A Primer on the Patterns of Negligence

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I. INTRODUCTION

This piece is purely and simply pedagogical. It is designed to help law students (and other students of law); it is designed to help them see the similarities between the various methods courts use to analyze negligence. If lawyers, judges, or others get some benefit out of my discussion I am pleased, but I dedicate this piece to those of you who are trying to discern some meaningful pattern in the cases you are studying in your first Torts course.

Negligence is a simple word; it is a simple word to describe a simple concept—the failure to exercise reasonable care. However, it is between the articulation of the concept and the resolution of concrete cases that complexities arise. These problems are made more troublesome, and more difficult, by the various ways in which courts analyze negligence. Where no statute is involved some courts employ what I will call a “proximate cause” analysis. Others use the duty-risk method. Still others employ an algebraic formula known as Learned Hand’s negligence formula. Where there is a statute that proscribes the defendant’s conduct, courts will often use that statute to establish the appropriate standard of care, and by doing so will employ what may appear to be yet another analytical approach to negligence.

The first-year law student, with all these different decisional models, may feel confused. She may wonder when to use what approach. She may be confused by the facially different “elements” each pattern presents.

Herein, I hope to show you that each of the approaches basically deals with the same issues. The same questions are being addressed by each approach even though one approach may articulate an element differently than another. One important difference between the approaches is who gets to decide what under each. I will endeavor in the
next few pages to do several things: (1) set forth the "elements" of negligence under each approach; (2) identify who decides which element under each approach; and (3) show the reader that what underlies each approach is really one, single, unified "pattern" for deciding a negligence case.

II. THE NEGLIGENCE "TESTS"

They tell me there is more than one way to skin a cat (I have never tried it nor have any desire to try it). Likewise, there is more than one way to analyze negligence. For present purposes, there are three commonly accepted negligence "formulas" or patterns. A fourth may be subsumed within any of the other three; or, it may stand on its own. These "formulas" are: (1) the standard common law proximate cause approach, (2) violation of statute, (3) duty-risk, and (4) the Learned Hand negligence formula. Let me begin with the traditional approach.

A. The Traditional Negligence Formula

There are four elements to negligence: duty, breach, a causal relationship between the defendant's alleged negligent (careless) act and the plaintiff's injuries, and damages. The causal relation is actually made up of two subelements: cause-in-fact and proximate (or legal) cause. Some refer to both of these subelements together as proximate cause, a tendency which has no doubt added to the confusion surrounding the term. However, I shall refer to proximate cause as the second part of the causal relationship requirement. For clarity's sake I will break the "cause" element down into two separate elements. Thus in order to recover in negligence, under this "proximate cause" approach, the plaintiff must establish each of the following:

1. Duty
2. Breach
3. Cause-in-fact
4. Proximate Cause
5. Damages

1. Duty

The hornbooks tell us that duty is a question for the court, at least usually. The duty we are talking about here is a duty to exercise

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2. See William L. Prosser et al., Cases and Materials on Torts 136 (8th ed. 1988) [hereinafter Prosser et al.].
3. Id.
4. See id. Indeed this tendency was one of the reasons for the development of duty-risk.
reasonable care under the circumstances. For present purposes, suffice it to say that a court may decide there is no duty owed in a certain situation for various reasons. One common reason about which I have previously written is administrative convenience. Courts will deny recovery to a whole class of plaintiffs whenever there is a fear that recovery would burden the courts with countless hard to decide cases. This concern was at the heart of rules that limited recovery for emotional distress. Likewise, courts refused recovery for wrongful birth or wrongful life because of problems with valuing life (versus non-life). Most courts still continue to deny recovery for negligently inflicted economic loss absent physical injury or property damage.

So these are some of the situations where courts would, or did, not impose a duty. When will a court impose a duty? One old saw provides that a court will impose a duty whenever the risks with which a defendant is presented are sufficiently grave to force a reasonable person to exercise reasonable care to avoid those risks. That is, a person has a duty to protect another whenever the risk to the other was sufficiently foreseeable that a person of ordinary prudence would exercise ordinary care to avoid that risk. But is this a question for the court or for the jury? In Palsgraf v. Long Island Railroad Co., Judge Cardozo indicated that it was a question for the court unless reasonable minds could disagree. Other courts routinely treat duty purely as a question for the court. Still others just generally state that they recognize a duty to exercise reasonable care to avoid foreseeable risks and leave the hard questions to the jury as matters of breach or proximate cause. This is basically what Judge Andrews said should be done in his Palsgraf dissent.

8. Pitre v. Opelousas General Hospital, 530 So. 2d 1151 (La. 1988).
10. The authors of one casebook on torts posit that the duty element is particularly relevant where there is a categorical rule excluding liability as to whole classes of plaintiffs on claims. David W. Robertson et al., Cases and Materials on Torts 163 (1989). See also Donoca v. Curry County, 734 P.2d 1339, 1340 (Or. 1987).
11. Prosser & Keeton on Torts, supra note 7, at 169.
12. Id. at 280. Of course this all assumes that the defendant had a duty to act because if he doesn't there can be no negligence in the first place. Prosser et al., supra note 2, at 409. Bishop v. City of Chicago, 257 N.E. 2d 152 (Ill. Ct. App. 1970).
14. Id.
2. Breach

What about breach? Well, breach is where we supposedly decide whether the defendant exercised the degree of care that a reasonable person acting under the same or similar circumstances would have exercised. Who decides breach? This is a question for the jury, not for the judge. But hold it; the breach question sounds a whole lot like the duty question asked in the last paragraph and there we said the judge got to decide. Who knows? Perhaps we might say that once the judge decides there is a duty then and only then does the jury get to decide for itself whether that duty has been breached.

3. Cause-In-Fact

Next is cause-in-fact and this too is supposedly a question for the jury. The jury must decide whether the defendant’s particular negligent act was a substantial factor in bringing about the plaintiff’s injuries. In about ninety-nine percent of the cases, the question is whether one can say “but for” the defendant’s negligence the plaintiff’s injuries would not have happened. Here one decides whether the defendant’s act was a necessary condition for the plaintiff’s injuries.

Please note the counter-factual nature of the inquiry. It requires jurors to answer a hypothetical question: what would have happened if what did happen hadn’t happened? If what happened would have happened even if what defendant did didn’t happen then there’s no cause-in-fact. Now, bear in mind this is supposed to be the easy cause question. In certain classes of cases even where one cannot say “but for” the defendant’s negligence the accident would not have happened, the courts still find cause-in-fact. They say that the defendant’s actions were a “substantial factor” in causing plaintiff’s injuries. Or, they resort to a redefinition of injury, as in the “lost chance of survival” cases. Or, they employ a fiction like concerted action, shifting the burden of proof on cause-in-fact, or market share liability. All of these

15. Leon Green, Rationale of Proximate Cause 132-44 (1927) [hereinafter Green, Proximate Cause].
16. Prosser & Keeton on Torts, supra note 7, at 266; Prosser et al., supra note 2, at 265.
21. Prosser et al., supra note 2, at 280.
deviations from the "but for" test are based in policy, even though we continue to pretend that the counter factual cause-in-fact question is purely a question of "scientific" fact.23

4. Proximate Cause

After cause-in-fact comes proximate cause, or legal cause as the Restatement (Second) of Torts24 (and now Louisiana25) calls it. What is proximate cause? Well it is really a way of deciding whether society ought to hold this defendant, whose negligent acts were a cause-in-fact of the plaintiff's damages, liable under these circumstances, to this plaintiff. Should the court sever the chain of causation or should it hold the defendant liable? As scholars have long pointed out, proximate cause is really a question of policy.26 However, in most states, the task of deciding whether the defendant's negligence is a proximate cause of the plaintiff's injuries is entrusted to the jury.27 How does a jury decide such a thing?

Most courts tell juries they must decide whether the plaintiff's injuries were foreseeable,28 direct,29 natural, or probable,30 in light of the defendant's conduct. If so, then the defendant's conduct proximately caused plaintiff's injuries. If, alternatively, the injuries were remote31 or unforeseeable,32 there would be no proximate cause. We could go on about these "magic words." Courts use them both alone and in combination. The important point, for now at least, is that the hornbook says proximate cause is a question for the jury.33 As such, one would expect a court to review a jury decision on proximate cause much as it would review any jury determination, with great discretion accorded the fact-finder. However, this is not always the case as appellate courts frequently seize the proximate cause question on appeal and treat it as

26. Green, Proximate Cause, supra note 15, at 68; Prosser & Keeton on Torts, supra note 7, at 273.
29. Id. at 51.
30. Id. at 68.
31. Id. at 66.
32. Id. at 75.
33. Prosser & Keeton on Torts, supra note 7, at 319.
if it were a question of law, to be more freely reviewed and reversed. This tendency created some ambiguity at common law regarding just what proximate cause meant. Still more confusion is created by competing cases within the same jurisdiction dealing with the issue. For years the thin skull rule, which provides that you take your plaintiff as you find him, has existed side by side with narrower rules for other cases. Moreover, some courts, such as the one deciding In re Polemis, hold a defendant liable for all damages which he directly caused. Others, such as the Wagon Mound court, limit liability to those damages which are foreseeable beforehand. Still others, following the Restatement (Second) of Torts use the word foreseeable but apply it in a hindsight manner, as Justice Andrews did in his Palsgraf dissent.

Adding confusion onto confusion, it is also at the proximate cause level that the jury, or judge (as factfinder), must deal with such intriguingly vague concepts as intervening causes, i.e. is the intervening cause superseding, in which case the defendant is relieved from liability, or merely intervening, in which case what the defendant did is deemed to be a proximate cause of the plaintiff's injuries? Such questions are generally not susceptible to purely rational responses.

5. Damages

Lastly is the question of damages. What is the "value" of the injuries that the plaintiff has suffered and that the law allows her to recover? This is always a question for the fact-finder, unless of course, reasonable minds could not disagree. Naturally there may also be questions as to whether the plaintiff is entitled to recover the type of damages sought. For instance, can a bystander who witnesses a close relative's serious physical injury recover for the ensuing mental distress in the absence of personal injury or property damage? To me that is more a question of duty—or proximate cause—than damages.

Wrapping up, in a traditional negligence case the allocation of decision-making responsibility looks like this:

34. Green, Proximate Cause, supra note 15, at 76. Kelly, supra note 27, at 89. See also Leon Green, Judge & Jury 380 (1930) [hereinafter Green, Judge and Jury].
38. Restatement (Second) of Torts § 435 (1965).
39. Prosser et al., supra note 2, at 316.
Thus, we have the standard negligence formulation. Naturally in a jurisdiction which follows this pattern or definition of negligence, it will sometimes happen that a tort defendant has violated a statute, usually a criminal statute. The plaintiff may ask the court to accept that statute as the appropriate standard of care in her tort case. That is, the plaintiff may claim that the violation of the statute constituted negligence because reasonable people do not break the law. In such a case, the negligence formula is slightly varied.

1. Elements

In deciding whether to adopt the statute as the standard of care of a reasonable person, the court asks itself two questions. First, is the plaintiff within the class of persons the legislature enacted the statute to protect? Second, is the risk that occurred within the class of risks the statute was designed to guard against? If the court answers both of these questions "yes" then the court accepts the statute as the standard of care of the reasonable person for purposes of the case before it.\(^4\) Actually this sentence may or may not be true depending upon the procedural effect that the jurisdiction accords to violation of a statute in a negligence case.\(^4\) I'll return to that point in a moment.

Just because the statute establishes the standard of care of the reasonable person does not mean that the plaintiff has won her case. She must still establish all the other elements of negligence. That is, the plaintiff must still prove that the defendant violated the statute, that the violation of the statute was a cause-in-fact of the plaintiff's injuries and that the plaintiff was, in fact, damaged. The astute reader will note that I have essentially equated the two questions concerning the class of persons and the scope of risks with the traditional formula's duty and proximate cause elements. Thus, let me chart the violation of statute approach and the traditional negligence formula side-by-side:

<table>
<thead>
<tr>
<th>Element</th>
<th>Who Decides?</th>
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<tbody>
<tr>
<td>Duty</td>
<td>Judge</td>
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<tr>
<td>Breach</td>
<td>Jury</td>
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<tr>
<td>Cause-in-fact</td>
<td>Jury</td>
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<tr>
<td>Proximate or legal cause</td>
<td>Jury</td>
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<tr>
<td>Damages</td>
<td>Jury</td>
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B. Violation of Statute

\(^4\) Prosser et al., supra note 2, at 209, 213; Prosser and Keeton on Torts, supra note 7, at 220.

Traditional Formula | Violation of Statute
---|---
Duty | Question 1 (Class of persons)
Breach | Violation
Cause-in-fact | Cause-in-fact
Proximate cause | Question 2 (Scope of risks)
Damages | Damages

a. Cause-In-Fact and Licenses

Several points now merit explicit attention. First, let me turn to cause-in-fact. It seems obvious that the plaintiff must establish that the violation of the statute was the cause-in-fact of her injuries; however, I fear this fact is sometimes downplayed. A good example of this arises in licensing cases. In a good many cases plaintiffs attempt to employ a licensing statute to establish the standard of care of the reasonable person or the reasonable professional. Imagine a case where a plaintiff claims that it is negligence to practice medicine without a license and therefore an unlicensed practitioner is liable for injuries resulting from medical treatment.45 Or, the plaintiff in another case claims that the defendant is negligent for driving a car without an operator’s license in violation of a statute.46 Courts wrestle with these problems.

I find one rather simple solution47 is to ask whether the lack of the license was the cause-in-fact of the plaintiff’s injuries. Can one say but for the lack of the license the injury would not have occurred? There are several Louisiana cases that have apparently adopted this approach with respect to unlicensed drivers thereby supporting my point, if not undermining my originality.48 It seems the answer to the question is usually no. An injury can occur even when a doctor, or a driver, has a license. One might argue that the jury ought to decide the cause-in-fact issue; however, the difficulty of answering the cause-in-fact question, if the statute is adopted as the standard of care, coupled with the violation’s potential prejudicial effect, may serve as a reason for the

47. A court could also find that a particular licensing statute is meant to protect against the risk that one will be injured by an improperly trained, negligent actor but not meant to protect one injured by a properly trained, non-negligent, but unlicensed actor. As such the crux of the case is whether the actor was negligent, not whether he had a license. For a recent Louisiana case applying a driver’s license statute as the standard of care of the reasonable person, see Chatman v. Turner, No. 91-0782 (La. App. 1st Cir. June 29, 1992).
court to refuse to accept the statute as the standard of care. Perhaps, these factors may even justify excluding the fact of the violation from the case because it is unduly prejudicial given its slight probative value. Alternatively, one could say that reasonable minds could not disagree on the cause-in-fact question. The real issue is whether the driver did fail to exercise due care, whether licensed or not. It is on this issue that these cases are usually litigated.

b. Duty and Proximate Cause

Turning from cause-in-fact to duty and proximate cause, one will note from the “elements” chart that question 1 takes the place of duty and question 2 takes the place of proximate cause. This “substitution” points out that the violation of a statute approach to negligence is remarkably similar to the traditional formula. What differences are there? This gets us to the question of who decides.

Normally, one would think it is the judge who decides whether to adopt the statute as the standard of care of the reasonable person under the circumstances. That is, it should be the judge who answers questions 1 and 2. That statement is not a radical one. Most would probably accept it and put it in their hornbooks. Thus we see an apparent difference between the traditional and the violation of statute approaches. This is so because if question 2 equates with proximate cause, as I have postulated, then the judge, in deciding whether the risk is within the scope of the statute’s reach, is deciding proximate cause. Under the traditional approach, it is the jury who decides whether the defendant’s negligence is a proximate, or legal, cause of the plaintiff’s injuries.

We could argue it is sensible to have judges make this scope of statute decision because it is appropriate for judges, rather than juries, to interpret the scope of statutes. The scope of the statute is a question of legislative intent, purpose, and policy which a judge is well suited to analyze and answer. But, if proximate cause, in garden variety negligence cases, is a question of policy, why don’t judges get to decide proximate cause too? I am sorry to distract you with that question but I couldn’t resist. Let me now reproduce my elements chart adding a column for who decides.

51. Prosser & Keeton on Torts, supra note 7, at 222; Prosser et al., supra note 2, at 213.
To summarize the point I’m trying to make, violation of statute looks a whole lot like plain old negligence except that the judge, not the jury, gets to decide the equivalent of the proximate cause question. I’ve highlighted this difference in the chart. Now, if I may, let me debunk a little of this apparent difference.

First, some courts, in violation of statute cases, still ask the jury whether the violation of the statute was the proximate cause of the plaintiff’s injuries. Whoa Jim! How can that be if question 2 equates with proximate cause? That’s a good question. It is almost as if the trial judge, in giving the jury the proximate cause issue in a violation of statute case, is saying: “Yeah, okay, this risk might be within the scope of the statute but I’d really like to ask the jury to make that decision.” Is it abdication of authority to ask the jury to make that decision? Or, is there something about the risk that occurred that makes it appropriate to get the common sense view of the community? However you explain or ask it, the effect is obvious. Asking the jury to decide the proximate cause question in a violation of statute case accentuates the similarities, not the differences, between the violation of statute approach and the traditional formulation.

Second, who really gets to decide proximate cause, duty, and even breach, in a violation of statute case, depends upon what procedural effect the relevant jurisdiction accords a finding of violation of statute in a negligence case.

2. Procedural Effect of Violation in a Negligence Case

Generally there are three possible procedural effects of the violation of a statute in negligence cases: “negligence per se,” “presumption of negligence,” or “some evidence” of negligence.

a. Negligence Per Se

In a “negligence per se” jurisdiction if the court answers questions 1 and 2 in the plaintiff’s favor, the standard of care (part of the breach question), duty, and proximate cause issues are resolved against the

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53. Prosser & Keeton on Torts, supra note 7, at 223.
defendant. Assuming that the defendant violated the statute and the violation was a cause-in-fact of some injury to the plaintiff, the defendant's only out is to prove, by a preponderance of the evidence, that the violation was excused. The mere fact that the defendant was exercising due care in violating the statute is irrelevant unless that due care rises to the level of an excuse. In such a jurisdiction, excuse is typically narrower than the generalized concept of ordinary care.

Note, under a "negligence per se" regime, the jury's role is rather limited. It decides whether there has been a violation; it decides cause-in-fact; and, it decides the amount of damages. The court decides the duty question, as usual, and it decides the proximate cause question. Of course, the jury gets to decide if the defendant is excused under the facts; however, it does not seem that the jury gets to decide what constitutes an excuse. That decision is left to the court. In short, the jury's role, in a paradigm "negligence per se" jurisdiction, is that of fact-finder. It does not bring its views, the common sense of the community, to bear on the policy aspects of the case. Policy, I suppose, is left to the judge in his, or her, guise as statutory interpreter.

One perceives another critical difference between a court deciding a negligence case in a strict "negligence per se" jurisdiction, under the violation of statute approach, and a court using the traditional approach. Traditionally, it is up to the jury to decide whether the defendant exercised reasonable care under the circumstances. That is, the jury, in essence, sets the standard of care for the case before it.

Certainly the jurors have some guidelines: the reasonable person, the reasonable person who is blind, the reasonable professional, etc. But applying these general guidelines to the case is the jury's job. It is part of the breach question, the big part. However, when a court adopts a statute as the standard of care in a "negligence per se" jurisdiction, it decides what the standard of care is and the jury, while it does decide whether there was a violation of the statute, does not get to decide whether the fact of violation constitutes a breach of the otherwise appropriate standard of the reasonable person under the circumstances. Functionally speaking, the jury has less to do in a "negligence per se" case than in a traditional negligence case, not only because it does not get to decide the proximate cause issue but, just as significantly, because it has no real role to play in deciding whether the conduct was negligent to begin with.

56. Of course there are some statutes the violation of which constitutes negligence whether the violation might otherwise be excused or not. See Prosser et al., supra note 2, at 234-35. These are cases where the statutory duty is so important, from a policy perspective, that one is almost absolutely liable for their violation.
b. Presumption of Negligence

Moving now to a jurisdiction that treats the violation of a statute in a negligence case as a “presumption of negligence,” one notes some subtle differences. The court still decides questions 1 and 2: scope of the statute concerning the class of plaintiffs protected and the risks covered. The jury still decides violation, cause-in-fact, and damages. So, if we want to be rigid about all of this, the judge still decides the proximate cause question in a “presumption of negligence” jurisdiction. However, the jury’s power is greater in a “presumption of negligence” jurisdiction than it is in a “negligence per se” jurisdiction. That enhanced power arises in the determination of the standard of care; it results from the very difference between violation of statute as a “presumption of negligence” and violation of statute as “negligence per se.” In a “presumption” jurisdiction, the defendant, after the court has decided questions 1 and 2 against him, can still prevail on the standard of care question if he establishes, by a preponderance of the evidence, that he was exercising due care, despite the violation. Thus the jury still gets to decide what the standard of care is, as in a traditional negligence case. However, in a traditional negligence case the plaintiff bears the burden of proving a breach of the standard of care; here, the burden of proving compliance with the standard of care is on the defendant. No doubt, the statute continues to hang over the defendant’s head like the sword of Damocles. He must prove that, even though he violated the statute, he was acting reasonably under the circumstances. However, this is an out the defendant does not have in a “negligence per se” jurisdiction.

c. Some Evidence

Lastly, in a jurisdiction where violation of a statute is “some evidence” of negligence, the jury has even more power. In such a jurisdiction, the jury may or may not adopt the statute as the appropriate standard of care. The burden of persuasion remains with the plaintiff throughout. In essence, the jury gets to decide the standard of care question—the traditional negligence question—as well as the proximate cause question (question 2). Presumably, the court must make a preliminary decision on questions 1 and 2 before allowing the jury to

57. Interestingly a statute logically could have another effect. The violation of a statute could merely place the burden of going forward with evidence of due care on the defendant. This would be consistent with saying that the statute creates a “presumption” of negligence. In such a case the violation would force the defendant to go forward with enough evidence of due care to avoid a directed verdict. If the defendant satisfied that burden then the ultimate burden of persuasion on “negligence” would be on the plaintiff and the violation would serve as some evidence of negligence.
consider the statute as "some evidence" of negligence. Otherwise, the statute would be irrelevant. However, the decision on question 2 (and maybe even question 1) is not binding on the jury in any real sense of the term. Moreover, the fact of violation does not establish breach of the ordinary person's standard of care. Thus, the "some evidence" approach is remarkably similar to the traditional approach in non-violation of statute cases.

C. Duty-Risk

Moving from violation of statute to duty-risk, one notes some marked similarities between the two approaches. This is quite natural since duty-risk is derived, in part, from the violation of statute approach. The most dramatic difference is that duty-risk is applied much more broadly. By definition, courts only employ the violation of statute approach when there is a statute involved. Duty-risk is potentially applicable to any and every negligence case.

1. Development and Promises

The complete development of the duty-risk approach is beyond the scope of this paper; however, a short summary is helpful to its understanding. Duty-risk was the creation of the legal realists: most notably, Dean Leon Green and Louisiana State University's own Professor Wex Malone. They responded to two principal problems with the traditional negligence formula, both of which grew out of the phrase "proximate cause." The first problem was that many courts used (and some continue to use) the words "proximate cause" to refer to both cause-in-fact and legal limitation, or legal cause. Expecting one horse to pull such

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58. Prosser et al., supra note 2, at 339; Green, Proximate Cause, supra note 15, at 21, 28.
59. See, e.g., Green, Proximate Cause, supra note 15; Green, Judge and Jury, supra note 34; Wex S. Malone, Essays on Torts (1986); Kelly, supra note 27.
60. See Kelly, supra note 27.
63. Ironically Prosser's casebook, Prosser et al., supra note 2, falls prey to this very tendency. On page 136 the authors allude to proximate cause as referring to both cause-in-fact and legal limitation. Then Chapter 5 is entitled "Cause In Fact" and Chapter 6, which deals only with legal limitation, is entitled "Proximate Cause." Despite this minor bit of confusion the book continues to be the most commonly used Torts casebook and for good reason. However, can law professors complain too much if students have a hard time grasping the concept of proximate cause?
a heavy wagon, especially such a confusing one, was a whole lot to ask. So much so that many juries were no doubt confused about what they were being asked to do when the court instructed them on proximate cause. As such, one of the real strengths of the duty-risk approach was its separation of the cause-in-fact question from the legal limitation question. Malone could not overemphasize this point. And, that separation is no mean feat. But the duty-risk approach promises even more.

One of the problems that had developed with the traditional negligence approach, and its reliance on the two words "proximate cause," was that judges could hide behind them. Proximate and cause, when placed side-by-side, are two big words, much bigger than they are alone. They are big enough in fact for lawyers, judges, even whole courts to get behind and stay behind. According to Green and Malone, the words obfuscated. You see, the great ones opined, proximate cause, or, more accurately, legal limitation, is really a question of policy. It is a question relating to the underlying purposes of tort law: compensation, deterrence, risk spreading, maybe punishment, administrative convenience, consistent development of the law (precedent), legislative will and fairness or morality. It is a question relating to all the things a civilized

64. Green wrote:
   Either we must recognize at least two kinds of "cause" meaning entirely different things, as has already been developed by the courts, or else we must find some way to relieve the term of this weighted meaning. It is thought that the analysis here suggested does this and thereby makes clear the problems which are involved so that they can be dealt with rationally.
Green, Proximate Cause, supra note 15, at 40; Wex S. Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60 (1956) [hereinafter Malone, Cause-In-Fact].
65. See, e.g., Malone, Cause-In-Fact, supra note 64.
66. Green, Judge & Jury, supra note 64, at 223.
67. Id. at 225.

Though, it may be conceded that somehow or other the judicial process gets an unbelievably large amount of its work done acceptably, there is no possibility of its successfully meeting the exactions of hard cases until it is recognized that the judge, in finding a basis for judgment, must go beyond and above any range for which rules have yet been fashioned. This does not mean that the individual judge cannot learn much from what other judges in other cases have done and said, or that juries cannot be aided by intelligent instruction. These may still be pressed; they are valuable means of educating judgment but that is as much as they can do in these hard cases. Neither good administration nor the progress of law at this point lies in authority of any sort. Legal science needs rather the power to discern the factors at work in the particular case, and the power to pass acceptable judgments for the time and place. These powers are not developed except by their employment. They have been in large part effectually blocked by so-called rules of causation, and thus, in addition to being worthless, these rules are hurtful.
society ought to consider in making decisions in difficult personal injury cases.

And, if legal limitation is a question of policy, then shouldn't judges talk about the policies that influence, or should influence, their decisions? One would hope. And I believe the legal realists did realistically entertain that hope. At least they thought judges should not rely on, or hide behind, words like: direct, remote, foreseeable, unforeseeable, natural, probable, expected, unexpected, intervening, superseding, and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions.69

In this regard, duty-risk promised two more things. First, to the extent that courts were not making policy decisions, but were taking doctrine seriously and really trying to apply the magic words, duty-risk revealed that policy, not linguistic and logical gymnastics, was critical. Second, to the extent that courts were really basing decisions on policy, rather than magic words, it encouraged them to explain those policy decisions. Of course, this all raised another interesting question, one we have already raised when looking at the other approaches to negligence: who decides? Were courts wrong in letting the jury decide the proximate cause (legal limitation) question? Was that part of their hiding?

Reading Green, one might conclude that the courts had erred in submitting the proximate cause question to the jury. Noting the complexity inherent in negligence cases and the confusion between the court's and the jury's role, he opined:

Judges habitually fall into two grave errors in handling cases of this nature. First, they do not recognize that they have a function to perform by way of defining the limits of the rule involved. Second, they place the burden on the jury under the guise of determining "proximate cause." And the stupid part of it all is that the attempt is made to use the "probability of harm" formula, employed to determine negligence, also as a test of this so-called "proximate cause" issue. Frequently a third error is made. It happens in this way: If the result obtained from erroneously leaving the fictitious "cause" issue to the jury is palpably unjust, or if the result of leaving it to the jury would probably be so, the appellate court declares as a matter of law that there was in fact no causal relation issue to be left to the jury, and proceeds to deal with it as an issue of causation for the court. Here they make use of all those weighted phrases such as "remote," "unforeseen," "intervening agencies," "independent agencies," and a score of others which are meaningless

69. Thode, supra note 62, at 24-25.
as solvents except they provide a smoke screen behind which the court can retire from an awkward position. They do here under the guise of determining "proximate cause" what should have been done by way of defining the scope of protection afforded by the rule invoked.

Cases are frequently left to a jury's determination which for one reason or another are allowed to stand, when, if the trial judge had exercised his proper function they would have been determined differently. Here the judge abdicates his primary function.70

But, were these judges wrong in letting the jury decide, or, was it only a question of craft, not allocation of decision-making responsibility? Answering this question requires an analysis of duty-risk and how it is different from the traditional negligence formula.

2. Duty-Risk v. Proximate Cause

Proximate cause, question 2, and the risk part of duty-risk are aimed at essentially the same thing. They are tools decision makers use to hone the scope of the defendant's duty. That is, decision-makers use these "questions" to decide whether the defendant owes the plaintiff a duty to exercise reasonable care to avoid a certain risk of harm and to decide whether the duty, if it exists at all, extends to protect against the risk that materialized in the case before the court? Recall Cardozo's phrase, if not his reasoning, from Palsgraf: "risk imports relation."71 Put another way, is the scope of the duty broad enough to extend to cover this risk? My colleague, Professor Frank Maraist, has said it about as well as anyone. He writes:

Every tort system must answer a fundamental question: assuming that the defendant's conduct is proscribed (is an intentional tort or negligent or is subject to strict or absolute liability), do we nevertheless want to impose liability upon the defendant for these damages, sustained by this plaintiff in this particular manner? The answer is dictated by policy, sometimes fundamental fairness and sometimes by a societal determination of whether to deter or encourage certain conduct. Sometimes the answer is influenced by considerations of allocation of resources, such as avoidance of a "floodgate of litigation." While the question is uniform and the rationale underlying the answer is often clear,

70. Green, Proximate Cause, supra note 15, at 76-77 (emphasis added) (footnotes omitted).
the name by which the question is described varies among the American jurisdictions.72

Another, whose writing predated Maraist's succinct eloquence, was Malone. He wrote, in what may be the most quoted paragraph in tort law, certainly the most quoted in our state:

All rules of conduct, irrespective of whether they are the product of a legislature or are 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, merely because it is shown that the violation of the rule played a part in producing the injury. 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 court cannot escape.73

Thus, put simply, the issue in a particular case is: does the duty go this far? Alternatively, as Professor Crowe has so precisely put it: does the defendant's duty extend to protect this plaintiff from this harm which has occurred in this manner?74 So how does the duty-risk approach handle this question? It collapses the common law's separation of duty and proximate cause into essentially one question. As noted, it clearly separates that question from the cause-in-fact question. When collapsed, the question looks a lot like questions 1 and 2 in a violation of statute case. To say it again, the duty-risk pattern asks: does this defendant owe a duty to protect this plaintiff from this risk which occurred in this manner?

Interestingly, there is yet another resemblance between the duty-risk approach and the violation of statute approach. In a violation of statute case, there is a "rule of conduct" for the court in the applicable statute. In a duty-risk case, it is almost as if the court enacts its own statute. It says: if we had a rule that said "thou shalt not do whatever it is that the plaintiff has alleged the defendant did," would violation of that rule extend to protect this plaintiff, and, therefore, justify recovery in a negligence action? What role does the jury play here? The jury may play some role, when deciding the breach question, in deciding whether we ought to have such a rule. Or, the court may make that


73. Malone, Cause-In-Fact, supra note 64, at 73.

74. Here I have paraphrased from Professor Crowe, William L. Crowe, Sr., The Anatomy of a Tort, 22 Loy. L. Rev. 903, 906 (1976). Crowe, in turn, was relying upon Green.
decision alone, in which case the jury only gets to decide whether there was a violation (as well as cause-in-fact and damages). If the jury gets to decide whether we have such a rule, duty-risk resembles the "presumption of negligence" violation of statute approach. If the jury must accept the court's rule, then it looks more like a "negligence per se" violation of statute approach. This all reminds me of Oliver Wendell Holmes' insistence that over time individual trial judges ought to start deciding negligence (breach) as a matter of law, that is, by essentially making rules. But I won't dawdle over legal history, now.

Let me, for the sake of clarity and consistency, chart the elements of the duty-risk approach in the same manner I have used for the other two approaches. I will set forth the elements in the order the Louisiana Supreme Court did in Hill v. Lundin & Associates, Inc. Many other Louisiana courts have followed suit.

<table>
<thead>
<tr>
<th>Duty-Risk</th>
<th>Who Decides?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cause-in-fact</td>
<td>Jury</td>
</tr>
<tr>
<td>Duty-Risk</td>
<td>Judge</td>
</tr>
<tr>
<td>Breach</td>
<td>Jury</td>
</tr>
<tr>
<td>Damages</td>
<td>Jury</td>
</tr>
</tbody>
</table>

3. Who Decides?

Now, back to who decides. Who decides whether the duty extends to protect this plaintiff from this injury which occurred in this manner? Does the judge? To many scholars, like Green, the answer is yes. Many Louisiana courts have apparently agreed. If the answer is yes, and the judge decides, then the allocation of decision-making responsibility looks like this:

75. Oliver W. Holmes, Jr., The Common Law 98-99 (1881).
76. 256 So. 2d 620 (La. 1972).
78. See, e.g., Crowe, supra note 74, and Thode, supra note 62.
So, the effect of duty-risk is to take the proximate cause question away from the jury and give it to the judge. One might justifiably conclude that there is some sense to this because the limitation question is a policy question and judges may be better prepared than juries to make such policy determinations. However, are such policy questions really capable of explanation? Professor Robertson has noted that courts using the duty-risk method do not always explain themselves. He states:

Maybe it is just a matter of tradition. Courts don’t talk that way, it is 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.  

Well then if that is the case, if you just can't talk about it, what has duty-risk done for us in this regard? Professor Robertson has said that duty-risk is an “evocative” approach to solving negligence problems. I read evocative to mean evokes discussion; however, if, even under an approach that is supposed to evoke discussion, courts don’t talk about why they decide as they do because one result just seems more fair than the opposite outcome, what has this evocative approach evoked? If a particular result just seems more fair than another, then perhaps magic words like foreseeability, directness, remoteness, etc., are alright to use. Maybe they’re alright to hide behind. Even Green let the jury hide behind them when deciding the negligence question, his third question.

Maybe to say that someone proximately, or legally, caused an injury to another is to connote something, not to denote it. Perhaps to say that a person proximately, or legally, caused an injury is to suggest a conclusion about a state of affairs that is in the nature of a metaphor. The real reason cannot be explained. It can only be suggested; it can only be hinted at. It can only be described in conclusory terms based on our common notions of what is fair: of what common decency and compassion demand.

Maybe the real reason for some decisions is as much a result of perception, sensation, and feeling, as it is a result of thinking and logic. But the law, at least as a craft, is logically oriented. It relies, in its public face, on reason and logic. Duty-risk encourages that reasoning and its exposition. But is it realistic in that regard? Does it neglect the visceral, unconscious aspect of the decision, an aspect that may be critical in any case where the scope of the duty really is at issue? In that regard, was proximate cause so bad in its appeal to what Justice

80. Robertson, supra note 61, at 12.
81. Id. at 1.
82. Robertson, supra note 61.
Lemmon in *Fowler v. Roberts* has called "ultimately visceral" reactions? I think not. Does forcing explanation force an underemphasis on the types of emotional factors law has traditionally not expressed as relevant. Certainly we don't read many tort decisions expressly articulating things like compassion, sympathy, and empathy. But can anyone doubt that these are at the heart of a lot of opinions in particular cases? If forcing judges to explain themselves overplays the rational, logical bases of decision, is it such a good thing?

I also think that if, in fact, proximate, or legal, cause decisions or duty-risk decisions are essentially visceral decisions then perhaps it is not undesirable to ask that juries, composed of members of the community in which the case arose, make those decisions. Maybe there are issues which judges are better suited to decide. As noted in the introductory section of this paper, interpretation of statutes is one of these areas. Moreover, some commentators have argued that juries are not able to deal with difficult economic and technological concepts. Perhaps, judges are better suited for some of these decisions as well. However, where the primary issue before the court relates, essentially, to what is fair, given the facts before the court, then perhaps the jury is the best decision-maker. However, that is not to say it is not desirable to preserve the flexibility courts now enjoy to decide those issues that are appropriate for courts to decide and juries to decide those issues that are appropriate for juries to decide.

We will not solve these problems here: assuming that the court does make this scope of duty decision, then the duty-risk method is most like the violation of statute approach where the effect of violation is "negligence per se." As in a "negligence per se" jurisdiction, the jury has no role in deciding what the scope of the duty is. Of course, the jury in a duty-risk jurisdiction may, unlike a jury in a "negligence per se" case, play a role in defining the standard of care when deciding the breach question. One may remain justifiably cynical concerning whether judges do, or always should, decide the risk questions themselves without asking the jury for help.

4. A Mid-Stream Summary

Let me now reassert a basic point. In each of the approaches described so far we see the same essential elements. They differ with respect to who decides what, which is illustrated by the chart of the elements below with "who decides" in parentheses. The chart begins with the traditional negligence formula and matches up the other ap-

83. 556 So. 2d 1 (La. 1989).
84. *Id.* at 5.
proaches to make the point that each of the three have all the same basic elements.

<table>
<thead>
<tr>
<th>Traditional</th>
<th>Statute</th>
<th>Duty-Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty (Judge)</td>
<td>Q1 (Judge*)</td>
<td>Duty (Judge)</td>
</tr>
<tr>
<td>Breach (Jury)</td>
<td>Violation (Jury)</td>
<td>Breach (Jury)</td>
</tr>
<tr>
<td>CIF (Jury)</td>
<td>CIF (Jury)</td>
<td>CIF (Jury)</td>
</tr>
<tr>
<td>PC (Jury)</td>
<td>Q2 (Judge*)</td>
<td>Risk (Judge)</td>
</tr>
<tr>
<td>Damages (Jury)</td>
<td>Damages (Jury)</td>
<td>Damages (Jury)</td>
</tr>
</tbody>
</table>

*Of course the binding effect of the judge's decision on these questions depends upon the procedural effect the jurisdiction accords a violation of statute.

Thus one can see the interrelationship, of the three approaches. One later arrival on the scene also merits our consideration: Learned Hand's negligence formula.

D. The Learned Hand Formula

In a series of opinions written in the 1940s, Judge Learned Hand distilled a negligence formula from the common law approach. The law and economics movement has since adopted his formula as its own. The formula provides that one is negligent where the burden (B) of avoiding a risk, or package of risks, is less than the probability of that risk occurring (P) times the gravity or severity of the anticipated risk should it arise (L). Put algebraically, as the great jurist himself put it, one is negligent if $B < P \times L$. It must be emphasized that B is not merely the direct cost of avoidance, i.e., repairs to a defective car. It also includes the loss society will suffer from risk avoidance, i.e., losses society will suffer because an alternative product design makes it harder to use. B also includes the costs to the defendant of discovering the risk, i.e., the cost of finding out that the car is defective.

1. An Economic Approach to Negligence: The Invisible Hand?

The law and economics school has adopted the formula because it is an economic statement of negligence. It is a definition of negligence tied to the efficiency of accident avoidance. That is, an economist would like to encourage people to invest in accident avoidance (B) up to the

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85. See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).
point where that investment ceases to produce further net accident avoidance \((P \times L)\). That is the point where the marginal benefit from the last unit invested in accident avoidance equals the marginal cost of that last unit. After that point, accident avoidance is too expensive; one dollar invested in accident avoidance will yield less than one dollar's worth of accident avoidance, or safety, if you will. That is, tort rules, to the economist, should encourage people to invest in accident avoidance up to the point where the marginal benefit derived from the investment equals the marginal cost of that additional safety. Negligence law then is part of that invisible “Hand” that assures efficient behavior. That equilibrium point represents an efficient investment in safety. Therefore, one is negligent if one could avoid an accident for less than its anticipated cost: if \(B < P \times L\). Note that \(P \times L\) represents the \textit{ex ante}, beforehand, “cost” of the risk. This cost should represent all the costs associated with the risk although one may justifiably wonder if this is ever the case in the real world.88 Ideally \(P \times L\) plus some amount for administration and profits ought to equal the pre-accident premium one would pay for insurance to avoid the risk.

How does the Learned Hand formula affect the traditional negligence formula? It consumes it. First, let's examine what it leaves. It probably leaves cause-in-fact. The plaintiff must still show that but for the defendant's failure to invest in safety, i.e., behave reasonably, the accident would not have happened. There is no economic reason, as I see it, even to leave this element, but most seem to still pay it lip service even if using Hand's formula. What about duty? Well one has a duty to protect against those risks for which \(B < P \times L\), and no others. What about breach? One has breached a duty to exercise ordinary (efficient?) care if \(B < P \times L\), and not otherwise. How about proximate cause? One is responsible for those risks for which \(B < P \times L\), and presumably not others. That is, one is responsible for those risks that made him negligent in the first place, and no others. Those risks, per the formula, are the risks that could have been efficiently avoided beforehand. I believe this is what the court meant in \textit{Wagon Mound II}89 when it said:

> It does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so; e.g., that it would involve considerable expense to eliminate the risk.90

Likewise, one sees an obvious corollary in Judge Keeton's formulation that one is liable for "that harm, and only that harm, of which

88. See id.
90. Id. at 618-19.
the negligent aspect of his conduct is a cause in fact.\textsuperscript{91} Finally, the Hand formula is consistent with Justice Dennis' statement in \textit{Pitre v. Opelousas General Hospital}\textsuperscript{92} of the scope of the liability of a "good faith" tortfeasor. He stated: "the same criterion of foreseeability and risk of harm which determined whether a physician in this kind of situation was negligent in the first instance should determine the extent of his liability for that negligence . . . ."\textsuperscript{93} And damages, how do they fit in under the Hand formula? I assume that under the Hand formula the defendant pays those damages that made him negligent in the first place—L.

Some courts seemingly only employ the Hand formula to determine whether there has been a breach of the duty to exercise reasonable care.\textsuperscript{94} However, in so doing they usually ask the duty question very broadly: does the defendant have a duty to exercise reasonable care to avoid a foreseeable risk? No matter, it should be seen that the Hand formula can basically swallow up the traditional negligence formula. One might wonder whether that is so unique or so bad. For now, let us ask whether the judge or jury should apply the formula. The practice is, I believe, that the fact-finders do the job. Certainly if the formula is primarily used to determine breach and breach is a traditional question for the fact-finder, the jury ought to apply the Hand formula.

If it is the jury's job to apply the formula, has the formula taken the trial judge out of the negligence business except in cases tried to the court, or, in jury cases, where the judge must decide whether to grant directed verdicts and judgments notwithstanding the verdict (JNOVs)? If so where does policy fit in? And, as a matter of policy, do we want juries, untrained in economic concepts, to be making economic decisions?\textsuperscript{95} Aren't judges better able to make these types of decisions and engage in these types of balancing processes, especially in the growing number of complex technological tort cases courts are faced with?\textsuperscript{96} These cases do not involve the same old reasonable person we used to talk about.

However, if we let judges "Do the Hand" have we taken juries out of the negligence business, except to decide cause-in-fact and maybe a question of pure fact now and then? If so, there are surely shades

\textsuperscript{91} Robert Keeton, Legal Cause in the Law of Torts 9 (1963).
\textsuperscript{92} 530 So. 2d 1151 (La. 1988).
\textsuperscript{93} Id. at 1161.
\textsuperscript{96} See \textit{id.}.
of Holmes idea of the rule of law in negligence cases at work again.\textsuperscript{97} That is certainly the result if we entrust the Hand formula to the judge, as opposed to the jury. How would duty-risk incorporate the Hand formula? Again, I think the question is backwards. How would the Hand formula incorporate duty-risk? It would, as it does with the traditional formula, eat it up.

In conclusion let me chart again, assuming for now that the jury is the entity applying the Hand formula.

<table>
<thead>
<tr>
<th>Traditional Formula</th>
<th>Who Decides?</th>
<th>Hand Formula</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty</td>
<td>Judge/Jury</td>
<td>$B &lt; P \times L$</td>
</tr>
<tr>
<td>Breach</td>
<td>Jury/Jury</td>
<td>$B &lt; P \times L$</td>
</tr>
<tr>
<td>CIF</td>
<td>Jury/Jury</td>
<td>CIF</td>
</tr>
<tr>
<td>PC</td>
<td>Jury/Jury</td>
<td>$B &lt; P \times L$</td>
</tr>
<tr>
<td>Damages</td>
<td>Jury/Jury</td>
<td>$L$</td>
</tr>
</tbody>
</table>

E. Summary

Under the traditional negligence formula, the violation of statute approach, and the duty-risk approach, the same questions are being asked. The only thing that is really different is who gets to do the answering. At common law, the jury gets to decide the proximate cause element and the breach element. Under the violation of statute approach, the court decides proximate cause when it decides whether the statute was intended, or designed, to protect against the risk that occurred in the case before it. Interestingly, even under the violation of statute approach some courts still insist upon asking the jury about proximate cause. Likewise, depending upon the procedural effect the relevant jurisdiction accords violation of a statute, the jury may still have some role to play in determining the scope of the statute’s protection. Likewise, in a violation of statute case, the court, rather than the jury, sets the standard of care although, once again, depending upon the procedural effect of violation of statute the jury may still retain some power here as well.

Turning to the duty-risk approach, the judge has the power to make the risk, or legal limitation (proximate cause) decision. The jury seems to retain its power to define the standard of care although the court’s statement of duty may even play some role here. Finally, the Learned Hand formula may give the jury great power, while collapsing the negligence question into essentially one issue: is $B < P \times L$? However, the formula is a synthesis of common law jurisprudence, so it cannot be considered a total deviation from the three other approaches.

So where does it all leave us? What have we learned about the various approaches to negligence? Perhaps like a rose, negligence by any other name, is still negligence.