas entails a bifurcated inquiry: (1) would a reasonable person have foreseen the possibility of harm as a consequence of his conduct, and (2) did the defendant fail to exercise such reasonable care as to avoid the harm? The defendant's conduct is viewed in light of the ambient circumstances.

Foreseeability is pressed into double service under proxi-

---

29. See notes 7-8, supra, and accompanying text.
30. Dean Green delineates the following determinants of duty with the observation that "if a human desire or interest cannot be given protection without offending one or more of what might be called the 'social senses' corresponding to these several factors, then it must go without protection; there is no duty to respect it." Green, supra note 11, at 1034.

1) The administrative factor. A court will not grant recovery under a certain rule if the adoption of such a rule will be accompanied by difficult and ponderous operation of the legal machinery.
2) The moral or ethical factor. Liability is imposed commensurate with the degree of the defendant's culpability. A rule of law will be expanded in direct proportion with the unreasonableness of the defendant's conduct.
3) The economic factor. The decision to formulate a rule of law requiring a shifting of the loss is often upheld for reasons of economic efficiency and the collective well-being.
4) The justice factor. Frequently, these other factors may prohibit the court from concentrating on the particular equities of the case before it.

Id.

31. W. Prosser, supra note 25, at 139-90.
mate cause;\textsuperscript{33} both the issue of negligence and whether that negligence was the proximate cause of the injury are often resolved through resort to the foreseeability formula.\textsuperscript{34} It should be noted that negligence as defined under proximate cause theory is not therefore necessarily actionable negligence since the unreasonableness of the defendant's conduct is not necessarily related to the harm which actually ensued. The negligence inquiry under duty-risk, however, parallels the scope-of-duty issue, but only to the extent that foreseeability is also a determinant of the latter. The defendant theoretically is negligent only as to that which was foreseeable, but as was explained above, the scope of his duty to use due care may extend beyond this point if the judge perceives that the relevant policy goals justify requiring the defendant to bear the loss.\textsuperscript{35} Thus, to Dean Green the issues of negligence and ultimate liability are not coextensive under duty-risk, and upon the validity of his disclaimer rests the practical success of the theory as a viable formula for district court litigation.\textsuperscript{36}

\textbf{Damages}

Often a plaintiff will suffer some damages for which the defendant should not be held responsible. Every loss must be one which the defendant under the circumstances was required to protect the plaintiff against.\textsuperscript{37} In other words, any loss that resulted from a hazard that fell outside the scope of the defendant's duty is not legally attributable to his conduct for the purpose of obtaining compensation.

\begin{itemize}
  \item \textsuperscript{33} See note 28, supra, and accompanying text.
  \item \textsuperscript{34} The limits of duty and the violation of duty are therefore determined by the same test. This so-called "danger" test is seen by Dean Green as "the strangest chapter in all tort law." Green, \textit{supra} note 11, at 1029. However, the breach of duty issue under duty-risk is determined by the "danger" test. See notes 50-52, infra, and accompanying text.
  \item \textsuperscript{35} This is not liability without fault because initial blameworthiness with respect to some foreseeable risks has been determined.
  \item \textsuperscript{36} See notes 50-52, 58-63, infra, and accompanying text.
  \item \textsuperscript{37} Green, \textit{supra} note 32, at 46.
\end{itemize}
Allocation of Functions Between Judge and Jury

The Judge’s Function

The division of labor between the judge and the jury under duty-risk has significant substantive impact on torts litigation. The framework within which each issue is to be resolved is simplified and narrowed in order that both judge and jury maintain control over their proper sphere of the litigation. The judge’s primary function is “to pass upon the larger questions which go to limit responsibility generally.” He must decide when initially confronted with the duty question whether it would be unjust, inappropriate, or simply bad social policy under the particular situation to hold the defendant responsible. Although the judge’s task should be to administer the law defining the duty, in most tort cases there is no applicable legislative will to interpret; private wrongs go uncompensated unless the court decides that there should be a rule of right conduct applicable to the facts. Under the proximate cause formula, the jury is allowed free reign in determining the existence and reach of a rule. The direction of social policy is

38. L. Green, supra note 5; F. Harper & F. James, The Law of Torts 871-89 (1956). Decisions on many issues are often dependent on he who decides them. In a very general way, the divergence between judge and jury could be said to occur whenever the demands of social policy outweigh the particular equities in the case before the court. Thus, when officials at a state institution negligently release an inmate who proceeds immediately to drive a car recklessly into the plaintiff, a jury could, responding to their innate sense of fair play, justly hold the state liable, while the judge may not be willing to countenance such a burden. The judge’s recourse is to resort to the terms of the language technique, such as “no duty” or “no proximate cause as a matter of law.” See Cappel v. Pierson, 15 La. App. 524, 132 So. 391 (2d Cir. 1931).

39. L. Green, supra note 5, at 30. The judge also frames the issues and restricts the admissible evidence to that which is relevant to prove the facts necessary for passing judgment on the issues. Of course, if there is not enough evidence to raise a reasonable inference, the judge declines to submit that issue for jury determination. F. Harper & F. James, supra note 38, at 873-76. The judge further influences the outcome in his choice of instructions to the jury. They are designed to guard against untenable assumptions by the jury and improper use of the facts. See Farley, Instructions to Juries, 42 Yale L.J. 194, 218 (1933). Unfortunately, there is no way of forcing the jury to consider the case exactly as requested, and no method of discovering whether they, in fact, did.

40. Even when relevant legislation exists, for example if a particular Louisiana Civil Code article applies, the duty issue must be formulated with regard to the facts of the particular case.

41. F. Harper & F. James, supra note 38, at 1059. The jury examines the facts
thrust into the hands of twelve laymen who confine their consideration to the parties before them, generally never endeavoring to evaluate the impact of a particular decision on the polity as a whole. With the application of duty-risk analysis, however, it is the clear obligation of the judge to decide whether a rule of law should apply to the facts before him, and if so, to formulate one. He may look to precedents, invoke analogous reasoning from other similar rules of conduct, and consider any social and economic interests he considers relevant to the instant case.42

The judge retains control over the duty issue throughout the litigation. An explicit ruling may be required at the outset if the defendant chooses to file an exception of no cause of action or motion for summary judgment based upon no duty as a matter of law. The judge should assume the facts as pleaded by the plaintiff and provisionally determine whether a rule of law should properly be constructed to place the risk of harm, by virtue of his conduct, on the defendant. After the plaintiff has presented his evidence, the judge has a better conception of the actual events which prompted the litigation. If defendant moves for a directed verdict, the judge can reassess the environmental details—the affinity of causal likelihood between defendant’s behavior and plaintiff’s subsequent injury, and the qualitative nature of such behavior—in order to more accurately weigh the specific values in contest before him. Again, subsequent to the presentation of all the evidence, the judge must decide if it is sufficient to raise a reasonable inference of both cause-in-fact and negligence to warrant a jury’s judgment: Of course, the same evidence is fundamental to the judge’s law-making competence on the duty issue. He, therefore, may grant a dismissal for one of two reasons—either the facts under which he previously based an affirmative ruling on the duty issue were not supported by sufficient evidence, or the evidence convinced him that the rule of law relied upon by

and decides whether there ought to be a rule of law covering the situation—whether defendant’s conduct was a proximate cause of plaintiff’s injury, rather than determining if the facts call into play the duty promulgated by the judge. See notes 58-63, infra, and accompanying text.

42. L. Green, supra note 2; Green, supra note 11.
plaintiff should not extend to this particular risk.\textsuperscript{43}

It is crucial for the purposes of appellate review that the judge phrase his decisions on these motions in terms of the scope of the defendant's duty, or the lack of evidence sufficient to support a reasonable inference necessary to bring such a rule of conduct into play. A finding that there was no "proximate cause" as a matter of law often does not distinguish between a judgment based upon insufficient evidence with respect to cause-in-fact or negligence, or a basic policy determination on the duty issue.\textsuperscript{44}

\textit{The Jury's Function}

It is the jury's responsibility to evaluate the evidence and establish the facts to which the law is to be applied. The mere submission of a case to the jury by the judge under duty-risk evinces a tentative conclusion on his part that it would not be inappropriate to hold the defendant responsible.\textsuperscript{45} A rule of conduct has been approved by the judge in the abstract, and it is the function of the jury to resolve such questions of fact as would or would not bring the rule into play. Dean Green maintains that the judge should actually instruct the jury "as to the specific duty owed by the defendant and its limitations in terms of the risks imposed."\textsuperscript{46} The duty charge should be hypothetical—if the jury finds the facts as alleged by the plaintiff, then the loss may be shifted to the defendant. The ultimate issue of law is consequently lifted out of the jury's sphere of competence, and their role is reduced to determining whether the evidence proves the facts about which the judge has provisionally constructed the rule of conduct. The particular diffi-

\textsuperscript{43} Green, supra note 32, at 36 n.18. The absence of duty is fundamental error any may even be raised on appeal.

\textsuperscript{44} Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42 (1962).

\textsuperscript{45} L. Green, supra note 2, at 90-93; Green, supra note 11, at 1030; Malone, supra note 1, at 75. Dean Green takes the view that the jury never decides the duty issue. By submitting the case to the jury, the law has, in effect, recognized a rule of due care encompassing this risk. The jury's agreement is all that is necessary to impose liability. However, this is not quite accurate. Often the judge will not be convinced that the duty does extend to the plaintiff's injury, and will cede the matter wholly to the jury for their less legalistic, but more intuitive reaction. F. Harper & F. James, supra note 38, at 1060.

\textsuperscript{46} Green, supra note 32, at 37.
culties that inhere in this approach will be discussed in the final section.

The jury must first pass on the question of cause-in-fact and decide whether defendant's conduct "had anything to do with plaintiff's injury." It should be impressed upon the jury that they are not to concern themselves at this point with the question of liability but are to ascertain whether there is a rationally perceivable cause and effect relationship between the two events. Instructions should explain that this issue is not affected by the existence of other causes but is confined to the problem of identifying the defendant's conduct as a necessary condition to plaintiff's sustaining the injury.

In contrast to the purely factual nature of the cause-in-fact inquiry is the submission of the negligence issue in the form of a "metaphysical" standard. The jury is empowered to narrow the general duty of due care in constructing a standard of reasonable conduct to accommodate the particular facts of the case. Based upon their common sense and experience, the metaphysical standard of reasonableness is translated into a yardstick for measuring the defendant's act. Interests and values are weighed in determining whether the defendant's conduct fell below the standard relating to the risk of harm imposed upon the plaintiff. Under duty-risk, then, negligence is

47. Malone, supra note 1, at 66. The allocation of the cause-in-fact issue to the jury is based on the assumption that it is a purely factual issue, and it is to the extent judgmental factors are not intentionally brought to bear. But see notes 70-78 infra, and accompanying text. Professor Malone has aptly demonstrated influence of the policy factors in the course of the inquiry into cause-in-fact. The distinction between questions of law and fact has always been a hazy one. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 185 (1898); Thayer, "Law and Fact" in Jury Trials, 4 HARV. L. REV. 147 (1890).

48. Green, supra note 32, at 37.

49. L. GREEN, supra note 2, at 73.

50. Id. at 73-74. Normally, the weighing process involves increasing the amount of caution required relative to the likelihood and seriousness of the harm. Whether the caution required will be so great as to abrogate the conduct creating the risk depends upon the social interest promoted by the conduct. See F. HARPER & F. JAMES, supra note 38, at 930-33; W. PROSSER, supra note 25, at 146-49. Judge Learned Hand was of the view that a cross-section of the community was more apt to give an accurate assessment of the care and prudence manifested by the defendant. He believed the factors involved were "not susceptible of any quantitative estimate . . . . For this reason a solution always involves some preference or choice between incommensurables, and
COMMENTS

only actionable if the existence of the specific harm-causing risk is considered a violation of the duty owed to the plaintiff. The defendant's conduct could conceivably be substandard with respect to other risks of injury, but he was not guilty of actionable negligence if the plaintiff was injured through the culmination of a risk lying outside the boundary of the defendant's duty. Such is not the usual method of determining negligence contemplated under the proximate cause formula. The defendant is guilty of negligence if any unreasonable risks accompany his conduct, without regard to the specific risk of harm which ultimately injured the plaintiff. Negligence under duty-risk immediately establishes liability. Liability under proximate cause depends upon whether such inchoate negligence is deemed to be the "proximate cause" of the actual harm which befell the plaintiff.

Duty-Risk and Jury Trials: Lynch v. Fisher

The following will be an exercise in the application of a pure duty-risk analysis to a jury trial in Louisiana. The facts will be borrowed from Lynch v. Fisher, a 1949 Louisiana appellate court decision. In that case, the defendant's employee parked a pulpwood truck on a highway without leaving a proper clearance on the pavement or positioning lights or flares to warn oncoming motorists. While driving down the highway, it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied." Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

51. "With respect to the risk, as distinguished from the conduct which injures the plaintiff, the defendant has in fact exercised due care." Campbell, Duty, Fault, and Legal Cause, 1938 Wis. L. Rev. 402, 409. This statement reflects the interlocking of the negligence and duty issues, and the degree to which the two inquiries draw upon the same considerations. This is a problem which presents itself when one seeks to confine the scope of duty issue to the judge. The high-water mark of the discussion occurs in Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928). See also Dias, The The Duty Problem in Negligence, 13 CAMB. L.J. 198 (1965); Green, Are Negligence and Proximate Cause Determinable by the Same Test? 1 TEX. L. REV. 243, 423 (1923); Green, The Palsgraf Case, 30 COLUM. L. REV. 789 (1930); Seavey, Mr. Justice Cardozo and the Law of Torts, 52 HARV. L. REV. 372 (1939).

52. See the majority and dissenting opinions in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); W. PROSSER, supra note 25, at 254-60; Green, supra note 44, at 59.

53. 41 So. 2d 692, 695 (La. App. 2d Cir. 1949).
Robert Gunter collided with the truck thus trapping himself and his wife in the front seat of his car. The plaintiff, Lynch, who lived nearby, ran to the scene of the accident and proceeded to extricate both Gunters from the burning wreckage. While retrieving a floor mat as a cushion for Mrs. Gunter, plaintiff found a gun under the seat and handed it to Mr. Gunter. Mr. Gunter, being temporarily mentally deranged and delirious as a result of the accident, fired the pistol at the plaintiff, the bullet striking him in the left ankle and inflicting serious injuries.

The Judge's Formulation of Duty

Upon the defendant's exception of no cause or right of action, the trial judge nonsuited the plaintiff, finding as a matter of law that defendant's employee's negligence was not the proximate cause of plaintiff's injury. The appellate court, however, reversed, primarily by disclaiming reliance on the test of foreseeability, and held Fisher liable, in effect, for events which at the time of his employee's conduct the employee could not have reasonably expected to later occur. The court realized that sole dependence on a foreseeability test for determining liability simply does not promote a just result, and instead chose hindsight as the most appropriate perspective for resolving the question of the extent of the duty owed by Fisher's employee to Lynch. The test of foreseeability would have excluded the improbable and almost bizarre manner of injury from being a consequence for which Fisher would be held responsible. Even so, legal theories such as the foreseeability or rule of possibilities test serve only to identify the issues and reduce them to convenient terms, and are not "a means to point unerringly to acceptable results." The situation here challenged the judge to actively mold the law in response to this particular set of facts. The plaintiff had placed his own safety at peril for the socially valuable act of rescuing

54. See Bohlen, The Probable or the Natural Consequence as the Test of Liability in Negligence, 49 AM. L. REG. 79, 148 (1901); Dias, The Breach Problem and the Duty of Care, 30 TUL. L. REV. 377 (1956); Green, Are Negligence and Proximate Cause Determinable by the Same Test? 1 TEX. L. REV. 243, 423 (1923); Payne, The Direct Consequences of a Negligent Act, 5 CUR. LEG. PROB. 189 (1952). See also note 32, supra, and accompanying text.

55. Green, The Palsgraf Case, 30 COLUM L. REV. 789, 796 (1930). See also L. Green, supra note 5, at 214.
a driver from a wreck caused, in part, by the socially unreasonable act of the defendant. The defendant's employee was, of course, negligent with respect to the foreseeable risk of someone like Gunter colliding with him from behind. The court obviously felt that such gross negligence with respect to that risk should carry over to other risks of injury along the causal chain, whether foreseeable or not.\textsuperscript{56}

The court thus found that the lower court had incorrectly applied the law of proximate cause; defendant's employee's negligence was in fact, the direct and proximate cause of the plaintiff's injury. No guide is given for the resolution of further cases as to what is or not a proximate cause. The duty-risk approach, however, provides a terminology for articulating the factors involved in such a determination.

The greatest obstacle to any attempt to state the limit of the law's protection in advance of particular conduct is the sheer multifariousness of human behavior.\textsuperscript{57} Therefore, to effectively dispose of individual cases, the judge needs a broad formula to direct his judgment-passing capacity. The inquiry into the existence and scope of the defendant's duty is intended to serve this purpose. Lynch, through his complaint, was demanding protection for a legitimate socially recognized interest—the safety of his person. He claimed that his right to be secure from unreasonable risks was violated by the defendant, and for this reason he suffered injury. The trial judge was required to explore the relationship between the act of Fisher's employee in parking the truck and Lynch's suffering of a gunshot wound in his left ankle; the judge then was required to determine whether he should create a rule of law in conformity with the general standard of due care to govern the occurrence. The rule of law, consequently, is not formulated in the abstract but rather is grounded upon the particular facts of the case before the judge and must be specific enough to make it clear whether the risk of Lynch getting shot was within the scope of the employee's duty not to park his truck in a position to obstruct the highway.\textsuperscript{58}

\textsuperscript{56} For a discussion of the interrelationship between causal relation and negligence, see notes 58-63, 70-78, infra, and accompanying text.

\textsuperscript{57} L. Green, supra note 2, at 12; Edgerton, supra note 3, at 221.

\textsuperscript{58} This is simply to say that the rule of law applicable to defendant's conduct
Unless the judge can rationally relate these two factual events in a cause and effect sequence, there is no relevancy between the events, and without relevancy no basis for associating one actor's conduct with another's injury so as to justify shifting the loss. Thus, if the judge perceives no causal connection, the plaintiff is nonsuited and the litigation ends. How great must the affinity of causal likelihood between the defendant's wrong and the plaintiff's injury be for the judge to consider the claim judicially cognizable? "The answer is that the affinity must be sufficiently close in the opinion of the judge to bring into effective play the rule of law that would make the defendant's conduct wrongful."

Thus, legal recognition of cause by the judge is based upon his feeling that, under the facts, the risk of injury was conceivably the responsibility of the defendant, and that perceived social goals would not be thwarted by requiring the loss to be shifted. His formulation of duty is complete once he is satisfied that the physical and metaphysical (in the sense of Fisher's employee's conduct being of such a quality as would justify its recognition as a cause were the physical relationship between the parking and the shooting otherwise insufficient to satisfy the minimal requirements of cause-in-fact) relationship between the harm and the conduct is significant enough for policy reasons to legally establish cause-in-fact. There is therefore no a priori formulation of the duty—the existence of this particular relationship must be first considered. The critical point to note, though, is that all that is now necessary for a judgment for the plaintiff is drawn from the particular facts of the case. Everyone owes a general duty of due care but, under duty-risk analysis, for the statement of the duty to aid in determining liability, the specific risk must be keyed to the conduct complained of. See Note, Impact of the Risk Theory on the Law of Negligence, 63 Harv. L. Rev. 671 (1950). Dean Green asserts:

The general duties stated in terms of "reasonable care" and similar abstractions are not difficult to state, but when they are so stated they go very little distance in giving aid to the judge in the particular case. The judge very quickly arrives at the point where he must say whether the generalization is applicable to the particular case; whether plaintiff is entitled to any protection under it; whether defendant was under any duty with respect to the conduct that transpired, and the interest which was injured.

Green, supra note 11, at 1025-26.

59. Malone, supra note 1, at 72. See Lewis, supra note 20, at 145. See also notes 58-63, 70-78, infra, and accompanying text.
is the jury’s concurrence on the evidence as establishing the facts forming the basis of the judge’s formulation of duty. The judge, in constructing the defendant’s duty, has considered “cause” in light of the substandard nature of defendant’s behavior. Negligence, in turn, has been determined by examining the causative act in terms of the risk imposed—the concept of “relative” negligence, as discussed earlier, in contrast to the proximate cause theory of “absolute” negligence. In formulating the scope of the defendant’s duty, the judge thus substantially subsumes all of the elements of a torts case.

Two problems immediately present themselves. First, the function of rules, and the reason for troubling with the development of them, is the convenient treatment of subsequent specific instances by the generalizations earlier laid down. However, what precedential value would the duty formulated in Lynch possess? The case “has just those aspects of uniqueness, chance, and impalpability which had best be buried and forgotten in the verdict of a jury rather than be perpetuated in a rule of law. It expresses nothing significant of social policy.” Secondly, permitting the judge to pass on the existence and extent of the duty obviously strips the jury of their traditional function as the ultimate arbiters of liability. The judge has affirmatively passed on cause-in-fact; actionable negligence is coterminous with scope of duty. The jury need only find the facts as the judge has assumed them to effectively foreclose the issue of liability.

For example, in Lynch, the judge decides if a duty owed by Fisher’s employee in the parking of his vehicle as he did extends to the risk of a rescuer (i.e., Lynch) getting shot by the dazed owner of a colliding vehicle. The judge, if he submits the questions of fact to the jury, preliminarily determines that the duty does so extend. If the jury later finds, based upon the evidence admitted, that the truck was so parked and that Lynch suffered harm, judgment for Lynch should follow. By ruling that a particular risk is included within the scope of

---

60. See notes 50-52, supra, and accompanying text.
62. Id.
63. F. Harper & F. James, supra note 38, at 1060; W. Prosser, supra note 25, at 255-58. See notes 52-56, supra, and accompanying text.
64. If the truck was so parked, it was a cause-in-fact, and he was also negligent,
a particular duty, the judge has condemned defendant's conduct as creating an unreasonable possibility of harm to the plaintiff, and if damages do in fact result, Fisher should be required to pay.

The point of this discussion is simply to demonstrate that "the matter of a tort case can't be split up into various parts as some undertake." The question of proximate cause or scope of duty partakes of all of the identifiable components of a tort case; thus, the efforts to allocate one aspect of the litigation to the judge and another to the jury and the attempt to segregate causation from duty or duty from negligence is simply unrealistic in the actual administration of justice by jury trial.

Under proximate cause analysis the judge's function was merely to inform the jury of their function and to insure that any decision reached was rationally supportable. After first deciding cause-in-fact, the jury was asked whether the plaintiff was negligent; in other words, were there certain unreasonable dangers that they could perceive as attendant to his conduct? The next issue was whether such negligence was a proximate cause of the injury; in other words, was the specific injury the culmination of one of the unreasonable dangers that they should associate with the defendant's conduct so as to hold him responsible? The benefit of phrasing the issues in such a manner is that it encourages a shifting of the loss to the defendant

---

according to the duty formulated by the judge when he assumed the existence of these facts at the outset of the case. See notes 50-52, supra, and accompanying text.

65. And it must be labelled unreasonable, even if not foreseeable, because the foundation of liability in negligence law is blameworthiness. The defendant is found to be blameworthy only if he has been unreasonable.

66. Lewis, supra note 20, at 145.

67. Id.

68. This method of stating the issue bears a resemblance to the "ease of association" test espoused by the Louisiana Supreme Court in Hill v. Lundin Associates, Inc., 260 La. 542, 550, 256 So. 2d 620, 622-23 (1972), for determining the scope of the duty. Negligence relative to the specific interest injured is not necessary under the proximate cause formula. Once substandard conduct is established—an act giving rise to at least one unreasonable risk—liability for all subsequent consequences is theoretically possible save the limiting effect of proximate cause. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 347-56, 162 N.E. 99, 102-03 (1928) (Andrews, J., dissenting). Professor Cowan describes this as "an intermediate position between liability for all harm however caused, and liability only to the restricted class foreseeably subjected to unreasonable risk." Cowan, supra note 61, at 53. See notes 50-52, supra, and accompanying text.
only if his conduct was commensurate with the penalty. Furthermore, the question of the extent of liability is handled more or less as a whole issue by the same body of individuals who determine the facts. It enables a jury to respond to the ultimate legal question with a "homely blend of fact and policy that is so deep rooted in our approach to everyday problems." The effect of the duty-risk concept of allocation of power is to significantly undermine this wholistic approach.

In instructing the jury in *Lynch* concerning the scope of Fisher's employee's duty, the judge would presumably inform them that if they found the employee's parking of the truck to be the cause-in-fact of Lynch's injury, and that the employee's conduct was negligent, then under the law they must hold Fisher liable for the loss. Of course, it is hard to imagine a judge who would follow Dean Green's suggestion here, because he would realize the absurdity of even having a jury if he were to tell them what constitutes actionable negligence through the use of a standard drawn from the particular facts of the case at hand. In practice, then, this instruction should be avoided. To what degree, however, do a jury's deliberations on cause-in-fact and negligence track the judge's inquiry into scope of duty?

*The Jury's Concurrence*

*Cause-in-Fact*

Professor Malone has remarked that "the evaluation which the trier will make of fact data will necessarily be affected by the purpose he is seeking to serve." As explained above, the judge "actually selects a 'condition' and for legal purposes invests it with the character of a 'cause' in determining whether a declaration states a cause of action." If the evidence is sufficient to raise a reasonable inference of cause-in-fact, the judge, in submitting the issue, is asking the jury for a ratification of his initial conclusion. In *Lynch*, the jury

---

69. Malone, supra note 1, at 66.
70. Id. at 62.
71. Lewis, supra note 20, at 145. This process was referred to previously, see notes 53-60, supra, and accompanying text, and is now elaborated on with reference to the jury's consideration of the cause issue.
72. See notes 53-62, supra, and accompanying text.
would be asked to pass judgment upon whether the parking of
the truck contributed substantially to the plaintiff's injury. A
Louisiana court would probably further define "substantial
factor" as a necessary antecedent: "But for the defendant's
conduct in parking the truck, would the plaintiff have been
shot?"73 Dean Green argues that this is merely a fact issue,
hardly ever an area in which the litigation should be centered;
once dealt with initially, causal relation should have no role in
the consideration or disposition of other issues.74 Actually, it is
a purposeful inquiry, and when framed as the above-mentioned
but-for test, allows a large amount of conjecture which can be
given a direction in accordance with policy aims of the judge
when deciding the duty issue, or conformed to the visceral
reactions of the jury in deciding the facts in light of the evi-
dence submitted.75

The test of causal relation, then, is citing an agency with
an end in mind, based upon the nature of the agency's relation-
ship with the end.76 The jury's function or objective is to deter-
mine blameworthiness, and common sense requires that this
be based on causal relation. The evidence suggesting Fisher's
conduct as a cause of Lynch's injury is evaluated, not on some
abstract plane devoid of ethical considerations as Green would
insist, but in terms of the jury's innate sense as to what is
necessary to constitute blameworthiness.77

73. This seems to be the course the Louisiana Supreme Court followed in Dixie
See Ainsworth v. Treadway, 361 So. 2d 957, 961 (La. App. 4th Cir. 1978).
74. Green, supra note 21, at 548; Green, supra note 32, at 35.
75. The distinction between the two views is more subtle than is at first appar-
tent. Professor Malone would agree with Dean Green that the issue of cause is not the
point at which judgmental faculties should be introduced. However, the fact that the
issue cannot be decided apart from the context of the particular case, and the purpose
of determining liability, to a certain degree prevents the neat distinction between cause
and other issues that Dean Green attempts to maintain.
76. See Lewis, supra note 21, at 158-60.
77. Id. at 155. Also consider the following as authority for this view:

Causality is not so much in the events themselves as in what we choose to pick
out as the cause from a number of antecedent phenomena. It explains much,
including the distinction between cause and condition . . . . Thus Mr. Bradley
. . . says, "if we want to discover a particular cause (and nothing else is a
discovery), we must make a distinction in the 'sum.'" Then, as before, we are
asked for a principle by which to effect the distinction between them. And, for
As far as the actual thought processes responsible for resolving the question of liability, it must be acknowledged that the causation issue, to the degree it is influenced by normative judgments, "insists upon spilling itself throughout every area of the controversy." This is not to say that one cannot make a distinction between the identifying of defendant's conduct as a necessary condition to plaintiff's injury and, on the other hand, charging him with the loss. In fact, treating the problem in this manner as duty-risk does improves immensely the clarity of decision-making on the appellate level. A judge is set free to explain why, for policy reasons, society will not regard "this cause" as "a cause" for the purpose of forcing the defendant to compensate the victim. In order to refuse to impose liability, the judge need no longer deny that the defendant actually caused, to some extent, plaintiff's harm. However, this is merely a change in the method of actually articulating the conclusions reached. The increase in clarity results from the implementation of an improved language technique. With myself, I return to the statement that I know of none which is sound, we seem to effect this distinction always to suit a certain purpose; and it appears to consist in our mere adoption of a special point of view.

G. Arnold, Psychology Applied to Legal Evidence and Other Constructions of Law 274-75 (2d ed. 1913). See also:

We do not decide the Idea of Space, or Time, or Efficient Cause from the phenomena about us, but necessarily look at phenomena as subordinate to these ideas from the beginning of our reasoning. It is true, our ideas of relations of Space, and Time, and Force may become much more clear by our familiarizing ourselves with particular phenomena; but still, the Fundamental Ideas are not generated but unfolded; not extracted from the external world, but evolved from the world within. In like manner, in the contemplation of organic structures, we consider each part as subservient to some use, and we cannot study the structure as organic without such a conception. This notion of adaption—this Idea of an End—may become much more clear and impressive by seeing it exemplified in particular cases. But still, though suggested and evoked by special cases, it is not furnished by them. If it be not supplied by the mind itself, it can never be logically deduced from the phenomena. It is not a portion of the facts which we study, but it is a principle which connects, includes, and renders them intelligible; as our other Fundamental Ideas do the classes of facts to which they respectively apply.

2 W. Whewell, Philosophy of the Inductive Sciences 109-10 (1847).
78. See Malone, supra note 69, at 61.
79. "[The terms 'rights' and 'duties'] we use to symbolize the conclusions of the judge in imposing or denying responsibility after a summing up of all pertinent factors." L. Green, supra note 5, at 30.
pect to a jury, the distinction is really not feasible. The jury does not have the responsibility of communicating the rationale of the decision, but of rendering it. They are not concerned with the language technique, but in resolving the issue at hand. Intellectual categorizing or judgment-passing accompanies the physical perception of every event. The allocation of power concept of the duty-risk theory (as opposed to the theory as a mere language-technique) is therefore anathema to actual practice for two reasons. First, if it seeks to prohibit the jury from morally evaluating the merits of the whole case, it is unrealistic in light of the way people actually classify sensory data. Secondly, the concept of "relative negligence" itself, if employed, requires the jury to "make law" in determining the ultimate legal issue of liability, even if only as a concurrence, since the decisional calculus involved substantially parallels the judge's inquiry into scope of duty. For the jury to use "absolute negligence," on the other hand, would be a totally vain endeavor if the judge has already drawn the parameters of the scope of duty when considering defendant's conduct and plaintiff's harm in a causal sequence. Furthermore, if foreseeability marks the limits of negligence, and scope of duty as expanded by other factors is not so restricted, it does the district court judge little good in Louisiana. Without a judgment n.o.v., the lack of of the jury's concurrence on the negligence issue will render irrelevant any concept of a broadened duty of care.80

Negligence

It seems, then, that the jury will select the conduct of the defendant "as a substantial factor in the death of the deceased by the test of negligence itself . . . [B]oth the matter of negligence and cause are tested by the culpability . . . of the person sought to be charged."81 It was the value or lack of value of Fisher's employee's act that made it an appreciable factor in the shooting of Lynch, and at the same time made it negligent.82 This is easily appreciated when one considers that

80. See note 30, supra, and accompanying text.
81. Lewis, supra note 20, at 160. A tort case thus turns upon a qualitative assessment of the defendant's act.
82. Id.
causal relation is recognized for certain remote (in terms of time and space) consequences in the case of intentional torts; the quality of defendant’s act rather than its physical and temporal proximity with the injury, is the dispositive factor.

Nevertheless, the negligence issue is posed to the jury as a separate instruction. The difference with the cause-in-fact instruction is simply that here, the jury is encouraged to intentionally exercise their normative judgments in evaluating the moral and ethical quality of the defendant’s conduct. In Lynch, the instruction should read as follows: Was the defendant negligent with respect to the injury suffered by plaintiff? As a further explanation, the court would center the inquiry on the foreseeability of the injury and the failure to use due care to avoid it. Again, one must realize that the question of substandard conduct is analyzed specifically in relation to the risk of harm that resulted in plaintiff’s injury. In other words, the question of negligence is not satisfied solely if the jury can perceive some unreasonable dangers associated with the defendant’s conduct, for instance the chance that an oncoming motorist would collide with the back of Fisher’s truck. Rather, it must conclude that Fisher violated a duty of care that would have protected against Lynch getting shot, and therefore his conduct constituted actionable negligence. Thus, negligence is only actionable if it is selected as the “proximate cause” of the injury to the plaintiff.

This is, as demonstrated earlier, noth-

83. Green, supra note 32, at 38.
84. Green, supra note 54, at 423. Dean Green states: “And it must always be remembered that negligence to be actionable must be so toward the plaintiff and not merely conduct subject to condemnation.” Id. at 253. Compare this language with the following quote from Justice Cardozo:

In every instance, before negligence can be predicted 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 . . . What the plaintiff must show is “a wrong” to herself, i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct “wrongful” because unsocial, but not “a wrong” to anyone. . . Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.
85. See Notes 50-52, 58-63, supra, and accompanying text.
ing other than the scope of duty issue passed on by the judge at the beginning of the suit which effectively encompassed the issues of substandard conduct, causation, and damages.

The question remains whether, if we dispense with the allocation of power aspect of duty-risk on the district court level, we should retain duty-risk as a language technique in jury instructions. It must be admitted that the terms "legal duty" and "attendant risks" are not exactly within the layman's vernacular, while words like "cause" and "reasonableness" are part of our everyday communication. This fact coupled with the success of the juries for the most part in handling proximate cause terminology despite the amalgamation of explanatory charges, should point to a retention of proximate cause instructions on the district court level. It is hoped, though, that appellate judges realize the degree to which each of these concepts is interwoven into the fabric of a torts case so as to prevent actual severability, and that to require as much in district court litigation is simply impractical.

Conclusion

There is no doubt that the adoption of duty-risk analysis in Louisiana has facilitated the clarification of judicial decisions and contributed substantially to the precedential value of opinions in certain areas of the law, at least for fact situations more commonplace than that in Lynch. Appellate courts no longer see fit to cloud their rationales in formulistic legal jargon but freely discuss the prevalent policy considerations of each case. However, it must be kept in mind that duty-risk is not a different method of mentally associating conduct with injury, but is merely a more accurate and concise guide to the articulation of the substantive considerations each of us selects to form judgments about external events. The point of this comment has been to demonstrate the degree to which the distinction between the concepts of duty, causation, and negligence is the artificial creation of legal scholars to serve purely communicative purposes. The factors which enter into the disposition of each are largely the same. For this reason, the attempt to confine the jury to certain issues within certain limits will meet with sure defeat. Every issue that juries have an
opportunity to decide will involve overlapping considerations and reflect their judgment on the whole case. Thus, the judge-jury division of labor espoused by duty-risk scholars is simply not achievable. However, that part of the theory which affords the district judge the justification for taking the case out of the jury’s hands on the duty issue and grants him the leeway to exercise his special competence on matters of law, should be recognized and accepted. In this sense, he maintains more effective and continuous control over the litigation. Nevertheless, the real benefits of duty-risk have come with its use as a language technique, and for this reason such benefits have been and will continue to be felt on the appellate level.86

*Mark Meyers*

---

86. It remains only for Professor Malone to summarize what has been said above: The effort by writers, and occasionally by courts, to oust the issue of proximate cause from judicial usage and to reallocate the same inquiry within the judge’s exclusive domain of declaring duties has not been successful except in those instances where the court has already become convinced that jury participation would be unwise. Most attempts to lay down a formula that would definitively assign to the judge and jury their respective functions in administering the proximate cause issue have become lost in the tangled undergrowth of the law. This, I believe, is as it should be . . . .

Malone, supra note 1, at 98.