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Everybody knows that under our system of negligence law, there are times when substandard (negligent) defendants whose behavior causes harm nevertheless escape liability. Nobody seems to know quite why, but we are all sure that it happens. If I hand an eight-year-old child a loaded shotgun; if he takes it home and gives it to his father; if that night his father gets drunk and kills your prize heifer, Nick the Greek is giving nine to one that I escape liability to you, even though:

1. I was negligent. (It's stupid and dangerous to give loaded guns to little kids.)
2. My conduct was a cause of your loss. (If I hadn't produced the gun, this would not have happened. The father might have got drunk and killed the heifer with a hatchet, just as he might have got hold of some other shotgun. But he wouldn't have killed the heifer, then, there, and thus.)

So why do I escape? The common-sense, visceral response that, while I was a cause of your loss, somehow I didn't cause it enough, leads to what for many years has been and in most places remains the standard answer—my negligence was not a proximate cause of your loss. I have, repeat, been blameworthy; and my blameworthy conduct was a cause of your loss—I contributed to the situation, created the opportunity, put some of the necessary forces in motion, “set it up.” But too much else has intervened—time, space, people, and bizarreness. This consequence of my negligent behavior, in other words, was somehow just “too cockeyed and farfetched” for you to expect me to pay for it.

The law's negative answer to your action against me—“while the defendant may have been negligent, his negligent conduct was not a proximate cause of the plaintiff’s loss”—obviously leaves a great deal unexplained. Why wasn't my conduct a proximate cause? Why need

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1. In Palsgraf Revisited, 52 Mich. L. Rev. 1, 27 (1953), Dean Prosser attributes this “test” to a prescient first-year student.
it have been a proximate cause? What is a proximate cause? Because
the proximate cause formulation appeals to reactions that are ulti-
mately visceral in nature, it is not surprising that the courts have
exhibited no particular temptation to try to get to the bottom of such
questions.² Attempting to explicate the inexplicable is not a charac-
teristic judicial flaw.

Still, the legal realist movement in America spawned a tradition
of relative judicial candor, and modern courts are somewhat sensi-
tive to the unwisdom of intentional mysteriousness. Recently in Hill
v. Lundin & Associates, Inc.³ the Louisiana supreme court gave a
strong and convincing demonstration of its determination to work at
unmasking the unnecessarily arcane. No one would have been very
surprised if the case had escaped supreme court review: the facts were
straightforward and rather unspectacular; the outcome below, while
ultimately deemed wrong, was in no important sense unacceptable.
The court’s sole reason for deciding the case, as the opinion makes
clear, was pedagogical—the case is a lesson in analytical technique
addressed to the lower courts and the bar.

Celeste Hill, a maid, tripped over a ladder lying in her em-
ployer’s yard and hurt herself. Perhaps the defendant, a home repair
contractor, was negligent in having left the ladder leaning against the
house after work was completed. But nobody knew who had later
moved the ladder to the ground, and that, in the court’s view, consti-
tuted a new risk, one for which defendant was not responsible. Ad-

². Proximate cause has always been a troublesome matter, occasionally thereby
provoking judicial expressions of impatience. In Insurance Co. v. Tweed, 74 U.S. (7
Wall.) 44, 52 (1868), the Supreme Court said of proximate cause doctrine (there, as
employed respecting questions of fire insurance coverage): “[W]e have had cited to
us a general review of the doctrine of proximate and remote causes as it has arisen and
been decided in the courts in a great variety of cases. It would be an unprofitable labor
to enter into an examination of these cases. If we could deduce from them the best
possible explanation of the rule, it would remain after all to decide each case largely
upon the special facts belonging to it, and often upon the very nicest discriminations.”
See also Mr. Justice Sanders, dissenting in Spiers v. Consolidated Cos., 241 La. 1012,
1027, 132 So. 2d 879, 885 (1961): “[T]he most serious issue posed is whether the
negligence of the defendant was a proximate, or juridical, cause of the harm to plain-
tiff. This question is not free from difficulty. In this state and elsewhere, the subject
of responsible causation is obscured by a smog of empty phrases and verbal intricacies.
It is difficult, if not impossible, to reconcile the decisions that have dealt with it.”
(Citations omitted.) For inquiry into the origins of the use of causation doctrines as
liability-limiting devices, see Green, Duties, Risks, Causation Doctrines, 41 Tex. L.
Rev. 42 (1962).

³. 260 La. 542, 256 So. 2d 620 (1972).
dressing itself with some intensity to an issue the lower courts had barely (if at all)\(^4\) seen, the court said:

The basic question . . . is whether the risk of injury from a ladder lying on the ground, produced by a combination of defendant's act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against the house.\(^5\)

That it was the method of framing such questions—not a particular answer to this particular question—that provoked the court’s interest in the *Hill* case is patent. The particular answer here turned out to be “no,” because

the record is devoid of any evidence tending to establish that the defendant could have reasonably anticipated that a third person would move the ladder and put it in the position which created this risk, or that such a ‘naked possibility’ was an unreasonable risk of harm.\(^6\)

That answer, taken alone, is not overly helpful. It invites such subsidiary questions as: Why is the risk that someone would move the ladder a “naked possibility”? What kind of evidence would go to establish that defendant could reasonably have foreseen that someone might move the ladder? Why was it necessary for plaintiff to establish that particular form of foreseeability; why wasn’t it enough that defendant could have foreseen a more general range of dangers presented by unattended ladders? Those questions are real and telling; they lurk beneath the surface explanation of the law’s negative answer to Celeste Hill. But no one could seriously have faulted the court for foregoing further inquiry.\(^7\) With respect to the particular

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4. The trial court had held for defendant because it found contributory negligence. The court of appeal held for plaintiff, in an opinion devoted almost exclusively to the “momentary forgetfulness” exception to the contributory negligence doctrine. On the issue that ultimately proved dispositive in the supreme court, the court of appeal said only: “We find that Lundin & Associates, Inc. was negligent in leaving this ladder on the job site, unattended, for two or three days after the work had been completed, where it was foreseeable that someone could be injured by the ladder.” *Hill v. Lundin Assoc.*, Inc., 243 So. 2d 121, 123 (La. App. 1st Cir. 1970).
5. 256 So. 2d at 622.
6. Id. at 623.
7. As much of the literature on the subject—whether it be termed “proximate cause,” “extent of liability,” “remoteness of damages,” “limitations on liability,” or “scope of liability”—demonstrates, getting at the underlying reasons for a particular determination is not easy. Prosser, it will be remembered, ultimately throws up his hands and concludes that about all that can be said is that defendant will pay for fault-
problem of the *Hill* case, the quoted answer has perhaps suggested about all that can sensibly be said: the contractor was (arguendo)* negligent, and as a result Celeste got hurt, but other things had more to do with her accident than defendant's actions.

II.

But the Louisiana supreme court did offer something more. The opinion in *Hill* is quite significant as an indication of the court's willingness, perhaps even determination, to get further in the *nature of the process* of formulating and answering questions of the sort involved in *Hill*. As a means of analyzing the clues it gives us, let us posit an intelligent laymen, not congenitally gullible, with an interest in the prevailing mode and level of discourse in our judicial system. The court has just stated that Celeste Hill loses, even though Lundin & Associates' negligent conduct contributed to her injuries. Brash and faintly irreverent, our layman asks *why*? There follow two scenarios. The first is intended to suggest the level of inquiry and explanation typical of a tribunal employing the standard, proximate cause approach to the issue presented. The second will be a rather bold extrapolation from the actual opinion in *Hill*.

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8. "Arguendo," because the supreme court's disposition—that, assuming a duty not to leave the ladder leaning against the house, breach of that duty did not give rise to liability because the duty did not embrace the particular risk—preempts reaching the question of the substandardness of the conduct in question. As the court stated in *Laird v. Travelers Ins. Co.*, 263 La. 199, 216, 267 So. 2d 714, 720 (1972): "Actually neither the combination fact-law question of negligence nor any attendant policy consideration which might deny liability on that basis is reached. The resolution of the duty-risk element of tort liability adversely to the claimant preempts an inquiry into ultimate negligence or fault, for liability cannot be imposed for negligent acts in the absence of that relationship."

9. This creature, who may not otherwise exist, emerged from 1 STANBURY'S NORTH CAROLINA EVIDENCE, 222 (Brandis Rev. 1973), where the author termed some particularly stupid rule of evidence law "a monumental legal asininity, impossible to explain to any laymen not congenitally gullible."
A.

Court: In order for plaintiff to establish liability for injury produced through a combination of defendant's act and that of a third party, it is necessary that she establish that the third party's action was not an independent intervening variable, insulating the defendant from liability under the doctrine of proximate cause. That is to say, it must be shown that plaintiff's injuries flowed from defendant's actions through a continuous, direct, unbroken sequence of causation, undisturbed by the intervention of unforeseeable superseding factors. We think that in the instant case, the record is entirely devoid of any evidence going to establish an unbroken chain of causation. On the contrary, it affirmatively appears from the facts that plaintiff's injury was proximately produced by the act of a third person in moving the ladder to the ground, rather than by the act of defendant in making the ladder accessible to the third person. Accordingly, we feel that plaintiff has failed to establish the requirements of legal and actionable negligence on the part of defendant.

I. (N.C.G.)L: Why is the action of the unknown person who moved the ladder so important? What does it mean to say that person's action was "superseding"?

Court: That person's action, like Lundin's, was a cause of Celeste's injuries—it was necessary for someone to put the ladder on the ground before she could fall over it. Further, that action happened later than the contractor's action of leaving the ladder leaning against the house—that is, it happened after the relevant conduct of Lundin was finished, over, at rest. Thus, in terms of both space and time, the act of moving the ladder was closer—more proximate—to Celeste's accident than Lundin's action.

I. (N.C.G.)L: Does this mean that it's only the last guy who does something wrong whom the law regards as responsible for an injury?

Court: Well, no, not always. It depends. Sometimes, the prospect that someone else will do something, or even do something wrong, will be the very thing the defendant should have guarded against. For example, if someone stops a truck on a dark highway at night, without putting out warning flares or devices, there is a strong possibility that some other driver will run into that truck. He may run into it because he couldn't see it at all; he may run into it because he wasn't

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10. This portion of the court's imaginary proximate cause explanation echoes the "passive negligence" formula, the doing to death of which was the major business in Dixie Drive-It-Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962). See notes 27, 41 and accompanying text infra.
paying as close attention to his driving as he should've been.11 Either way, the fellow who left the truck on the highway ought to be liable to an innocent person hurt by that collision. We would probably say something to the effect that defendant who left the truck on the road should have foreseen collision with a later inattentive motorist as likely enough to require him to take precautions against it.

I. (N.C.G.)L: Well, what's really so different about Celeste Hill's case? Couldn't you say that when the contractor left the ladder against the house, he should have realized that someone might knock it down and hurt himself or somebody else; that a child might try to climb it and fall; or that somebody might move it to the ground (maybe, for all we know, for the very purpose of guarding against these other dangers) where an innocent person could trip over it?

Court: In the last analysis, these problems are matters of judgment, of degree. This court is charged with the responsibility of reaching a decision, one way or the other, in some very close and difficult cases. In our view, somebody's moving the ladder to the ground just did not seem the kind of thing the defendant should have been concerned about when he left the ladder leaning against the house.

I. (N.C.G.)L: But didn't another appellate court come to the opposite conclusion?

Court: Yes, but in this case, the court below did not seem to see the issue of proximate cause with any clarity; it was mainly concerned with another problem in the case.12 We felt that if the issue had been properly highlighted for the court below, it would have agreed with us.

B.

The second scenario is based (rather loosely and presumptuously) upon the opinion actually written in the Hill decision. Again, the concerned layman has been told that Celeste loses, and asks "why"?

Court: The basic question is whether the risk of injury from a ladder lying on the ground, produced by a combination of defendant's act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against the house. Foreseeability is not always a reliable guide, and certainly it is not the only criterion for determination whether there is a duty-

11. These are the essential facts of the Dixie case. See note 10 supra.
12. See note 4 supra.
Where the rule of law upon which a plaintiff relies for imposing a duty is based upon a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court’s own judgment of the scope of protection intended by the Legislature. Where the rule of law is

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13. It is a major contention of this article that the Hill court’s major reason for discrediting “foreseeability” as the main test for the extent of defendant’s duty was the rigidity and aura of automatic application with which it had come to be entrusted. A closely-related flaw in that term is the confusion that has been imposed on it and on the law of negligence by the fact that it has been made to serve two distinct functions: (1) the test of whether defendant has been negligent at all; (2) the extent of his liability once negligence is established. The use of the same term in approaching two distinct issues has contributed to difficulty in keeping them separated, a confusion to which then Judge, now Justice Tate addressed in Bergeron v. Houston-American Insurance Co., 98 So. 2d 723, 725 (La. App. 1st Cir. 1957), cert. denied, Feb. 10, 1958: “This non-actionable ‘very slight fault’ . . . is correctly equated by [appellee] with that found in ‘freak accidents,’ where the failure to guard against a remote possibility of accident, or one which could not in the exercise of ordinary care be foreseen, is held not to constitute actionable negligence. These cases [relied upon by appellee] all concern accidents which were not reasonably foreseeable and avoidable by the exercise of due care, whereas appellee’s argument is actually that the disproportionately severe injuries received by the child . . . were not reasonably foreseeable. We do not believe these cases to be apposite to the present issue, for in our opinion the accident to the child . . . was a foreseeable consequence [of appellee’s conduct] . . ., although admittedly the injury received . . . was more serious a consequence of the accident than might reasonably have been expected.” (Citations omitted.) Judge Tate’s explanation was lucid: the issue in the cases appellee adduced was negligence vel non, while the issue in the instant case was the extent of liability once negligence was shown. The typical use of “foreseeability” as a rubric respecting each issue led to the necessity for the explanation. For other examples of the difficulty of keeping the two issues separated, see Centanni v. New Orleans Public Belt R.R., 261 So. 2d 729, 731 (La. App. 4th Cir. 1972) (Hill cited on issue of negligence for proposition, “It is only that conduct which creates an appreciable range of risk for causing harm that is prohibited.”). See also Jones v. Robbins, 275 So. 2d 812 (La. App. 2d Cir. 1973); Vander v. New York Fire & Marine Und., Inc., 192 So. 2d 635, 640-41 (La. App. 3d Cir. 1966) (concurring opinion).

In short, “foreseeability” as a test for the extent of a negligent defendant’s liability has been a mess. In addition to the sort of confusion noted above, it seems to have had the power to make into difficult issues questions of liability that would on their face seem relatively straightforward. In the following cases, the Louisiana supreme court eventually held for plaintiff, but only after some travail: Jackson v. Jones, 224 La. 403, 69 So. 2d 729 (1953) (unattended lumber with protruding nails hurt child on school ground); Lasyone v. Zenoria Lbr. Co., 163 La. 185, 111 So. 670 (1927) (three-inch nail protruding from tenant-house wall punctured skull of tenant’s seventeen-month-old daughter); Davis v. Hochfelder, 153 La. 183, 95 So. 598 (1923) (mother cut herself breaking into bathroom to rescue son asphyxiated by faulty heater); Payne v. Georgetown Lbr. Co., 117 La. 983, 42 So. 475 (1906) (sawmill worker killed when watchman threw shovel, hitting carriage lever).

14. For forthright recognition that the process of determining the ambit of protec-
jurisprudential and the court is without the aid of legislative intent, the process of determining the risk encompassed within the rule of law is nevertheless similar. The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination. This defendant’s alleged misconduct, its alleged breach of duty, was in leaving the ladder leaning against the house unattended. The risk encountered by the plaintiff which caused her harm was the ladder lying on the ground where it was placed by another. The record is devoid of any evidence tending to establish that the defendant could have reasonably anticipated that a third person would move the ladder and put it in the position which created this risk, or that such a “naked possibility” was an unreasonable risk of harm.15

I. (N.C.G.)L: What does it mean to ask whether the defendant could reasonably have anticipated that a third person would move the ladder? What kinds of evidence that he could have anticipated it might Celeste Hill have presented?

Court: Perhaps the reference to the defendant’s reasonable anticipations is misleading you. As we said in the case,

 foreseeability is not always a reliable guide . . . . Just because a risk may foreseeably arise by reason of conduct, it is not necessarily within the scope of the duty owed because of that conduct. Neither are all risks excluded from the scope of duty simply because they are unforeseeable. The ease of association of the injury with the rule relied upon, however, is always a proper inquiry. . . . ‘All rules of conduct irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect some persons under some circumstances against some risks. Seldom does a rule protect every victim against every risk that may befall him. . . . The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the courts cannot escape.16 This defendant’s alleged . . . breach

15. The hypothetical court’s explanation consists of selected quotes from the Hill opinion, 260 La. 542, 550-51, 256 So. 2d 620, 622-23.
16. The court was quoting Malone, Ruminations on Cause-in-Fact, 9 STAN. L.
of duty was in leaving the ladder leaning against the house unattended. The risk encountered by the plaintiff was the ladder lying on the ground where it was placed by another. The record is devoid of any evidence tending to establish that the defendant could have reasonably anticipated that a third person would move the ladder and put it in the position which created this risk. A rule of law which would impose a duty upon one not to leave a ladder standing against a house does not encompass the risk here encountered.\textsuperscript{17}

I. (N.C.G.)L: Pardon me, but, to me, \textquotedblleft anticipate\textquotedblright{} and \textquotedblleft foresee\textquotedblright{} mean much the same thing. It sounded as if you said foreseeability is not the test, but then later said this victim loses essentially because the way she was hurt was not foreseeable.

\textit{Court}: You are overlooking our repeated reference to the policy inquiry of the ease of associating the injury with the rule violated. What we are saying is something like this: If we created a rule saying, \textit{\textquotedblleft don't leave ladders leaning against houses after work is through,\textquotedblright} we would have in mind a range of dangers involving the ladder as an invitation to climb, and probably as well a range of dangers involving the propensity of leaning ladders to fall. But we don't think we'd have been particularly concerned about the danger that someone might lay the ladder on the ground where someone else might trip over it.

I. (N.C.G.)L: You did say, though, that there was no \textit{evidence} that defendant could reasonably have anticipated that a third person would move the ladder and put it in the position which created this risk. Does that really mean, then, there's no evidence that the creator of a rule against leaving ladders leaning would have been worried about the prospect of someone's laying it on the ground? What kind of evidence would show \textit{that}?\textit{\textsuperscript{17}}

\textit{Court}: The inquiry into the ease of association of the injury with the rule violated is not unrelated to the question of what the particular defendant should have anticipated. If, for example, there had been evidence tending to show that defendant knew or should have known that the home where Celeste Hill worked as a maid was a continually chaotic place, with window washers, gardeners, painters, carpenters, cooks, chickens, and dogs forever coming and going; with ancient invalids roaming the grounds; with tiny children in great numbers always tearing about, we might have felt that a rule of

\textsuperscript{17} Rev. 60, 73 (1956), an article that ought to be consulted by everyone as an example of what law review articles are supposed to be but seldom are.

17. 260 La. 542, 551, 256 So. 2d 620, 622-23.
negligence law required that dangerous things like ladders not be left lying or leaning about such a place, at all. In that case, Celeste's injuries would be much easier to associate with the rule violated by defendant.

I. (N.C.G.)L: That does seem to make sense. But why isn't it always just as good to say that, if and only if defendant should under the circumstances have foreseen something like this happening, then he is liable for it?

Court: That formulation would often do nicely. But it is sometimes true that a defendant who has been substandard because his conduct created a number of foreseeable dangers is held liable for the occurrence of some other danger created by that same conduct, even though he couldn't have foreseen that.

I. (N.C.G.)L: Oh, I remember your saying at the beginning that "just because a risk may foreseeably arise by reason of conduct, it is not necessarily within the scope of the duty owed because of that conduct. Neither are all risks excluded from the scope of duty simply because they are unforeseeable."18 When is it, then, that a defendant who couldn't have foreseen a particular danger is nevertheless responsible for it?

Court: When we said that, we had a couple of instances in mind. In one case,19 the defendant was driving a heavy truck pretty recklessly. He ran into the rear of a parked truck; it exploded; some overhead power lines were severed, and one of them fell on a lady who came out of her house 100 to 150 feet away to see what was happening. The court quite correctly held defendant liable, even though perhaps nobody would have anticipated the particular injury to plaintiff. He was, after all, very negligent; the entire series of events happened quickly and dramatically, and, as the court said, "the [specific] consequences of negligence are almost invariably surprises."20

In the other case,21 defendant negligently left his truck on a dark

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18. 260 La. at 550, 256 So. 2d at 622.
19. This is Chavers v. A.R. Blossman, Inc., 45 So. 2d 398 (La. App. 1st Cir. 1950).
20. Id. at 402. The court was quoting WHARTON, LAW OF NEGLIGENCE, § 77 (2d ed.). The Louisiana courts have not infrequently resorted to that particular quotation, usually in circumstances indicative of judicial doubt about the wisdom of a particular extension of liability. See, e.g., Atkins v. Bush, 141 La. 180, 74 So. 897 (1917) (defendant liable for condition of barbed wire fence which cut off foot of plaintiff riding by on wagon on public road; the Court thought the accident "an extraordinary one" but comforted itself with the Wharton quotation.); Payne v. Georgetown Lbr. Co., 117 La. 983, 42 So. 475 (1906) (sawmill worker killed when watchman threw shovel, hitting saw-carriage lever).
21. This is Lynch v. Fisher, 34 So. 2d 513 (La. App. 2d Cir. 1947) (nonsuit mo-
highway, unmarked. Some people ran into it; they were hurt and trapped in their car, which eventually caught fire. Plaintiff, who lived nearby, came over to help. While helping the injured lady out of her car, he found a pistol and handed it to the dazed husband, who shot plaintiff in the ankle. The court held that defendant, who'd left the truck in the road, was liable to the rescuer, despite the fact that nobody would have predicted that anything exactly like this would happen, essentially because the defendant was quite negligent, plaintiff was a decent, heroic volunteer, and the husband who did the actual shooting was not in control of his faculties at the time.

I.(N.C.G.)L: I can sort of sense why those two cases are, in a way, different from Celeste Hill's case—different enough to justify their coming out differently. But it is very hard for me to explain that difference to myself in words.

Maybe it would help to approach it from the other direction. I believe you also said that just because a risk is foreseeable, it is not necessarily within the defendant's duty. When would a defendant who could and should have foreseen the thing that happened nevertheless escape responsibility for it?

Court: In the case we had centrally in mind when we made that statement, plaintiff's husband and father were killed by a dangerous lunatic whom defendant M.D. had that very day released from a facility for the insane, despite his strong suspicions about the lunatic's dangerousness. Notwithstanding the evident foreseeability of the tragedy, the court found that defendant was not liable. As you suggest is frequently true in this area of law, the reason is a bit difficult to articulate. About all the court said was that the statutes setting up the duties of the defendant made his decisions respecting the release of inmates completely discretionary. Really, one would ultimately just have to say the case involved special problems of an institutional nature, no pun intended.

I.(N.C.G.)L: I think I am beginning to understand something. You said in the opinion in the Hill case that "the same policy considerations which would motivate a legislative body to protect from certain risks are applied by the court." You also said that "the task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises."
That means that each case that comes up has to be looked at to see if this defendant ought to be liable?

Court: That is somewhat overstated, but it is essentially correct. In the last analysis, we are charged with the responsibility of reaching a result which is fair, just, and even-handed under all the relevant circumstances.

I.(N.C.G.)L: “Fair, just, and even-handed”—that’s the kind of thing you meant by the terms “policy considerations" and “policy aspects" in the Hill opinion?

Court: Partly. The courts are always intensely concerned with being fair to the particular parties in the case at hand. But “policy" is a word that also evokes other obligations of the courts:

—to decide in accordance with precedent, when there is relevant precedent, or to explain carefully why not;
—to avoid reaching decisions that create or imply the existence of a principle that would be difficult or impossible to apply sensibly and fairly in the future;
—to consider whether the general application of the kind of result reached in a particular case would amount to an unnecessary, undesirable, or unfair economic or social burden on some class of businesses or individuals.25

I.(N.C.G.)L: But none of those “policy considerations” are talked about in the Hill case, nor, from what you tell me, in these other cases presenting the same general kind of problem. Why is that?

Court: Maybe it is just a matter of tradition. Courts don’t talk that way, it’s just not done. But, really, you must realize that often there’s not very much sensibly to be said about the ultimate reason for a particular result—that it just seems more fair than the opposite outcome may be about all there is to it.

I.(N.C.G.)L: Then why write opinions at all? What, for example, was really accomplished by the opinion in the Hill case?

Court: You are getting pretty far afield in asking about judicial opinions generally. There are all sorts of reasons, some of them deeply connected with the importance of ritual in any society, supporting the general practice of opinion writing.26

25. The considerations my imaginary court has just articulated are taken from Leon Green’s frequently iterated explanations for the outcome of duty decisions—his moral, historical, administrative, and economic factors. See, e.g., Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV. 1014, 1034 (1928).

26. I do not intend to evoke anything as over-statedly cynical as the following from Jerome Frank. Indeed, a basic tacit premise here is that judicial opinions can and
But with respect to the Hill case itself, it is easy to answer you. Lawyers and courts are very busy; they have a lot to do, and usually seem to have to do it quickly. For that reason and others, there is an incredibly strong tendency to need, and therefore to create, cut-and-dried rules for certain kinds of cases. Sometimes that works, but often the rule is too specific and rigid to be really workable. For example, the Louisiana courts routinely used to say that any time defendant's negligence had become passive, had come to rest, before something else of an active nature hurt the plaintiff, defendant was not liable. Of course, such a "rule" overlooks hard questions such as how you tell when someone's negligence has become passive. And even if you could tell, sometimes it would be unfair to apply the rule. Eventually we had to do away with that cut-and-dried idea. We had to tell the lower courts there's nothing magic about the idea of "passive negligence"; that the "passive negligence" formulation may be a useful way of putting the question, but that, to answer it, there's no substitute for sensitive and informed judgment in the particular case. 26

The same kind of worry led us to write the Hill opinion the way we did. It seemed to us that the lower courts had been taking ideas like "foreseeability" and "proximate cause" and attempting to make magic, cut-and-dried, automatic problem-solving devices out of them. Something almost like a computer model was evolving: plug in the facts; if the label "foreseeable" kicks out of the computer, plaintiff wins; if not, not. What we were telling the lower courts in the Hill opinion was this: Look, not many of the possible statements of doctrine of the negligence law are rules, in the sense of inexorable or automatic application. Certainly there are no rules for these difficult problems of the extent of defendant's duty. What negligence doctrine does for you in these cases is provide an efficient and clear way of stating and seeing the problem. But, in the last analysis, the answer to the issue is a human, not a computer, judgment.

should explain. See Frank, What Courts Do In Fact, 26 ILL. L. REV. 645, 653 (1932): "The judge's opinion makes it appear as if the decision were a result solely of playing the game of law-in-discourse. But this explanation is often truncated, incomplete. Worse, it is frequently unreal, artificial, distorted. It is in large measure an afterthought. It omits all mention of many of the factors which induced the judge to decide the case. . . . Opinions, then, disclose but little of how judges come to their conclusions. The opinions are often ex post facto; they are censored expositions. To study those eviscerated expositions as the principal bases of forecasts of future judicial action is to delude oneself."

27. In my view, the imaginary court has just stated the most important aspect of the decision in Dixie Drive-It-Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962). See note 10 and accompanying text supra and notes 33, 41 and accompanying text infra.
I. (N.C.G.)L: That's very exciting! What you've said is that the law offers a formula for carefully analyzing these problems, but that it is a mistake to think that it offers automatic or easy answers?

Court: Yes. The point is that "foreseeability" and "proximate cause," like "passive negligence," are not useful formulae for analysis. On the contrary, all these phrases seem to be prone to treatment as rules, rather than as analytical guides to principled decision. The Hill decision commends a formula that makes it clear what the court is really charged with doing in each case: determining, via the same kinds of policy considerations which would motivate a legislative body to impose duties to protect from certain risks, whether there is a duty-risk relationship in the case at hand.

III.

When I began studying torts in the late fifties, I was convinced by Wex Malone (in person and in print) and Leon Green (in print) that problems of the general sort presented by the Hill case were better approached—more clearly, more efficiently, and, in a sense, more honestly—through inquiry into the ambit of defendant's duty28 than via any of the multiplicity of causation doctrines traditionally used to limit liability. In the ensuing years spent studying and teaching torts, nothing has happened to dispel that conviction. The relative advantages of the duty formulation are myriad and formidable: (1) As a theory designed to account for and predict judicial outcomes, it is clearer and infinitely more cogent.9 (2) As a vehicle for suggest-

28. Perhaps because "proximate cause" or "legal cause" has been the more traditional approach to the issue of the ambit of liability of a negligent defendant, the courts sometimes exhibit a tendency to see the scope-of-duty approach as somehow magical and mysterious. (See, e.g., Illinois Cent. R.R. v. Cullen, 235 So. 2d 154, 159 (La. App. 4th Cir. 1970) (dissenting opinion): "The 'duty' approach is not significant in view of the fact that this is a question of contributory negligence and the duty approach is not applicable in such situations.") But there is nothing strange or peculiar about it; it is simply an alternative, shorter-and-clearer way of putting the basic issue of the ambit of responsibility of a negligent actor. "Proximate cause" formulations can be translated into "duty" formulations, and vice versa; see the beginning statement of each of the two scenarios, supra, text following notes 9 and 12.

29. "Proximate cause" doctrines can become wonderfully intricate; their rococo elaborations are especially impressive for a vehicle offering so little in the way of meaningful explanation. See, e.g., Brody v. Aetna Casualty & Surety Co., 438 F.2d 1148 (5th Cir. 1971), treating and ultimately approving a fairly ponderous proximate cause jury instruction given by an exceptionally able trial judge in the case treating Jayne Mansfield’s fatal accident. See also Moses v. Central Louisiana Electric Co., 324 F.2d 69 (5th Cir. 1963), for an intricate and troubled proximate cause charge which was disapproved as misleading by the appellate court. These proximate cause doc-
ing the inevitability of human choice, it is far more honest. (3) As a means of indicating the range of policy factors that should be considered in reaching judgments of the sort in question, it is more evocative. ("Evocative," because it is rare that the duty formulation will lead to very extensive discussion of the underlying policy factors; but at least the importance of "policy" gets mentioned.) (4) In its function of allocating the respective decision-making powers and responsibilities of judge and jury, it makes more sense.\footnote{In this article the focus is on the use of the duty formulation in articulating appellate judgments; the important judge-jury question is not being considered. That question, of course, was crucial to the evolution of the theory. See L. Green, Judge and Jury (1930); L. Green, Rationale of Proximate Cause (1927).}

Still, I was slightly puzzled by the magnitude of the enthusiasm with which both my mentors greeted the *Hill* decision. My problem, as I put it to Professor Malone, was essentially this: Suppose we agree that there's not much a judge in a case like *Hill* can or should say beyond making it clear that the law as a matter of policy has elected to draw the line of protection short of the instant risk. Then what's so wonderfully more elucidating about the vocabulary of duty than the jargon of proximate cause? Neither type of formulation offers much in the way of a real-world reason for the conclusion being reached. True, the duty analysis is all but invariably more elegant, cleaner, more concise than proximate cause talk. True, the duty formulation makes it somewhat clearer that the law is making a rather arbitrary policy choice. (Maybe proximate cause language *does* try to sound as though there's some firm doctrinal basis for the decision.) But the two formulations are rather easily translatable, one into the other. Each is rather easily seen to be ultimately the articulation of a conclusion, rather than an explanation of its grounds. So, aside from aesthetics, what real difference does it make?

Since posing that rather lengthy question, I have attempted further study of the problem. The obvious starting point was *Dixie Drive-It-Yourself System v. American Beverage Co.*\footnote{242 La. 471, 137 So. 2d 298 (1962).} There, the Louisiana supreme court, concerned to defuse and de-rigidify a "pastries are not less intricate when employed as a vehicle for appellate court articulation. See Hoover v. Wagner, 189 So. 2d 20, 27 (La. App. 1st Cir.), cert. denied, 249 La. 735, 190 So. 2d 241 (1966). "It is . . . the firmly entrenched law of this state that to constitute proximate cause as distinguished from remote cause, the negligent act must be the primary or moving cause of the injury, or that cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, provided the injury is of a nature reasonably anticipatable or foreseeable as a natural consequence of the wrongful act." See also Peats v. Martin, 133 So. 2d 920 (La. App. 2d Cir. 1961).} There, the Louisiana supreme court, concerned to defuse and de-rigidify a “pas-
sive negligence” formula, \(^{32}\) for the first time clearly prescribed\(^{23}\) that problems of the extent of liability of a violator of a relevant statute be approached in terms of “whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute.”\(^{34}\) The importance of the Dixie decision has been well recognized; \(^{36}\) it changed the thinking of the Louisiana courts respecting the appropriate range of inquiry in statutory negligence cases, \(^{38}\) and has had dramatic effect in cases involving breach of case law duties as well.\(^{37}\)

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32. See notes 10, 27 and accompanying text supra and note 41 and accompanying text infra.

33. Dixie is not the first case employing the ambit of protection approach to problems of statutory negligence. See, e.g., Lopes v. Sahuque, 114 La. 1004, 38 So. 810 (1904). However, prior to Dixie resort to that approach was somewhat random, and there had been no such clear and complete articulation.

34. 242 La. at 487, 137 So. 2d at 304.

35. For a thorough study, see Malone, Ruminations on Dixie Drive-It-Yourself Versus American Beverage Company, 30 LA. L. REV. 363 (1970).


37. See Craig v. Burch, 228 So. 2d 723, 730 (La. App. 1st Cir. 1969), where, reversing the trial court, the court of appeal after extended and careful analysis held negligent seller of recapped tire liable to victims of automobile accident. “The term proximate cause must be used with caution because it does not concern an inquiry into cause. Rather, it involves an inquiry into duty, more particularly, the extent of defendant's duty with respect to plaintiff's interest to be protected.” See also Illinois Cent. R.R. v. Braswell Indus., Inc., 227 F. Supp. 347 (W.D. La. 1964); Murphy v. Central La. Elec. Co., 261 So. 2d 694 (La. App. 3d Cir.), cert. denied, 262 La. 302, 283 So. 2d 44 (1972); Ates v. State Farm Mut. Auto. Ins. Co., 191 So. 2d 332 (La. App. 3d Cir. 1968); Fontenot v. Fidelity Gen. Ins. Co., 185 So. 2d 896 (La. App. 3d Cir. 1966); Dartez v. City of Sulphur, 179 So. 2d 482 (La. App. 3d Cir. 1965); Audubon Ins. Co. v.
Still, of the more than 130 decisions ostensibly relying on the *Dixie* case, most continue to employ causation language to refer to issues other than cause-in-fact, occasionally to the complete detriment of


38. According to Professor Malone in *Ruminations on Dixie Drive-It-Yourself Versus American Beverage Company*, 30 LA. L. REV. 363, 373 (1970), “the influence of the *Dixie* opinion in prompting courts of appeal to regard causation within its proper and modest perspective as a factual matter to be determined according to the probabilities has been great.” However, to complete the picture one would have to add, “but not great enough.” For example, the courts of appeal seem fairly routinely to say that the negligence of one party was the “sole cause,” or the “sole proximate cause,” or the “sole and proximate cause” of an accident when what they apparently mean is either that the other party was not negligent, or that the other party’s negligent conduct did not breach a duty extending to the particular risk. As Professors Green and Smith stated in *Negligence Law, No-Fault, and Jury Trial—I.*, 50 TEX. L. REV. 1093, 1117 (1972): “Many, perhaps most, courts use ‘proximate cause’ to mean causal connection, but the usage is frequently ambiguous. The courts that reject ‘foreseeability’ as a requisite of proximate cause are thinking of it as the causal connection between the defendant’s conduct and the plaintiff’s injury. This, however, is not always true, because proximate cause is also used as a substitute for other issues in a negligence case.” In none of the Louisiana cases referred to is it believed that causal connection was the issue; in each of them, the terminology of causation referred either to the want of negligence or the want of duty on the part of another party to the accident. See McDonald v. Osborne, 279 So. 2d 263 (La. App. 2d Cir. 1973); Bailes v. Casualty Recip. Exch., 279 So. 2d 255 (La. App. 2d Cir. 1973); Reliance Ins. Co. v. Dickens, 279 So. 2d 234 (La. App. 2d Cir. 1973); Griffin v. Stephany, 279 So. 2d 232 (La. App. 4th Cir. 1973); Clements v. Continental Ins. Co., 277 So. 2d 714 (La. App. 2d Cir. 1973); Poret v. Spencer, 277 So. 2d 689 (La. App. 2d Cir. 1973); Hale v. Aetna Cas. & Sur. Co., 273 So. 2d 860 (La. App. 2d Cir. 1973); Moore v. Concrete Pipe Prod., Inc., 263 So. 2d 481 (La. App. 3d Cir. 1972); Riel v. Howell, 243 So. 2d 280 (La. App. 3d Cir. 1971); Smith v. Frederick, 221 So. 2d 306 (La. App. 4th Cir. 1969); American Fid. Fire Ins. Co. v. Tyler, 210 So. 2d 561 (La. App. 2d Cir. 1968); Wascom v. Varnado, 209 So. 2d 72 (La. App. 1st Cir. 1968); Muse v. W.H. Patterson & Co., 182 So. 2d 665 (La. App. 1st Cir. 1965); Kinchen v. Cottle, 175 So. 2d 379 (La. App. 1st Cir. 1965); Barilleaux v. Noble Drill. Corp., 160 So. 2d 319 (La. App. 4th Cir. 1964); Foreman v. American Auto. Ins. Co., 137 So. 2d 728 (La. App. 3d Cir. 1962).

The use of causation language when something else is meant can produce serious confusion. It is particularly likely to do so when it provokes statements to the effect that, because A caused it, B didn’t, as in *Beraud v. Allstate Ins. Co.*, 251 So. 2d 402, 403 (La. App. 1st Cir. 1971): “There is little doubt that the plaintiff violated . . . the statutory prohibition against passing in a no-passing zone. . . . [But] the fact that plaintiff found herself opposite the ‘yellow line’ or in a no-passing zone at the time the accident occurred does not require here our finding that such conduct amounted to negligence. Mrs. Beraud had commenced her passing maneuver and could have done so in perfect safety as the way was clear of oncoming traffic. Except for the defendant’s having negligently made a left turn in front of Mrs. Beraud at a time when he should
have observed her in the act of passing him, there would have been no accident. In other words, the conduct of the plaintiff in violating the statute prohibiting passing was not a cause-in-fact of the accident.' Of course, once it's realized that there can be more than one cause-in-fact of an accident, it's perfectly plain that both plaintiff's conduct and defendant's conduct were causative here. The court did have a genuine reason for exonerating plaintiff, cast in terms of the scope of protection of the statute plaintiff violated. But the statement that, because defendant caused it, plaintiff didn't is clearly wrong. See in this connection the discussion of Brantley v. Brown, 277 So. 2d 141 (La. 1973), note 47 infra.


As suggested, the equation of "proximate cause" and "cause in fact" does not very often distort outcome, but it does produce confusion and frequently means that the reader is unable to determine what, precisely, the theory of a particular resolution was. See Hinegardner v. Dickey's Potato Chip Co., 205 So. 2d 157, 161 (La. App. 1st Cir. 1967); defendant's action in blocking view at corner "too remote to figure actively or proximately in the conduct of [the two drivers]. Its negligence formed no part of the chain of causation and was not a cause-in-fact. See Dixie . . . . We quote approvingly from 65 C.J.S. Negligence . . . . in its discussion of proximate cause . . . ." The result reached was sustainable under one of two theories: (1) the accident would have happened even had the view been unobstructed; (2) defendant's duty did not embrace the risk of collision between two vehicles as negligent as those here involved. The point about the court's approach—indeed, the distinctive feature of equating "proximate cause" and "cause in fact"—is that one can't tell which resolution was achieved. There was similar confusion in O'Connor v. St. Louis Fire & Mar. Ins. Co., 217 So. 2d 750, 753 (La. App. 4th Cir. 1961); the court said that the action of child plaintiff in entering traffic, rather than the double-parking of Pepsi truck, was the "sole factor which brought about the injury." It then said, "framing this another way, it is our opinion that the injury which was suffered by the young child was not one which the statute was contemplated to protect. Had the truck been legally parked next to the curb the result to the young child would have been the same had she run out from in front of it into the street into the path of the approaching taxi." This merger of causation and duty doctrines leaves the reader at sea as to what the basis for decision was.

Finally, there are a number of indications that the courts sometimes see "cause-in-fact" as the only limitation Dixie suggests on the extent of coverage of a relevant duty, when, in reality, it is only the threshold inquiry; the operative limitation Dixie stresses is the policy inquiry into the coverage of the duty. See, e.g., Coleman v. Van Dyke, 277 So. 2d 709 (La. App. 2d Cir. 1973); Communication Serv. of La., Inc., v. Smith, 250 So. 2d 414 (La. App. 4th Cir. 1971); Beaug v. Broussard, 199 So. 2d 386
clarity of analysis and correctness of outcome. Further, even the rather clearcut admonition against automatic employment of the "passive negligence" notion has sometimes been ignored. All in all, the picture that emerges is that the courts of appeal have been willing
to employ the language of the Dixie formulation, but that they have often wished to cling to other, partially inconsistent notions that seem to provide more specific guidelines. Courts may say that “each case must be decided on its own facts,” but “no rule . . . can be laid down”, but rules have a powerful appeal to busy judges, and apparently will be found or created whenever the psychological need is strong enough.

Still, the Dixie approach is clearer and more straightforwardly policy-oriented than its predecessor; it has been influential; and even a limited success is encouraging. On two levels, the Hill decision represents a major step forward in a trend that may be said to have begun with Dixie. First, on the technical level of operating the duty-risk approach, it teaches that the following issues comprise the appropriate range of inquiry in negligence cases (whether the duty allegedly breached be a statutory provision or a case-law duty):

1. Was the conduct complained of a cause-in-fact of the harm?


43. Id. See also Insurance Co. v. Tweed, 74 U.S. (7 Wall.) 44, 52 (1868), quoted supra note 2.

44. For a mild example of a judicial tendency to make tests or rules out of approaches, statements of policy or general principle, see Speight v. Southern Farm Bureau Insurance Co., 254 So. 2d 485, 489 (La. App. 3d Cir. 1971): “In Todd v. Aetna Casualty & Surety Company, . . . we held that the test of whether recovery will be allowed for mental anguish, fright, etc., resulting from unintentional torts, once causation in fact has been established, is whether defendant’s duty to the plaintiff includes protection against the consequences which actually occurred as determined by their foreseeability tempered by judicial policy. We are of the opinion that that test is met in the case at bar.” See also the original hearing in Pierre v. Allstate Ins. Co., 221 So. 2d 46 (La. App. 4th Cir. 1969), rev’d, 257 La. 471, 242 So. 2d 821 (1971).


46. From one point of view, Dixie prescribed the duty-risk approach for cases involving violation of statute, and Hill made clear that the approach is to be applied to breaches of case-law duties, as well. See Hill v. Lundin & Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972).

47. Cause-in-fact is properly a straightforward factual inquiry, involving little or no conscious resort to factors of policy or justice; the issue is simply whether defendant’s conduct was, in fact, a cause of plaintiff’s harm. Some confusion has been produced in this respect by the fact that the Dixie court used the term “substantial
factor” as a synonym or test for causation in fact, and that term, as Professor Malone pointed out in Ruminations on Dixie Drive-It-Yourself Versus American Beverage Company, 30 La. L. Rev. 363, 373 (1970) “might appear to suggest that the factor should not be regarded as a cause-in-fact unless it is important policy-wise. This could tend to reintroduce all the vagaries of proximate cause.” Some of that confusion is reflected in the cases cited in note 38 supra.

However, by and large, when the courts have confronted the issue of causation-in-fact as such, they have handled it straightforwardly and sensibly, utilizing the notion that plaintiff's burden on the issue is via a preponderance of the evidence, which means that he needn't negate all other possible causes; that there can (indeed, will always) be more than one operative cause of an accident, and that more than one cause can be actionable; and that, therefore, it is incorrect to say that, because A caused it, B didn't. See Vonner v. State Dept. of Pub. Wel., 273 So. 2d 252 (La. 1973); Ruthardt v. Tennant, 252 La. 1041, 215 So. 2d 805 (1968); Home Gas & Fuel Co. v. Mississippi Tank Co., 246 La. 625, 166 So. 2d 252 (1964); Naquin v. Marquette Cas. Co., 244 La. 569, 133 So. 2d 395 (1963); Perkins v. Texas & N.O. R.R., 243 La. 829, 147 So. 2d 646 (1962).

For a recent and noteworthy aberration, see Brantley v. Brown, 277 So. 2d 141 (La. 1973), where the majority, having reached a justifiable outcome and adduced sufficient reasons for it, reached further for “causation” reasons and, in doing so, fomented confusion. Issue: whether a twelve-year-old boy's negligence and violation of statute in riding on a fender should bar his recovery against the driver of another car that violated the host vehicle’s right of way, causing the boy to be thrown from the fender into the path of the other vehicle. Answer: no. Reason: “[T]he risk that such a statute is designed to protect against does not encompass the risk of negligent driving. . . . [T]he duty . . . did not encompass the particular risk here encountered.” 277 So. 2d at 144. Unfortunately, the majority went further, adding as a reason: “[Y]oung Brantley's act of riding on the fender played no causative role in the accident. The accident occurred solely because Mrs. Myles negligently violated the Brown vehicle’s right of way. . . . [A]ny negligence on the outrider’s part does not causally contribute to such an accident or to his injuries thereby resulting, for in the absence of the other driver’s negligence there would have been no accident and thus no injury at all: . . . .” 277 So. 2d at 143. What that amounts to saying, it seems, is that because Mrs. Myles caused the injuries, young Brantley didn’t. The error is obvious: if young Brantley hadn't been on the fender, the chances are he wouldn't have been hurt at all, and it is all but certain that he wouldn’t have been hurt as and how he was. That Mr. Justice Tate, author of the Brantley opinion, was taking an uncharacteristic position on the issue of causation in that case is indicated by his opinion in Vonner v. State Department of Public Welfare, 273 So. 2d 252 (La. 1973). Holding the welfare department liable for the death of a child beaten in a foster home, Justice Tate analyzed the causation issue thusly: “To meet the burden of proof required in civil cases, the circumstantial evidence need not negate all other possible causes, it need only prove the causal relationship to be more probable than not. Further, the breach of duty need not be shown to be the sole cause of the injuries; it is a cause in fact of the harm to another if it was a substantial factor in bringing about or not preventing the harm that the duty was intended to protect against.” (Citations omitted.) 273 So. 2d at 255. (Emphasis added.) As a dissenting opinion in Brantley evidences, the majority opinion there suffers, at the least, from a case of over-persuasion.
(2) Was the defendant under a legal duty imposed to protect against the particular risk involved?\(^4^8\)

(3) Taking into account the dangers created by defendant’s conduct, including but not limited to that which actually occurred in the instant case—\(^4^9\) giving due but not automatically decisive weight to any violation of relevant statute—\(^5^0\) was the defendant’s conduct negligent, substandard, blameworthy?

(4) Was the plaintiff damaged; if so, to what extent?

It is on the second, deeper level of fundamental judicial philosophy that the *Dixie-Hill* trend is most interesting (and that the jubilation expressed by mentors Green and Malone at the decision in *Hill* becomes fully understandable). The point can best be explicated by reference to *Pierre v. Allstate Insurance Co.*,\(^5^1\) decided just over two years prior to the *Hill* case, wherein a fairly typical traffic situation ultimately provoked a philosophical break-through. Defendant’s insured had left his Chrysler unattended on a narrow road, partially blocking traffic, and it was not difficult to conclude that in doing so he was both negligent and in violation of relevant statutory provisions. Plaintiffs’ decedent was killed when a pickup truck in which he was a passenger, forced by the Chrysler to stop for oncoming traffic, was rear-ended by an inattentive dump truck. The pivotal issue was whether defendant’s duty embraced the risk that killed decedent. Prior to ultimate disposition in the supreme court, the following resolutions were proposed:

(1) The trial court held that the sole proximate cause of the accident was the negligence of the dump truck driver; that the Chrysler driver’s negligence was too remote to be actionable.

(2) On original hearing, the Fourth Circuit Court of Appeal said they thought the trial judge was right, but that they were compelled


\(^5^0\) See *Smolinski v. Taulli*, 276 So. 2d 286, 289 (La. 1973): “While statutory violations are not in and of themselves definitive of civil liability, they may be guidelines for the court in determining standards of negligence by which civil liability is determined”; *Weber v. Phoenix Assur. Co.*, 273 So. 2d 30, 33 (La. 1973): “We have rejected the concept that a violation of a penal statute automatically constitutes negligence, and we have rejected the terminology ‘negligence per se’.” *Laird v. Travelers Ins. Co.*, 263 La. 199, 208, 267 So. 2d 714, 717 (1972): “Criminal statutes are not, in and of themselves, definitive of civil liability’ and do not set the rule for civil liability; but they may be guidelines for the court in fixing civil liability.” Some of the courts of appeal appear still unaware that the negligence per se language and approach have been repudiated, see discussion at note 63 *infra*.

\(^5^1\) 257 La. 471, 242 So. 2d 821 (1971).
by Dixie's rejection of the "passive negligence" concept in just such situations to a contrary result.\(^{(3)}\)

(3) On rehearing, the court of appeal changed its mind, distinguishing Dixie on the facts: here, the parked vehicle was not actually hit, and the pickup had been stopped for several moments before the dump truck hit it.

(4) The supreme court on original hearing agreed fundamentally with the reasoning and conclusion of the court of appeal.

On rehearing, the supreme court reversed. Justice Barham's opinion demonstrated that causation-in-fact was clear; that the statute violated by defendant's insured was designed with just this kind of risk in mind; and that the really difficult issue in the case was presented by the fact that the negligence of the dump-truck driver was also a cause-in-fact of the accident.\(^{(4)}\) On that issue, the following language is crucial:

> The keys for the solution of the issue of responsibility when there is more than one cause-in-fact of damages are (1) a determination of the exact risk or risks anticipated by imposition of the legal duty which has been breached and (2) the legal or policy considerations which grant excuses from certain consequences which follow an act of negligence. This requires, under the facts and the law of each case and the attendant exigencies, a jurisprudential determination which will implement and make effective our broad codal provisions concerning those who should respond in damages for their fault.\(^{(5)}\) (Emphasis added.)

\(^{52}\) Pierre v. Allstate Ins. Co., 221 So. 2d 846 (La. App. 4th Cir. 1969). The original disposition by the court of appeal in Pierre is yet another demonstration of an understandable but regrettable tendency to make rules out of decisions that promulgated only approach and technique. See Malone, Ruminations on Dixie Drive-It-Yourself Versus American Beverage Company, 30 La. L. Rev. 363, 369 n.22 (1970): "On one occasion the Court of Appeal for the Fourth Circuit felt itself so constrained by its interpretation of Dixie as an arbitrary rule that it felt obliged to distinguish the case. Pierre . . . ." See also note 44 supra.

\(^{53}\) Plaintiffs had settled with the owner and driver of the dump truck and its insurer, and with the driver of the pick-up, his employer, and its insurer.

\(^{54}\) 242 So. 2d at 831. The italicized language clearly admonishes attention to each case on its own facts. In its invocation of "broad codal provisions" in support of that sensible approach, it foreshadows an increasingly prevalent theme in Louisiana jurisprudence. More recently, one of the courts of appeal sounded much the same theme, intimating that "proximate cause" jumbles may be in origin children either of the devil or the common law. Winzer v. Lewis, 251 So. 2d 650, 655 (La. App. 2d Cir.), cert. denied, 259 La. 934, 253 So. 2d 379 (1971). After stressing that article 2315, rather than the particular traffic statute violated, was the key to the case, the court said: "We think it fair to say that in most instances, when [2315's] meaning has become obscure
Under that approach the court concluded, not without difficulty, that the statutory prohibitions in the case were designed to avoid collision with confused or inattentive drivers as well as prudent drivers, who hit another vehicle as well as the offending vehicle.

At the technical level, the *Pierre* court well utilized the duty-risk approach later and more clearly promulgated in *Hill*. At the deeper level of jurisprudential philosophy, the italicized language from *Pierre* is crucial. What the case amounts to is a clear and almost fully explicit admonition that rules are not magic; that each case must be approached, within a fabric of principle and doctrine, on its own facts. It seems evident that the Supreme Court of Louisiana has been trending rather strongly in recent years toward a fairly consistent position that the Louisiana tort law should seek to avoid the proliferation of doctrines of a narrow and rigid thrust, in favor of

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55. For another perspective on this same theme, see Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78 (1968).

56. It is highly significant that even the most extreme American legal realist position is premised on precisely the assumption that standards and principles whereby decisions can be reached, understood, and criticized exist and can be ascertained. See J. FRANK, LAW & THE MODERN MIND 137 (1930): "All judges exercise discretion, individualize abstract rules, make law. Shall the process be concealed or disclosed? The fact is, and every lawyer knows it, that those judges who are most lawless, or most swayed by the 'perverting influences of their emotional natures,' or most dishonest, are often the very judges who use most meticulously the language of compelling mechanical logic, who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules, who sedulously avoid any indications that they individualize cases. If every judicial opinion contained a clear exposition of all the actual grounds of the decision, the tyrants, the bigots and the dishonest men on the bench would lose their disguises and become known for what they are."

57. The "fabric of principle and doctrine" that constitutes the law of negligence is not notably nebulous, compared to the necessary referent in many areas of constitutional law. See, e.g., the frequent, necessary appeal to "juridical tradition" in Justice Frankfurter's powerful opinion in *Rochin v. California*, 342 U.S. 165 (1952). Now that, by itself, is a vague standard indeed, yet can anyone reading the *Rochin* opinion doubt that there is a juridical tradition which spoke with some clarity to the issue being considered in that case?

more straightforward, conscious, and fact-oriented resort to the underlying principles of the Louisiana Civil Code. In the past eleven years, the court has: (1) disapproved the concept of "passive negligence" as a key to decision in multiple-cause situations; (2) strongly admonished the lower courts against the notion that "foreseeability" is magic; (3) sought to take some of the "automaticness" out of the contributory negligence doctrine; (4) disapproved the concept and the term "negligence per se"; (5) buried the anciently troublesome


62. Laird v. Travelers Ins. Co., 263 La. 199, 267 So. 2d 714 (1972), where, in the very first sentence of the opinion, the court indicated its full consciousness that the jurisprudential movement being discussed was the key to the case: "The posture of the case before us, the facts, and the legal issues presented would appear to be acceptable with unanimity to the courts below and this court. However, the method of resolution of the issues as well as the result to be obtained in that resolution has provoked disparity of view." 263 La. at 202, 267 So. 2d 715. (Emphasis added.)

63. See note 51 supra, for the supreme court decisions stating and iterating this principle. It seems rather straightforward, yet some of the courts of appeal seem determined to cling to the disapproved terminology. See Augustine v. Dugas, 278 So. 2d 907, 909 (La. App. 4th Cir. 1973): "We find this accident was caused solely and proximately by the negligence of the plaintiff in attempting to cross Canal Street outside a crosswalk and not at an intersection. Such action is in violation of LSA-R.S. 32:213 . . . . This action of plaintiff is what the statute . . . . was designed to prevent. This violation of the provisions thereof is negligence per se which will, in this case, preclude recovery by plaintiff." Plaisance v. Smith, 278 So. 2d 155, 159 (La. App. 4th Cir. 1973): "Under the authority of [Dixie] we find Mr. Plaisance was guilty of negligence per se in walking on Louisiana Streets in violation of LSA-R.S. 32:216 (B) . . . ." Poret v. Spencer, 277 So. 2d 689, 691 (La. App. 2d Cir. 1973): "Plaintiff's first contention is that Mrs. Spencer was negligent per se for failing to stop for the school bus in violation of LSA-R.S. 32:80 . . . . We find this statute inapplicable . . . ." Mistretta v. Fiorella, 269 So. 2d 589 (La. App. 4th Cir. 1972): "Plaintiff claimed to have proved the owner's failure to comply with a New Orleans ordinance, constituting per se negligence . . . ." The court went on to impose liability on the basis of the conclusion that violation of the ordinance was a "legal cause" of the fire loss.

I am not contending that any of the cited decisions was wrongly decided. The contention is rather that the courts in three of the four used the discredited negligence per se formula in a way that obviated the required inquiry into the question of the substandardness of the actor's conduct. It does seem highly surprising that in none of the cases did the court of appeal seem aware of the supreme court's action abolishing the negligence per se approach and terminology.
“assured clear distance” rule;\(^6\) (6) sternly rejected the idea that entry into smoke or fog on the highway is contributory negligence as a matter of law;\(^6\) (7) to a considerable degree demystified res ipsa loquitur;\(^6\) (8) in the field of intentional torts, thrown out the famous old “aggressor doctrine.”

It would not be amiss to suggest that an orderly revolution is in progress. All the doctrines in question suffered principally from undue rigidity of application, and all are proving expendable in the interest of a more forthright interjection of informed human judgment into the tort process. There is nothing new or unAmerican about this. No modern torts lawyer should forget the spectacle of O.W. Holmes, Jr., history’s “straw man” on the very issue under discussion. In 1881 he wrote that negligence law should continually become more specific and detailed, so that there would be fewer and fewer and narrower and narrower determinations that had to be left to juries, and more and more that the law had “settled,” had “fixed.”\(^8\)

In 1927 he decided that, as a matter of law, it was negligent of any motorist at a grade crossing not to stop, look, listen, and in frequent cases reconnoiter;\(^9\) and in 1934 the entire matter had to be straightened out by Mr. Justice Cardozo, who delivered a gentle but firm coup de grace to Mr. Justice Holmes’ rule.\(^9\) Pointing out that the rule in question (quite typically of formulations too narrow and rigid in scope) was in origin an “unnecessary . . . remark”;\(^10\) labelling it “a fertile source of controversy”;\(^11\) citing the need to “clear the ground of brushwood”;\(^12\) ruefully surveying the “thickets of conflicting judgments,”\(^13\) the “diversities of doctrine”\(^15\) it had spawned, Mr. Justice Cardozo said the rule had to be dispatched.

It is likely that the supreme court’s determination that the negligence per se approach and terminology be abandoned was influenced by the fact that in Louisiana, statutes and ordinances, particularly relating to traffic, literally proliferate. See, e.g., Grisby v. Coastal Mar. Serv., 235 F. Supp. 97 (W.D. La. 1964).

71. Id. at 102.
72. Id.
73. Id.
74. Id. at 103.
75. Id. at 104.
Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. 6

In Louisiana, a "natural flowering" seems to be in progress. At least in the torts field, there seems to be emerging a new judicial philosophy, cast in the form of a modern civilianism determined to see the Civil Code through the eyes of the present. Exhibiting no particular regard for the ersatz respectability of antiquarian veneer that Code study seems sometimes to represent, 77 this new civilianism rightly views the Code as a fabric of juridical principle within which concerned, candid, and informed judges can and must perform their very human function. The analytical technique provided by the court in the Hill case is an important event in the emergence of this new judicial philosophy. Attention to its specific thrust and detail and, more importantly, to the underlying philosophical tradition it represents can appreciably aid an orderly transition into a truly principle-oriented Louisiana tort system. Viewed in that light, the Hill case is indeed a happy event; Professors Green and Malone may continue to applaud, as immoderately as they choose, and I hereby join them.

76. Id. at 105.