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Torts

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I. TIME-FRAME TORTS

Recent cases at the state and federal level have opened the door for actions by persons who have developed cancer from smoking cigarettes or who have developed the lung disease commonly known as asbestosis. In some cases the lung condition is attributed to both asbestos and tobacco acting synergistically.

The first decision of importance is the recent United States Supreme Court decision in *Cipollone v. Liggett Group, Inc.*[1] *Cipollone* is based on constitutional law, and more specifically the extent that a federal statute, which mandates warnings on cigarette labels and in advertisements, preempts state law actions for damages.

The plaintiff in *Cipollone* filed a complaint in federal district court relying on diversity jurisdiction and alleging that she had developed lung cancer from smoking cigarettes produced and sold by the defendant manufacturers. Her claims were based on New Jersey law as follows:

> (1) defective design because the manufacturer failed to use a safer alternative design;
> (2) defective design because the social value of the product was outweighed by the dangers it created;
> (3) failure to provide adequate warnings of the health consequences associated with smoking cigarettes;
> (4) negligence in the manner the cigarettes were tested, researched, sold, promoted, and advertised;
> (5) breach of express warranty that cigarettes did not present any significant health consequences;
> (6) fraudulent misrepresentation in that the manufacturers willfully attempted to neutralize the federally mandated warnings;
> (7) fraudulent misrepresentation in that the manufacturers possessed and failed to act upon medical and scientific data which indicated that cigarettes presented health hazards; and

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1. 112 S. Ct. 2608 (1992).

(8) conspiracy to defraud by depriving the public of such medical scientific data.

A. Preemption

The Supreme Court considered the question of whether the Federal Cigarette Labeling and Advertising Act of 1965[2] or the 1969 amendment to that Act[3] preempts any or all of plaintiff's claims. The Court held that the Act of 1965 does not preempt state law claims for damages, *i.e.*, the 1965 Act only supersedes positive legislative enactments which mandate particular warnings in advertising and on labels. Section 4 of the Act contains the federally mandated warning and Section 5 of the Act contains the following statement of preemption:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package. (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this act.

In 1969, section 5(b) of the Act was amended to read as follows:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this act.

The Court reasoned that by amending the preemptive section of the Act Congress intended not only to reach positive legislative enactments but also any type of duty imposed under state law, including common law tort duties.

In order to determine which of plaintiff's claims were preempted, the Court looked to the exact language of the Act: whether the predicate legal duty to a claim for damages would constitute a requirement or prohibition based on smoking and health with respect to advertising or promotion.[4]

The Court concluded that plaintiff's claim that the defendant failed to provide adequate warning was preempted to the extent that plaintiff was trying to show that post-1969 labels, advertisements, and promotions should have included additional warnings. The Court also concluded

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2. Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340 (1988)).

3. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended 15 U.S.C. §§ 1331-1340 (1988)).

4. *Cipollone*, 112 S. Ct. at 2612.

that negligence claims based on the research and testing practices of the defendants were not preempted because such a duty would not be "with respect to . . . advertising or promotion."[5] Plaintiff's claim for breach of express warranty was not preempted even though plaintiff claimed that the warranty arose out of statements made in advertising. The Court reasoned that an express warranty was not a duty imposed by law but a "contractual commitment voluntarily undertaken" by the defendants.[6]

With regard to plaintiff's fraudulent misrepresentation claims the Court reached a different conclusion for each. The first claim, that defendants neutralized the effect of the federally mandated warnings, was preempted. The Court reasoned that a state law duty not to minimize the hazards of smoking was no more than the converse of a duty to include warnings, a basis for claim that the Court had already determined to be preempted.

The second fraudulent misrepresentation claim was not preempted. The Court reasoned that a duty not to make false representations of material facts or not to conceal material facts was not necessarily related to advertising or promotion "insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising or promotion."[7] The Court also reasoned that claims based on a state law duty not to make false statements of material facts in advertising are not preempted because such claims are not predicated on a duty based on smoking and health but rather on a more general duty not to deceive.[8]

Lastly the Court concluded that plaintiff's claims alleging conspiracy to misrepresent or conceal material facts were not preempted because they were based on a general duty not to conspire to commit fraud—not a prohibition "based on smoking and health." In *Cipollone*, the defendants did not assert that plaintiff's claims based on defective design were preempted by the 1969 version of the federal statute. However, similar defective design claims were asserted in a Louisiana case prior to the United States Supreme Court's decision in *Cipollone*.

B. Louisiana Law

On the local scene, prior to the *Cipollone* decision, in *Gilboy v. American Tobacco Co.*,[9] the Louisiana Supreme Court held that the Louisiana Products Liability Act,[10] effective September 1, 1988, could

5. *Id.* at 2621.
6. *Id.* at 2622.
7. *Id.* at 2623.
8. *Id.* at 2624.
9. 582 So. 2d 1263 (La. 1991).
10. La. R.S. 9:2800.51-.59 (1991).

not be applied retroactively. The plaintiff filed suit prior to the effective date of the Act; therefore, he had the right to proceed under pre-Products Liability Act law, as set forth in *Halphen v. Johns-Manville Sales Corp.*[11] The court in *Gilboy* concluded that under *Halphen* the plaintiff had the right to have a jury determine whether cigarettes are unreasonably dangerous per se, overturning the court of appeal's granting of summary judgment for the defendant.

The *Gilboy* court went on to conclude that an unreasonably dangerous per se claim under *Halphen* was not preempted by the Federal Cigarette Labeling and Advertising Act.[12] Even if the Federal Labeling Act preempts a failure to warn claim, a plaintiff still has an unreasonably dangerous per se claim. Although the Louisiana decision was rendered prior to the United States Supreme Court decision in *Cipollone*, it appears to have anticipated the crux of the decision very accurately.

Under *Halphen*, to determine if a product is "unreasonably dangerous per se," the trier of fact must apply a risk/utility test, *i.e.*, whether a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. In *Gilboy*, the court stated that "[w]arning consumers that a product is dangerous reduces but does not eliminate a manufacturer's responsibility for a product which is unreasonably dangerous per se."[13] And "[t]he adequacy of a manufacturer's warnings is a factor in assessing comparative fault."[14]

In *Gilboy* the court left open the following questions to be decided as a matter of comparative fault: (1) Did the manufacturers suppress health warnings? (2) How effective were the warnings? (3) Was the plaintiff competent to assume the risk when he started smoking? (4) Did plaintiff's addiction to cigarettes make his decision to continue smoking a voluntary choice?, and (5) Did plaintiff voluntarily encounter the risk of lung cancer? The court assumed that comparative fault would be applicable without discussing the issue.

After *Gilboy*, the *Halphen* unreasonably dangerous per se claim becomes a formidable weapon against cigarette manufacturers due to the low social utility of cigarettes. Dates are an important concern to potential plaintiffs attempting to assert *Halphen* claims. In *Gilboy*, suit was filed prior to the effective date of the Product Liability Act; therefore, all the key dates would have fallen prior to the effective date of the Act. Key dates to consider are (1) when plaintiff started smoking, (2) when plaintiff developed cancer, and (3) when plaintiff became aware that he or she had developed cancer. The date that will determine whether

11. 484 So. 2d 110 (La. 1986).
12. *Gilboy*, 582 So. 2d at 1266.
13. *Id.* at 1265.
14. *Id.*

pre-Act law will be applied is the date that plaintiff's cause of action accrues.[15] Plaintiff's cause of action accrues when he has a right to sue—after the three elements of fault, causation, and damage have occurred.[16]

For prescriptive purposes, plaintiff has one year to file suit from the time that he has a cause of action, which would be one year from the date he develops cancer.[17] In order to use pre-Act law, plaintiff would have to invoke *contra non valentem* to avoid dismissal based on prescription. *Contra non valentem* is an exception to prescription "where in fact and for good cause plaintiff is unable to exercise his cause of action when it accrues."[18] The two categories of the doctrine that could be of benefit to a potential plaintiff suing a cigarette manufacturer are (1) where the manufacturer himself has done something to effectively prevent the potential plaintiff from availing himself of his cause of action and (2) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the manufacturer.[19]

The next issue a potential plaintiff must consider is comparative fault. Whether comparative fault will be applied to a plaintiff's claims against a cigarette manufacturer will depend on whether plaintiff's claims are based on negligence or strict product liability. In 1979 the legislature amended Civil Code article 2323 to codify the concept of comparative fault. The act that amended Article 2323 included the statement that "[t]he provisions of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective."[20] It is clear that the legislature intended Article 2323 to apply prospectively only from the effective date of August 1, 1980,[21] but a jurisprudential scheme of comparative fault analogous to Article 2323 was extended to product liability claims through *Bell v. Jet Wheel Blast*.[22] Because the comparative fault scheme applicable to product liability was jurisprudentially created through *Bell* it could be applied retroactively even though Article 2323

15. *See* Cole v. Celotex, 599 So. 2d 1058 (La. 1992); Crier v. Whitecloud, 496 So. 2d 305 (La. 1986); Faucheaux v. Alton Ochsner Medical Found. Hosp. & Clinic, 470 So. 2d 878 (La. 1985); and Lott v. Haley, 370 So. 2d 521 (La. 1979).

16. *See Cole*, 599 So. 2d 1058; Trahan v. Liberty Mut. Ins. Co., 314 So. 2d 350 (La. 1975); Owens v. Martin, 449 So. 2d 448 (La. 1984) (citing Seals v. Morris, 410 So. 2d 715 (La. 1982)); and Weiland v. King, 281 So. 2d 688 (La. 1973).

17. La. Civ. Code art. 3492.

18. Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1321 (La. 1979).

19. *Id.*

20. 1979 La. Acts No. 431, § 4.

21. 1979 La. Acts No. 431, § 7; *see* Cole v. Celotex, 599 So. 2d 1058, 1065 (La. 1992).

22. 462 So. 2d 166 (La. 1985).

could not.[23] In applying comparative fault retroactively to a product liability claim that accrued prior to the effective date of Article 2323, the court would be applying the comparative fault rule of *Bell* retroactively and not that of Article 2323 because Article 2323 does not apply directly to product liability claims. Substantively, *Bell* makes it clear that contributory negligence and assumption of risk are inconsistent with a comparative fault system and should not operate as a complete bar to recovery.

In *Fulgium v. Armstrong World Industries, Inc.*,[24] a federal district court assumed that comparative fault should be applied to an asbestos exposure case in which the exposure occurred prior to the effective date of Article 2323. The court cited *Bell* to support the idea that Louisiana "rejected contributory negligence as a complete bar to recovery in all product liability cases."[25] The court went on to apply the *Bell* test and determined that comparative fault would be appropriate in that particular case.

In *Murray v. Ramada Inns, Inc.*,[26] the Louisiana Supreme Court decided that assumption of the risk should not operate as a complete bar to plaintiff's recovery regardless of whether the defendant is found to be negligent or strictly liable. Just as the *Bell* court found with contributory negligence, the *Murray* court concluded that assumption of the risk was inconsistent with a comparative fault system. "Regardless of the theory upon which liability is based, it appears evident that the application of comparative fault precepts in the multitude of cases affected by this decision necessarily eliminates the efficacy of 'assumption of risk' and, apparently negates the need to speak in term of 'victim fault.'"[27]

Under pre-Act product liability law, a plaintiff may also bring a claim against a manufacturer in negligence, while under post-Act product liability law the Act is the exclusive remedy for a plaintiff suing a manufacturer for damage caused by his product. As discussed earlier, Article 2323 applies directly to negligence claims, and if plaintiff is suing based on "events" which occurred prior to the effective date of Article 2323 in its present form then plaintiff is subject to pre-comparative fault law under which contributory negligence and assumption of the risk operate as complete bars to recovery. The recent Louisiana Supreme Court decision in *Cole v. Celotex* makes it clear that in a negligence action "events" that occurred prior to August 1, 1980, are subject to pre-comparative law.[28]

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23. *See* Norton v. Crescent City Ice Mfg. Co., 150 So. 855 (La. 1933).
24. 645 F. Supp. 761 (W.D. La. 1986).
25. *Id.* at 762.
26. 521 So. 2d 1123 (La 1988).
27. *Id.* at 1137 (Cole, J., assigning additional reasons).
28. Cole v. Celotex, 599 So. 2d 1058 (La. 1992).

In *Cole*, plaintiffs sued the executive officers and their employer corporation in negligence for failing to provide a safe workplace. Plaintiffs developed cancer from asbestos exposure. The court held that the key "event" to determine whether pre-comparative fault law applied was the date of exposure. The court reasoned that in the atypical situation where the damages or injuries result from a continuous process—a slow development of a hidden disease over time—the proper "event" for fixing the effective date for application of Article 2323 is the tortious exposure to asbestos rather than the date on which the cause of action accrues. Since the tortious exposures in *Cole* occurred prior to August 1, 1980, the court applied pre-comparative fault law. However, the jury specifically found that plaintiffs were not contributorily negligent; therefore, contributory negligence did not operate as a bar to recovery in the case. Pre-comparative virile share apportionment of liability was used to allocate liability among the solidarily liable tortfeasors because Civil Code article 1804, governing contribution among tortfeasors, had the same effective date as Article 2323, having been revised in the same legislative Act.[29]

In *Cole*, the court did not address whether comparative fault principles should be applied to plaintiffs' product liability claims against the asbestos manufacturers. The court recognized that this would depend upon an application of *Bell*:

> As noted by the Third Circuit, contributory negligence was available as a defense to the only defendant in this case, INA, the liability insurer of the executive officers. Several manufacturers and suppliers remain as defendants in the companion *Champagne* case. Whether contributory negligence or comparative fault is available as a defense to those defendants in the product liability claims asserted against them is an issue not presented or decided in the present case. See *Bell v. Jet Wheel Blast, Division of Ervin Industries*, 462 So.2d 166 (La. 1985).[30]

Champagne v. Celotex Corp.[31] was the companion case to *Cole*. The manufacturers in *Champagne* were the principal defendants, and the court held, as it did in *Cole*, that pre-comparative fault law should be applied to plaintiffs' claims in negligence against their employer and co-employees for failing to provide a safe workplace. The *Champagne* case had not yet gone to a jury, so the questions of plaintiff fault or contributory negligence had not yet been determined. The court held that a finding of contributory negligence or assumption of the risk would bar plaintiffs' recovery in their negligence claims against their employers

29. Civil Code article 2103 was revised in the same legislative act. This article was one of the sources of Article 1804. 1979 La. Acts. No. 331, § 1.

30. *Cole*, 599 So. 2d at 1068 n.29.

31. 599 So. 2d 1086 (La. 1992).

and co-employees, but the court did not address whether comparative fault should be applied to plaintiffs' product liability claims against the asbestos manufacturers.

Justice Dennis, concurring in the *Champagne* decision, recognized that "the question whether contributory negligence or comparative fault can be applied, as a matter of law, to reduce the recovery of the plaintiffs from the manufacturers-defendants"[32] was presented because there had not yet been a jury determination, as there had been in *Cole*, that plaintiffs were not contributorily negligent. Dennis correctly cites *Bell* for the proposition that comparative fault, rather than contributory negligence, applies to strict product liability claims. He applied comparative fault to this particular asbestos exposure case restating the *Bell* test: "comparative fault may not be applied to reduce a claim for damages in a case in which such a reduction would provide no incentive to other plaintiffs to guard against the type of negligent behavior engaged in by the plaintiff."[33] Dennis also noted that "the allocation of fault among tortfeasors is founded in part on the need for economic incentive for product quality control, a goal not advanced by forcing the injured person to underwrite the loss, particularly when the defendant tortfeasors have the capacity to distribute the loss more efficiently."[34] Whether comparative fault will be applied to a pre-Act product liability claim against a cigarette manufacturer will depend on a judicial application of the *Bell* test.

It should also be observed that the claims in *Cole* and *Champagne* are pre-Article 2324, which has been held not retroactive, so that all defendants cast will be in full solidarity, not subject to an allocated portion or percentage of fault.

Returning to the opening theme of this analysis, it appears that the principles announced by the court in *Cole* and *Champagne* are generally applicable to tobacco and lung cancer, determining whether to apply pre-Product Act law and pre-comparative fault law, the accrual of the cause of action, the application of *contra non valentem*, and the applicable rules of solidarity.

II. Louisiana's Double Whammy:[35] The Duty-Risk Analysis and the Lack of a Constitutional Right to Civil Trial by Jury

Roberts v. Benoit[36] is the Louisiana Supreme Court's latest attempt to articulate a workable approach to proximate or legal cause, known

32. *Id.* at 1089 (Dennis, J., concurring).

33. *Id.*

34. *Id.*

35. Whammy is defined as "a paralyzing or lethal blow," Webster's Third New International Dictionary 2599 (1986).

36. 603 So. 2d 150 (La. 1992).

in Louisiana as the duty-risk analysis.[37] While *Roberts* is an excellent work of scholarship, it does little to solve this long-standing puzzle. The approach taken in *Roberts* is inconsistent with the court's 1988 decision in *Pitre v. Opelousas General Hospital*.[38] The court's conversion of a proximate cause issue into a scope-of-duty legal question necessarily entailed exactly what the *Pitre* court sought to avoid and discourage—a policy decision with no explanation. The *Pitre* court observed that "terms such as 'duty' are merely verbal expressions of policy decisions and do not explain them. Allusions to policy should not be made a substitute for more determinate legal principles when they may be utilized."[39] This is particularly true when the basic issue is a factual proximate cause question.

The court in *Roberts* held that the duty imposed on a sheriff not to promote a cook to the position of deputy in name only, so that the cook could receive state supplemental pay, did not include the risk that the cook on his own time while intoxicated would accidentally shoot the plaintiff with the cook's own personal firearm. The sheriff had commissioned the cook and other kitchen workers as deputies so that they could receive state supplemental pay. They were given inadequate training which included only one day of firearms training. The trial court found that the Sheriff's Office had negligently hired and trained the cook/deputy; the Supreme Court reversed. The primary issue addressed by the Supreme Court was whether the acts of the Sheriff's Office were the legal cause of the plaintiff's damages.

The opinion gives a scholarly and exhaustive discourse on legal cause, citing the important cases on this issue, but offers no analysis beyond what has already been developed in earlier opinions tackling the question. The duty of care owed by the sheriff was defined in such narrow terms as to preclude the possibility that the risk of plaintiff's injury would fall within this duty, *i.e.*, the Sheriff's Office had a duty not to promote a kitchen worker to deputy so that he could receive state supplementary pay, but this duty does not protect the public from negligent acts of the "paper deputies" outside their work as kitchen workers.

The cook was commissioned as a "deputy" in name only in that he was never called upon to perform any duties other than those of a cook. He was not required to carry a gun nor was he issued one. The gun involved in the accident was purchased by the cook after he was

37. *See* Dixie Drive It Yourself Sys. v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962); Hill v. Lundin & Assocs., Inc., 260 La. 542, 256 So. 2d 620 (1972); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988).

38. 530 So. 2d 1151 (La. 1988).

39. *Id.* at 1155-56.

commissioned as a deputy; however, the purchase was not linked to his duties with the Sheriff's Office. The cook was clearly not qualified to be commissioned as a deputy nor was he adequately trained. However, during his limited training he was told that it was better to have a gun and not to need it than to need a gun and not to have it. He was also given a copy of department regulations which state that firearms should be removed to a safe place while deputies are engaged in recreational activities involving the consumption of alcohol and that a weapon should only be drawn when one's life is in danger or the use of deadly force is anticipated.

Whether the court reached the correct substantive result as to liability in *Roberts* is of course open to question, particularly in view of the vigorous dissents. The more troublesome aspect of the decision, however, is that the court's treatment of the basic issue of proximate cause as a scope-of-duty-law-question led it to make a policy decision without discussion of the various influential policy factors. This approach is inconsistent with the approach to legal cause taken a few years earlier in *Pitre*, when the court adopted a foresight-foreseeability approach and phrased it in the form of a question that should be decided by the trier of fact, *i.e.*, a negligent tortfeasor should be held liable for the damages that were reasonably foreseeable at the time of the tortfeasor's conduct; or, a negligent tortfeasor should be held liable only for the consequences that a reasonable person would expect to follow from his conduct.[40] This issue of foreseeability is to be decided by the trier-of-fact, be it judge or jury, in the form of the factual question of legal cause or proximate cause, according to *Pitre*.

In the *Pitre* case, the court held that a physician who had negligently performed a bilateral tubal ligation was liable only for the birth of the unwanted and unplanned child, but he was not responsible for the risk that the child would be born with a birth defect, for the physician could not have predicted or foreseen that the child would be born with a defect, nor did his negligence cause or create the defect.

The foresight-foreseeability approach of the *Pitre* court was taken with the express intention of providing the trier of fact with a workable system for making a determination of legal cause as a factual issue:

> [I]t may be helpful to use a "legal cause" analysis which affords the application of "foreseeability" rules and other concepts of limitation. Although indistinct, these rules and concepts are more determinate than the abstract idea of a "duty" based on various "policy considerations" and may prove more helpful to triers of the facts, at least as starting points for legal reasoning.[41]

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40. *Id.* at 1161.
41. *Id.* at 1156.

The *Pitre* court clearly recognized the need to develop guidelines for the trier of fact to follow:

> Rather than merely deciding that the defendant's duty does or does not cover certain types of damage after reflecting on appropriate policy considerations, we will not only engage fully in that judicial process but we will also attempt to articulate auxiliary rules for determining the extent and nature of damages ascribable to the defendant that will be helpful to triers of fact in future cases.[42]

Legal cause is correctly viewed by the *Pitre* court as a mixed question of law and fact. Unless the court finds as a matter of law that there is, or is not, legal cause, the question should go to the trier of fact.

By contrast the *Roberts* court took a straight duty/risk approach, treating legal cause as purely a question of law for the court to decide, on the theory that "the scope of the duty inquiry is ultimately a question of policy" and thus a question of law for the court. The court did not discuss the policy considerations that led to its conclusion. The court resorted to a narrow statement of the duty in order to dispose of the case consistently with its policy viewpoint, in a sense stacking the deck of analysis to fit the result to the conscience-of-the-court feeling about the case. The foreseeability approach was shrugged off as "merely a legal fiction useful in instructing juries" which is "necessary if judges are to palm off the theretofore legal question of legal cause as a factual one to be decided by juries."[43] According to *Roberts*, the critical test in Louisiana is phrased in terms of "ease of association" which is a combination of both policy and foreseeability.[44] More specifically, is the harm to the plaintiff easily associated with the type of conduct engaged in by the defendant?

It is widely acknowledged that the terms such as foreseeability, reasonably anticipated, remote, and tenuous, when used by the appellate court in disposing of a case, simply articulate conclusions already reached by the court. Can "ease of association" be any different?[45]

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42. *Id.* at 1159.

43. This, notwithstanding the specific provision for legal cause as a jury issue as provided by La. Code Civ. P. art. 1812.

44. Hill v. Lundin, 260 La. 542, 256 So. 2d 620 (1972).

45. Another court has stated:

> On the previous appeal we stated aptly: "somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity." We believe that this point has been reached with [these] claims. . . . The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. Under all the circumstances of this case, we hold that the connection between the

An attempt was made in *Roberts* to reconcile the court's approach with *Pitre* by suggesting that the approach taken in *Pitre* was helpful only after the court had determined that the defendant had breached a duty owed to plaintiff and was then trying to determine what damage should be attributed to defendant's conduct. The *Roberts* court misses

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defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. "The law does not spread its protection so far." Holmes, J., in Robins Dry Dock [& Repair Co. v. Flint, 275 U.S. 303 at 309, 48 S. Ct. 134 at 135 (1927)].

In the final analysis the circumlocution whether posed in terms of "foreseeability," "duty," "proximate cause," "remoteness," etc. seems unavoidable. . . . [W]e return to Judge Andrews' frequently quoted statement in Palsgraf v. Long Island R.R.: "It is all a question of expediency . . . 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."

Petition of Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821 (2d Cir. 1968).

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 someone, it harms him a mile away as surely as it does those on the scene.

. . . .

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.

. . . .

. . . 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.

Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. Ct. App. 1928) (Andrews, J., dissenting) (citations omitted).

the boat, for the question of legal cause, proximate cause, or risk within duty, is always to determine what damage should be attributed to the defendant, whether it is phrased in terms of the scope of the duty or foreseeability of the harm. The *Roberts* court suggests that the *Pitre* decision was some type of anomaly necessitated by its facts—that the foresight-foreseeability approach was better suited for the factual situation in *Pitre*. In all the cases cited by *Roberts*, the court was deciding legal cause as a matter of law. *Roberts* seems to indicate that legal cause should never go to a jury, whereas *Pitre* properly recognizes that legal cause is typically a question for the trier of fact except in those few cases where the evidence is such that reasonable minds could not differ, and the issue must be decided "as a matter of law," or in the extraordinary cases where policy concerns may come into play.

The choice of analysis debate implicit in the *Roberts* and *Pitre* opinions is largely academic so long as our appellate courts have jurisdiction to review facts found by the jury. The decrees of law as to wrongful life in *Pitre* and as to sheriff responsibility in *Roberts* represent the deepest acts of conscience by the court commonly labeled as policy decisions. The socio-economic values of the court manifested in those decisions would be the same whether exercised in the name of duty-risk or traditional proximate cause. The choice of analysis scheme thus has practical consequences only in its controlling the allocation of function to judge or jury, for the jury's collective layman's conscience has a different set of socio-economic values than does the policy-oriented appellate court. Compensation of the injured through expanded tort liability of risk distributors may be uppermost in the appellate court conscience, while reasonableness of conduct and responsibility of the plaintiff for his own injury may guide the jury to its verdict. Unless the jury can speak with finality in its traditional factual province, there is no meaningful difference between *Pitre* and *Roberts*.

The very serious foregoing question not addressed in *Roberts* is when is legal cause a question of law for the court and when is it a question for the trier of fact? The opinion strongly suggests that it is always a question of law for the court as a scope-of-duty question. The trial judge thus remains unguided as to when legal cause should be decided by the court as a question of law and when it should be submitted to the jury with instructions on reasonable foreseeability; but it may be the rule of *Roberts* that the jury should never get the question at all.

This is all definitively treated in *Palsgraf*; Cardozo's majority opinion represents the determination of the scope of duty as a question of law (more elaborately expounded by Leon Green), and Andrews' dissent represents the classic application of proximate cause as an issue of fact for the jury.[46]

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46. The Cardozo duty analysis is by no means the law of the land. *See* W. Page

The opinion in *Roberts* illustrates the chief peril of the duty/risk analysis, that the traditional fact issue of proximate cause will be taken over entirely by the court under the guise of deciding a question of duty, which is a question of law. If the *Roberts* case had been tried in the federal system, the results undoubtedly would have been quite different. Under the Seventh Amendment, questions of fact are within the province of the jury, and a failure to honor that jurisdiction of the jury results in a breach of the constitutional right of the parties to trial by jury. The United States Constitution, the jurisprudence and the Federal Rules of Civil Procedure make it absolutely clear that questions of fact in a jury trial are the constitutionally protected province of the jury.[47]

The Seventh Amendment provides that the jury trial, as it existed at the common law, shall be preserved to the citizens of the country and facts found by a jury shall not be reviewed by any court. The jury trial thus guaranteed to the citizens is defined by historic standards, *i.e.*, the jury trial preserved to us is the one obtaining at common law between 1791, the date of the adoption of the Seventh Amendment, and 1938, when the rules of civil procedure for the federal district court, recognizing right of trial by jury, were adopted.[48] Unquestionably during that period, proximate cause in negligence cases was a question of fact for the jury. All authorities agree on this.[49] That leads to the obvious next question—what is proximate cause?

Keeton et al., Prosser and Keeton on the Law of Torts § 45, at 319-20 (5th ed. 1984). It seems evident that in all of these proposed rules and formulae the courts and the writers have been groping for something that is difficult, if not impossible, to put into words: some method of limiting liability to those consequences which have some reasonably close connection with the defendant's conduct and the harm which it originally threatened, and are in themselves not so remarkable and unusual as to lead one to stop short of them. It may be questioned whether anyone has yet succeeded in devising terminology that, as a way of expressing the idea of such a reasonably close connection, will ever achieve greater acceptance in courtrooms than the despised word "proximate."

47. Charles A. Wright, The Law of Federal Courts § 92, at 609 (4th ed. 1983). "The Seventh Amendment creates a historical test for trial by jury. The practices of the common law in 1791, when the amendment was adopted, is made the standard."

48. *See id.*.

49. "And finally it is generally admitted that what is a proximate cause of an injury is a question of fact, ordinarily to be decided by the jury." William B. Hale, Handbook on the Law of Torts § 19, at 46 (1896).

> The question of proximate cause is usually for the jury upon all the facts. Proximate cause is said to be a mixed question of law and fact which must be submitted to the jury under proper instructions. But where the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.

1 Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise

To get right to the point, it is submitted that the proximate cause analysis set forth in Andrews' dissent to *Palsgraf* is the scheme of proximate cause cognizable as a question of fact in the common law jury trial contemplated by the Seventh Amendment and by the constitutional guarantee of civil trial by jury found in the great majority of the state constitutions. Typically, the state constitutions provide that the right of civil trial by jury as known at the common law shall remain inviolate. The right to trial by jury thus governs state procedure as well as federal procedure as to the proximate cause question-of-law, question-of-fact problem.

The Leon Green analysis, embodied in Louisiana tort analysis through the so-called duty/risk scheme, eliminates the traditional proximate cause question of fact for the jury by phrasing the question as one of scope of duty, so that the former proximate cause question of fact for the jury becomes a question of law for the court. Louisiana is the only state operating its tort analysis with the duty/risk formula. It is submitted that it is possible to do so in Louisiana, and only in the state court system of Louisiana, because Louisiana does not have the traditional constitutional guarantee of civil trial by jury. Indeed, it has no constitutional guarantee of civil trial by jury whatsoever and has full civil appellate review of fact. This may be the reason the Green analysis has not been adopted in Texas—where Green is revered in a fashion most appropriate for such genius—for Texas has a constitutional right to civil trial by jury in the traditional form.[50] It is immediately apparent that the duty/risk scheme would not mesh with the constitutional right to

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Independently of Contract, 111 (3d ed. 1906).

> It is frequently said, in judicial opinions, that the question whether a given act was the proximate or remote cause of an injury which followed it, is ordinarily a question for the jury. It is said that "it is not a question of science or knowledge. It is to be determined as a fact, in view of the circumstances attending it." It is said to be the province of the jury "to look at the facts as they transpire, and ascertain whether they are naturally and probably connected, in orderly sequence with the prime cause, or disconnected by some intervening agency affecting its operation.

1 Seymour D. Thompson, Commentaries on the Law of Negligence § 161, at 157 (1901).

"It was only in the 1840s, when a more coherent idea of a substantive law of negligent torts had developed, that proximate cause became firmly established as an element in negligence law." Patrick J. Kelley, *Proximate Cause in Negligence Law*, 69 Wash. U. L.Q. 49, 68 (1991).

50. Tex. Const. art. 5, § 10:

> Sec. 10. In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

have the jury decide questions of fact in the form of proximate cause questions. So it is only in Louisiana and in the Cardozo opinion in *Palsgraf* that the duty/risk concept exists, in which the scope-of-duty as question-of-law phrase is used to decide the traditional proximate cause-issue of fact question.

How would *Roberts* have been tried in the federal system? Without dispute, the district judge would have ruled that the sheriff's office has a duty to use appropriate care in commissioning deputies. Whether the sheriff's office used the proper care in commissioning the cook would have been a question of fact for the jury (the determination of the issue of negligence), because it was clearly a set of facts on which reasonable minds could differ. As to cause in fact and legal or proximate cause, typically, the federal judges combine them in a single instruction;[51] but it might serve our purposes better here to separate the two questions. In *Roberts*, there is obviously a genuine issue of fact on whether the commissioning of the cook as a deputy was a "but for" cause-in-fact of plaintiff's injury. (A jury would have been on sound grounds in finding no causation because history shows that even the most highly qualified occasionally misbehave with their firearms.) So it was a question of fact for the jury to determine causation. Knowingly separating the legal or proximate cause issue, if the jury found that the commissioning of the cook was negligent and was the cause in fact of the plaintiff's injury, it is again beyond dispute that in ninety-nine percent of the courts in this country, the question of proximate cause would have been put to the jury as a question of fact. There would have been instructions on intervening cause, superseding cause, remote and tenuous causation, departure from official duties on a personal lark, and other suggested instructions to inform the jury on the nuances of this particular fact issue, but make no mistake, proximate cause properly would have been put to the jury as a question of fact. What would the jury have returned? The jury in *Roberts* itself returned a finding of liability, so it can be speculated that a jury in the federal system might have found the same.

The foregoing scenario illustrates the huge difference between our state system and the federal system with its constitutional guarantee of

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51. Proximate cause instruction—the plaintiff must prove by a preponderance of the evidence that the act or failure to act by the defendant was a cause in fact of the damage plaintiff suffered. An act or a failure to act is a cause in fact of an injury or damages if it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damages. The plaintiff must also prove by a preponderance of the evidence that the act or failure to act by the defendant was a proximate cause of the damage plaintiff suffered. An act or omission is a proximate cause of the plaintiff's injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable consequence of the act or omission. Bench book of local judge in Federal District Court, Middle District of Louisiana.

civil trial by jury, proximate cause as a question of fact, with no jurisdiction of facts by the appellate court. In a *Roberts* federal trial there would have been sufficient evidence to support the jury's findings on each of the key issues, and it would have been absolutely futile to appeal the case to the Fifth Circuit because it would have found that the jury had simply done its duty.

Because *Roberts* was tried in the state court, the plaintiff was subjected to a double whammy, the analysis through duty/risk scope-of-duty question of law for the court and, perhaps even more devastating, the lack of constitutional guarantee of civil jury trial. The parties also face the appellate review of fact which in this case reversed the jury on a question that in every other state in the union and in the federal system would have been a question of fact on which the jury's verdict was binding.

There are numerous cases in the federal system and in the various states pointing out that proximate cause is an issue of fact for the jury and failure to honor the factual jurisdiction of the jury deprives a party of its constitutional right to civil trial by jury.[52] It is thus only in

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52. In our present case the conclusion is inescapable that the court, in granting a new trial as to damages only, has substituted its finding that Rosenthal's negligence was a proximate cause of the injury for the special verdict of the jury finding that Rosenthal's negligence was not a proximate cause of plaintiff's injury. The court by its order has in effect determined that Mound and Rosenthal are both liable to the plaintiff for his injuries. In so doing, the court acted beyond its jurisdiction. In our present case, a jury trial was properly requested and granted upon all the issues and all issues were submitted to the jury by special verdicts, as authorized by rule 49(a). The parties were entitled to have all issues tried by the jury as a matter of right. Rules 38, 39. Such rules preserve the right to jury trial, guaranteed by the Seventh Amendment, which reads: "In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." The amendment is plain and unambiguous and speaks for itself. The only manner in which facts tried by a jury may be re-examined as a question of law is limited to situations where a motion for directed verdict upon the issue is made at the close of all the evidence and a motion for judgment n.o.v. has been made as authorized by Rule 50(b).

Tsai v. Rosenthal, 297 F.2d 614, 617-18 (8th Cir. 1961) (citations omitted).

Likewise, whether Chicago Bridge's breach of its duty of care to Keene was the *proximate cause* of Keene's injuries was an *issue of fact* for the *jury* to decide. The *jury* permissibly could find it was reasonably foreseeable that a Ceilcote employee would undertake to move Chicago Bridge's sand pot from the scaffolding boards and was in danger of being injured in doing so without the assistance of Chicago Bridge employees or special equipment such as the cherrypicker used by Chicago Bridge to lift the sand pot on top of Ceilcote's scaffolding boards in the first place. Whether the risk of injury from negligent conduct is reasonably foreseeable and proximately caused by such negligent

Louisiana that the adversaries in tort litigation can experience this double whammy.

In a state with a constitutional right to civil trial by jury and with the historic jurisdiction of the jury over questions of fact as they obtained in jury trials at the common law, it is submitted that Andrews' proximate cause scheme in his dissent to *Palsgraf* (closely followed in *Pitre*) is the only intellectually sound analysis for a workable allocation of functions among the judge and the jury, at the same time honoring the constitutionally required allocation of fact to the jury. Andrews' statement was of the very traditional scheme, that if the defendant violated the general duty of care governing his endeavor, and his breach of care caused harm to various defendants, it would be a factual question for the jury as to which of those harms were proximately caused by his breach. Of course, the court stands as guardian of the jury process and any issue of fact can be so clear because of the evidence that reasonable minds could not differ on the questions, so that the question of fact may be decided as a matter of law. It is a simple system and has stood the test of time beautifully. It is the system to which Justice Dennis wants us to return. We should make the return trip to traditional proximate cause, carrying with us the constitutional right to civil trial by jury in Louisiana, giving to the jury verdict on matters fairly within its province the full dignity guaranteed by the Constitution of the United States and guaranteed by the constitutions of the other states to all their citizens.

> conduct is ordinarily a question for the jury. The record in this case contains competent evidence to prove that it was foreseeable that placing a loaded sand pot on top of another subcontractor's material was dangerous and could result in injury to that subcontractor's employees.

Keene v. Chicago Bridge & Iron Co., 596 So. 2d 700, 705 (Fla. App. 1st Dist. 1992) (citations omitted, emphasis added).