The Vocabulary of Negligence Law: Continuing Causation Confusion

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I. INTRODUCTION: LIVING IN INTERESTING TIMES

Everyone who works in the torts field knows that the law is capable of rapid and dramatic change. Even so, living through the last half of the 1990s in Louisiana is reminding many experienced judges and lawyers of the fabled Chinese curse, “may you live in interesting times.” It is too early to assess the performance of the 1997 legislature. The 1996 legislature did too much to summarize here.1 Among the more dramatic of the 1996 changes are the provisions for assigning fault percentages to immune and judgment-proof entities and charging those percentages against the plaintiff’s recovery;2 the radical restriction of the categories of strict liability;3 and the elimination of punitive damages except against drunk drivers.4

In times of such politically inspired turbulence, the kind of work done in this article—analyzing and criticizing subtle and incremental changes being made by the judiciary in the everyday vocabulary and conceptual apparatus of the basic law of negligence—may seem effete. But any such characterization would be off the mark. Particularly during these periodic episodes of ideological ferment, maintaining a stable and consistent vocabulary is the essential first step toward principled dispute resolution.

2. See La. Civ. Code art. 2323(A) (providing that the “fault of all persons causing or contributing to the injury” must be quantified); La. Civ. Code art. 2324(B) (setting out a general rule that a tortfeasor “shall not be solidarily liable with any other person”); La. Code Civ. P. art. 1812(C)(2)(b) (giving an illustrative list of nonparties whose fault must be quantified if any party demands it).
5. La. Civ. Code art. 2315.4 (providing for exemplary damages for “wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries”).
II. DOING THE GARDEN

Broadly speaking, the goals of negligence law consist in (a) assuring adequate recompense for deserving injury victims and (b) discouraging behavior that is unduly accident-productive while (c) protecting the innocent from exposure to suit and liability in tort. These goals are not achievable unless those involved in the operation of the tort-law system—judges, legislators, practicing lawyers, and academic lawyers—speak more or less the same language. Even when we speak the same language, we are bound to disagree. When we don't speak the same language, we can't even be sure what we're disagreeing about.

Speaking the same language is easy when nothing much is happening—i.e., when the speakers are relatively few in number, isolated from other groups, and living peaceful lives. Speaking the same language gets much harder when strange new things keep happening, when new speakers are appearing and new ways of thinking are emerging. Negligence law's language is bound to change, just as all natural languages are bound to change, as its users confront new phenomena, attitudes, possibilities, and restraints. The trick is to allow the vocabulary to grow and develop while at the same time maintaining control.

From the present point of view, part of the work of the academic lawyers who concern ourselves with the maintenance and growth of the system of negligence law can be seen as a form of concept gardening, involving the nurture and care of desired growths and the ruthless extirpation of undesired growths. Here is my concept-gardening philosophy: Useful new ideas, terms, and approaches should be cautiously welcomed and ultimately, perhaps generously, nurtured, but they cannot be allowed to flourish in proliferation—we've got our beds and rows all laid out, these beautiful new plants can't just crop up wherever they want to. And of course, lots of these new plants are far from beautiful. They are weeds, is what they are. Weeds must be weeded out.

Occasionally I wonder whether my co-workers are sufficiently obsessed with the need for weeding. A previous issue of the Louisiana Law Review carries companion articles by me—"Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases" [hereinafter "Allocating Authority"]—and the gifted young Professor Galligan—"Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson" [hereinafter "Inspired Ramblings"]—. My piece describes a stable, middle-ground vocabulary of negligence law and somewhat urgently advocates fairly strict adherence to it. Professor Galligan's response is in a different philosophical spirit. Galligan's concept-gardening philosophy is perhaps epitomized by his concluding sentences:

Negligence like a cat has had many lives (or models) and, there's more than one way to skin a cat. When dealing with something as amorphous as negligence, flexibility seems to me to be a most attractive virtue.\footnote{Galligan, supra note 6, at 1132.}

Translated into my gardening metaphor, Galligan wants to let a thousand flowers bloom. I am inclined to view of those flowers as weeds. Friends and co-workers, Galligan and I are nevertheless doing the garden and digging the weeds in philosophically different ways.

III. PAGES ONE, TWO, AND THREE

At this point it may help if we drop the gardening metaphor and start thinking about a map. At least it helps my first-year students to think of the map of negligence law as a three-page atlas.

Page One is the plaintiff's prima facie case—what the plaintiff must establish in order to achieve a recovery. Page Two covers the affirmative defenses—what the defendant can establish that will either defeat or diminish the recovery that the plaintiff provisionally achieved on Page One. Page Three deals with multiple tortfeasor issues: issues of joint and several (solidary) liability, contribution, indemnity, crediting for partial settlements, immune tortfeasors, and phantom tortfeasors.\footnote{See generally David W. Robertson, The Louisiana Law of Comparative Fault: A Decade of Progress 49-80 (LSU Law Center 1991) [hereinafter “Progress”]; David W. Robertson, Solidary Liability in Tort: Understanding Gauthier and Touchard Part I, 41 La. B.J. 227 (1993); and David W. Robertson, Solidary Liability in Tort: Understanding Gauthier and Touchard Part II, 41 La. B.J. 334 (1993).}

The main focus of this article is Page One—confusions that can eventuate and mistakes that can occur when the contents of Page One get scrambled together. But we must also pay attention to the conventional wisdom of staying on the right page. Full evaluation of the desirability of any proposed change in the law of negligence will include an assessment of how dramatic an alteration is contemplated. Speaking very generally, modest change is better than radical change.\footnote{A plausible case might be made for abandoning the negligence system altogether and turning to some other apparatus for handling society's accident problem. But as long as we are committed to the negligence system, we need to work at maintaining its conceptual integrity.} When it can be seen that a proposed change entails treating the matter at hand on a brand new page, the proposed change is revealed as potentially radical. For example, the 1996 Louisiana Legislature's decision to virtually eliminate solidary liability and to provide for assigning fault percentages to immune employers and phantom tortfeasors can be criticized as conceptually heretical for moving a set of issues traditionally treated on Page Three—designed for allocating responsibilities among tortfeasors, for regulating the plaintiff's...
IV. PROBLEMS ON PAGE ONE: SCRAMBLING THE FIVE ELEMENTS OF THE PLAINtIF'S PRIMA FACIE CASE

It has come to be common ground that the plaintiff's prima facie case in negligence law comprises these elements: duty, breach, cause in fact, legal cause, and damages.12 These elements are highly useful—I would like to say indispensable—conceptual tools. They are coming to constitute a consensus vocabulary whereby judges, practicing lawyers, and academic lawyers can conduct efficient conversations about particular legal problems.

10. See La. Civ. Code art. 2323(A) (providing that the "fault of all persons causing or contributing to the injury" must be quantified); La. Civ. Code art. 2324(B) (setting out a general rule that a tortfeasor "shall not be solidarily liable with any other person"); La. Code Civ. P. art. 1812(C)(2)(b) (giving an illustrative list of nonparties whose fault must be quantified if any party demands it).

Note that under La. Civ. Code art. 2324(A), solidary liability still exists among those who act in concert to commit "intentional or willful" torts.

Respecting the intertwined issues of solidary liability and whose negligence to quantify, the '96 legislature took the rightmost of three possible paths. Moving from left to right, those paths are:

(a) assign fault to anyone culpably involved in the accident and impose solidary liability on defendants. This combination charges the defendant with the fault of persons with whom he or she may have had no relationship whatever;
(b) assign fault only to parties to the lawsuit and settling tortfeasors; and impose solidary liability on defendants. (When fault is mistakenly assigned to someone it shouldn't have been, use the ratio approach to set aside the unwanted finding.) (This was the pre-1996 law); (c) assign fault only to parties to the lawsuit and settling tortfeasors; and do not impose solidary liability on defendants. (Again, use the ratio approach to set aside unwanted findings.) (This would have been a supportable change for the '96 legislature to have made.); and
(d) assign fault to anyone culpably involved; and do not impose solidary liability on defendants. This fourth path—the one chosen by the '96 legislature—charges the plaintiff with the fault of persons with whom he or she had no relationship whatsoever.

11. See infra Section VIII-C.

12. There are three functionally equivalent ways of enumerating the five elements. Probably the most common—and to my mind, slightly the clearest—is illustrated by Justice Cole's opinion for the court on rehearing in Roberts v. Benoit, 605 So. 2d 1032, 1051 (La. 1992) (enumerating duty, breach, cause in fact, legal cause, damages). See also Fowler v. Roberts, 556 So. 2d 1, 4-5 (La. 1989). The second is illustrated by Justice Victory's opinion for the court in Pitre v. Louisiana Tech Univ., 673 So. 2d 585, 589-90 (La. 1996) (enumerating duty, breach, cause in fact, scope of protection, damages). A third formulation combines duty and legal cause/scope of protection into a single element with two not-very-clearly separated subparts. This third formulation seems to be going out of style.
Efficient conversations are what we want to have. Picture two lawyers and
a judge, at work in a chambers conference or in court trying to get to the bottom
of a tough case. When the three of us start to grapple with this particular legal
problem, the five-element vocabulary will help us get quickly on the same wave
length without an undue expenditure of energy or ink. Then, as we start to get
down to serious work, the common vocabulary and conceptual structure can help
us find our way to the relevant authorities; to interpret those authorities; to
identify and begin to understand the policies being served by those authorities;
and to try to specify with precision (and thus narrow toward manageability) the
points of disagreement among us.13

If you agree with me that a common vocabulary—a consistent conceptual
structure—is essential to reasoned negligence-law discourse, then you may also
agree with the usefulness of identifying the potential and recurrent types of
confusion among the five elements on Page One. There being five elements that
need to be kept straight, the theoretically possible categories of confusion among
them are ten in number.14 Happily, not all ten need treatment here. The
important potential confusions are only half as many: duty with breach, duty
with legal cause, breach with legal cause, cause in fact with legal cause, and
cause in fact with damages. I have treated many of these combinations in other
papers and publications.15 The matters requiring attention here are the
relationships among the breach, cause-in-fact, and legal cause issues.

V. DEFINING THE BREACH AND CAUSE-IN-FACT ELEMENTS

There is little danger of confusing, conflating, or coalescing the breach and
cause-in-fact issues.16 These two issues are definitionally and conceptually

13. The bedrock disagreements—stemming from the lawyers’ chosen positions and the judge’s
value system—will not disappear, but we can save a lot of time by precisely identifying them. Dean
Leon Green was fond of saying that the legal vocabulary is useful in a limited sense: It is like a
horse that you can ride to the general vicinity of the problem at hand, whereupon you must get down
and walk. He was right, of course. But we must not forget that riding is better than walking, and
good horses are better than poor ones.

14. Duty can conceivably be confused with the other four (4); breach, with duty plus the other
three (3); cause in fact, with the foregoing two plus legal cause and damages (2); legal cause, with
the foregoing three plus damages (1). 4+3+2+1 = 10.

15. See David W. Robertson et al., Cases and Materials on Torts 142, 156-57, 160-67, 179-94
(1989); David W. Robertson, An American Perspective on Negligence Law, in Tort Law 193-227
(3d ed. 1994); Robertson, Progress, supra note 8, at 21-32; David W. Robertson, The Common Sense
of Cause in Fact, 75 Tex. L. Rev. 1765 (1997) [hereinafter “Common Sense”]; Robertson, supra note
5; David W. Robertson, Liability in Negligence for Nervous Shock, 57 Mod. L. Rev. 649 (1994);
David W. Robertson, Ruminations on Comparative Fault, Duty/Risk Analysis, Affirmative Defenses,
and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev.
1341 (1984) [hereinafter “Ruminations”].

16. In his opinion for the unanimous seventeen-member Fifth Circuit in Gautreaux v. Scurlock
Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc) (holding that Jones Act plaintiffs owe
reasonable care for their own safety, not “slight care” as had been believed), Judge Duhé bundled
quite separate and distinct from one another. In this section we will examine the standard definitions of the breach and cause-in-fact issues. These definitions will then serve as benchmarks for the discussions in the subsequent sections of the article.

A. **Breach**

When analyzing the breach issue, one assumes *arguendo* that the defendant owed a duty of reasonable care\(^\text{17}\) and asks whether he or she breached it. The issue has several names, including breach, substandard conduct, and negligence with a lower-case "n." Under whatever name, we are here asking whether the defendant violated the duty of reasonable care that we have established or are provisionally assuming is owed.

To determine whether the defendant violated the duty of reasonable care, we ask whether the seriousness of expectable injury risked by the defendant's conduct multiplied by the probability of such injury's occurrence outweighs the burden of taking adequate protections against it.\(^\text{18}\) This question can be summarized in useful symbols as $B<PL$,\(^\text{19}\) with "B" standing for the burden that taking adequate precautions would have imposed upon the defendant, "P" the probability of injury, and "L" the injury.\(^\text{20}\)

If the plaintiff establishes by a preponderance of the evidence that $B<PL$, the defendant's conduct was negligent.\(^\text{21}\) The $B<PL$ question incorporates the perspective of a hypothetical person of ordinary prudence ("POP") in the position

\(^1\)The $B<PL$ question incorporates the perspective of a hypothetical person of ordinary prudence ("POP") in the position of the breach and cause-in-fact issues together in a surprising way. But I don't think he was confused; coalescing the two issues served a rhetorical purpose. I am working on a paper for possible future publication that analyzes the *Gautreaux* decision.

\(^{17}\)One assumes the existence of duty *arguendo* or—as is more frequently the case—sees with clarity that the existence of duty is readily established. I don't agree that the ease with which the duty element is often satisfied makes that concept "meaningless," as Professor Galligan states in *Galligan*, supra note 6, at 1120. When duty is easily established, this simply means that the law is clear. The law is at its most meaningful when it is clear. Galligan probably used "meaningless" in the sense of "uninteresting."


\(^{19}\)Asking $B<PL$ rather than $B>PL$ reflects the general rule imposing the burden of persuasion on the plaintiff.

\(^{20}\)United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J., for the court). "Burden" here is a very broad idea, potentially encompassing inquiry into the purposes of the defendant's activity that produced the injury; what it would have cost the defendant in time, money, and other goods to add accident precautions or otherwise alter the activity sufficiently to cut down on the risk of injury; and how well any suggested precautions would have worked. In an early piece presaging Learned Hand's famed $B<PL$ summarization, Henry Terry laid down a five-factor formulation for determining "the reasonableness of a given risk." Terry's first two factors were what later became "P" and "L"; his other three elaborated the "B" part of the balancing. Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40, 42-43 (1915).

\(^{21}\)Carroll Towing Co., 159 F.2d at 173.
of the defendant.\textsuperscript{22} If in light of B and PL that person would have acted differently—less dangerously—than did the defendant, the defendant's conduct was substandard. The substandard conduct question is for the jury unless reasonable minds could not differ. The jury's inquiry may be sharpened by evidence as to customary practices in defendant's profession, trade, or industry and/or by expert opinion testimony, but its answer to the breach question is ultimately an expression of the jury's normative preferences.\textsuperscript{13}

The B<PL inquiry is sometimes called the Hand formula, after Judge Learned Hand, who may have been the first to articulate it clearly.\textsuperscript{24} In Inspired Ramblings, Professor Galligan says "the value served by the Hand formula is economic efficiency."\textsuperscript{25} Galligan's emphasis on "the" imports a significant exaggeration, I think. On both the B and PL sides of the scales, courts and juries often take into account values that are in no meaningful sense economic,\textsuperscript{26} and properly so. At bottom, the breach issue is simply (but potentially comprehensively) whether the defendant behaved properly, as judged by his peers. There is more to proper behavior than economics.

\section*{B. Cause In Fact}

The cause-in-fact element addresses the causal connection between the defendant's wrongful conduct and the plaintiff's injury.\textsuperscript{27} The most widely used conceptual frame for testing that connection is the but-for inquiry.\textsuperscript{28} This deceptively simple test asks whether the injury in suit would have occurred if the defendant had avoided the wrongful conduct at issue in the lawsuit. Everyone who moves about in the world successfully applies the but-for test countless

\begin{itemize}
  \item \textsuperscript{22} In general, the hypothetical POP is objectified. But defendant's superior knowledge and skill as well as his physical characteristics (including disadvantages) will be attributed to POP. And if the defendant is a child, POP becomes a fairly subjective construct, taking on the attributes incident to defendant's own age, intelligence, and experience.
  \item \textsuperscript{23} The application of general norms to particular situations is part of the jury's traditional role. Issues like the breach element in the negligence-law cause of action are sometimes called "mixed question[s]" of law and fact. David W. Robertson, The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana, 29 La. L. Rev. 78, 93 (1968).
  \item \textsuperscript{24} See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
  \item \textsuperscript{25} Galligan, supra note 6, at 1124 (emphasis in original).
  \item \textsuperscript{26} See, e.g., Roberts v. State, 396 So. 2d 566 (La. App. 3d Cir.), aff'd on other grounds, 404 So. 2d 1221 (1981) (treating a blind man's aesthetic and spiritual need to move around at times without his cane as a sufficiently weighty "B" to offset the likelihood that he might bump into and injure someone); Kimbar v. Estis, 135 N.E.2d 708 (N.Y. 1956) (weighing campers' aesthetic preferences for darkness against the dangers of darkness). Lately some of the proponents and opponents of the "law & economics" school of academic tort law have been assuming that B<PL? focuses solely on money. The assumption is historically inaccurate. See, e.g., Terry, supra note 20 passim.
  \item \textsuperscript{27} For full treatment see Robertson, Common Sense, supra note 15.
  \item \textsuperscript{28} See Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 85 (1975) (referring to "the virtual universality" of the but-for test).
\end{itemize}
times each day, usually without conscious thought. But properly framing and answering the but-for inquiry in a lawsuit is a significantly complex mental operation involving five essential steps. The first four steps are required to carefully pose the question. The fifth step tries to answer the question posed.

The first step is to identify the injury or injuries for which redress is sought. This step usually causes no trouble. However, when it does present difficulties they can be substantial.

Second, identify the defendant's wrongful conduct. Extreme caution is necessary here. It does not help the plaintiff to show that her injuries would not have happened if the defendant's parents had never met. The plaintiff must show that her injuries probably would not have happened if the defendant had not engaged in the particular conduct alleged (and ultimately proved) in the lawsuit as wrongful.

The third step is where most of the mistakes occur. This step requires using the imagination to create a counter-factual hypothesis. Create a mental
picture of a situation identical to the actual facts of the case at hand in all respects except one: "correct" the defendant's wrongful conduct to the minimal extent necessary to make it conform to the law's requirements. In all aspects this third step must be kept conservative and modest. The hypothesis must be counter-factual only to the extent necessary to ask the but-for question. Only the defendant's wrongful conduct must be "changed," and that only to the extent necessary to make it conform to the requirements of law. It will be seen that the mental precision required here is a corollary of the step two requirement of "fixing as precisely as possible the piece of conduct—the exact act or omission—with which the defendant is charged." At step three, one mentally alters only that piece of conduct, and one keeps the alteration modest, "changing" the defendant's behavior only enough to make it non-tortious.

The fourth step asks the key question: would the injuries of which the plaintiff complains probably have been avoided if the defendant had behaved lawfully in the sense just indicated?

The fifth step in the but-for inquiry is answering the question. If the four inquiry-formulating steps have been done correctly, answering the question will usually be easy.

In visualizing the five-step process, a videotape metaphor may be of use. After identifying the injuries in suit and the wrongful conduct, back up the tape to the point of injury. Stop the tape. Change only one thing: change the

would be carried. But once the ship was under way, plaintiff learned that five hundred steerage passengers were aboard. When the ship reached New York, it had to be quarantined for two weeks. (If no steerage passengers had been aboard, the quarantine period would have been half that.) Plaintiff did not come down with cholera, but as a result of the two-week incarceration he suffered minor illness and business losses, for which he sued.

In limiting the plaintiff's recovery to the results of the second week of quarantine, the Normannia court fumbled the cause-in-fact analysis. The court correctly identified the wrongful conduct as the agent's misrepresentation. Id. at 471. But when it came time to "correct" that conduct for purposes of asking the but-for question, the court didn't do the obvious thing, which would have been to ask what would have happened if the agent had told the truth. (Answer: the plaintiff would not have made the trip, thereby avoiding all of the injuries in suit.) Instead, the court "corrected" the agent's misrepresentation by taking the steerage passengers off the ship. Id. at 482. If there had been no steerage passengers, the plaintiff would have sailed, and the ship would have been quarantined for one week, not two. Therefore, the court concluded that the plaintiff's damages were limited to those stemming from the second week of quarantine. This was wrong. Lest you think it was justifiable as some kind of legal cause limit, note that this was an intentional tort case—fraudulent misrepresentation—as to which the ambit of responsibility has traditionally been regarded as almost as extensive as the reach of factual causation. Normannia wasn't a debatable legal cause case; it was a wrongly decided cause-in-fact case.

34. The law's preference for an intellectually conservative "correction" flows from the realization that the but-for test incorporates a counter-factual inquiry—asking what would have happened under a factual scenario that never actually existed—and a felt need to keep that kind of speculation as narrowly confined as possible. Courts often emphasize the necessity of focusing the but-for inquiry in this way. See, e.g., Boyer v. Johnson, 360 So. 2d 1164, 1166-67 (La. 1976); Farley v. M. M. Cattle Co., 529 S.W.2d 751, 755-56 (Tex. 1975).

defendant's conduct to the extent necessary to make it conform to law. In other words, change the accident scene only as necessary to reflect the assumption that the defendant is now conducting herself properly. Don't change anything else. Now, with the defendant behaving properly and lawfully—with defendant's wrongful conduct out of the picture—run the tape forward. Do you see the plaintiff being injured? If so, defendant's wrongful conduct was not a cause in fact of the injury; it was irrelevant. Do you see the plaintiff escaping injury? If you see that clearly enough, then the defendant's wrongful conduct was a cause in fact of the injury. Do you see snow on the screen, no picture, just static? If so, the plaintiff has failed to meet the burden of proof on the issue of factual causation.36

C. Ross's Recap

The foregoing definitions show that keeping the breach and cause-in-fact issues separated is no great trick. It's just this simple: The breach question asks whether defendant acted right. The cause-in-fact question asks what would have happened (would the plaintiff still have been hurt?) if the defendant had acted right.

VI. THE LEGAL CAUSE ISSUE

A. As Distinguished From Cause In Fact

*Legal cause* is the emerging term—a significant improvement—for what used to be called *proximate cause.*37 The modern view is that the legal cause issue "has nothing to do either with cause or proximity."38 Rather, the term *legal cause* is a synonym for "the scope of liability or scope of protection element" in the duty/risk analysis.39 As Chief Judge Marvin recently observed for the second circuit:

"Cause" in legal cause or proximate cause is a misnomer because the scope of duty inquiry is actually an inquiry into whether a legal standard of care exists and into policies for and against extending the asserted legal standard of care to protect the particular plaintiff against the particular harm.40

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36. At this point, the law sometimes steps in with justice-serving mitigations such as the substantial factor test. See generally Robertson, *Common Sense,* supra note 15.

37. See Fowler v. Roberts, 556 So. 2d 1, 5 & n.5 (La. 1989); cf. W. Page Keeton et al., Prosser & Keeton on Torts § 42, at 273 (5th ed. 1984) [hereinafter "Prosser & Keeton"].


The foregoing expressions suggest that at the judicial level, conceptual confusion between the cause-in-fact and legal cause issues should not be much of a problem. For the most part, that is true. However, any time the same term is used for different ideas, occasional confusion is guaranteed.

Moreover, it is not at all clear whether juries understand what they are expected to do with legal cause interrogatories.\textsuperscript{41} And jury findings of "no legal cause" are often hard to interpret. Indeed, whether juries should even be used to determine legal cause is significantly controversial.

The following subsections approach the legal cause issue in a way that I hope can shed some light on the tangle of difficulties involved with using juries to answer the legal cause question. Subsection B presents a brief (modern) history of the emergence and use of the legal cause concept in Louisiana law. This history generates the definitional structure described in Subsection C. Subsection D then tries to demarcate the breach and legal cause issues and to explain why the law of negligence needs both. Subsection E argues that juries are suitable decision makers for the legal cause issue.

The use of juries to determine the breach, cause-in-fact, and legal cause issues necessitates attention to the details of putting these questions to jurors in intelligible form. Section VII below suggests that it would probably improve jury trials if separate cause-in-fact and legal cause interrogatories were used and makes a beginning effort at formulating some jury instructions that might help clarify juries' attention to the cause-in-fact and legal cause issues.\textsuperscript{42}

B. The Legal Cause/Scope of Protection Issue: Dixie Drive It Yourself to Date

Anglo-American tort law arrived early at the principle—nowadays usually known as negligence per se\textsuperscript{43}—that tort liability can sometimes be predicated

\textsuperscript{41} Puzzling over Louisiana Code of Civil Procedure articles 1812 and 1813 leaves me suspicious that there may be some subtle distinction between what Article 1813 calls "interrogatories" and Article 1812 calls "special verdicts." I don't want to get involved with any such subtlety if I can help it. In this paper I am using the term "interrogatories" to mean particular questions put to juries; this meaning embraces (and indeed specifically focuses upon) the "special verdicts" provided for in Article 1812.

\textsuperscript{42} In trying to formulate my own suggested jury instructions, I imply no critique of H. Alston Johnson, III, \textit{Civil Jury Instructions}, in 18 Louisiana Civil Law Treatise (1994). As I appreciate that work's philosophy and intent, it was aimed at reflecting current practice rather than proposing changes.

While implying no critique of that work, I do have one passing thought about the portions I have studied—\S\S 3.03 (cause in fact), 3.04 and 3.05 (breach), and 3.15 through 3.17 (legal cause). I think these sections may tend to tell the jury more law than it is likely to be able to use effectively. If I were to undertake an ambitious task like Johnson's Volume 19, the result would surely not be better, but it might be shorter.

\textsuperscript{43} In Robertson, \textit{supra} note 5, I demonstrate that the oft-stated notion that Louisiana has no negligence per se doctrine is false.
upon the defendant's violation of a penal statute. The 1874 decision in *Gorris v. Scott* stated that principle and its key limitations in now-classic language:

> [W]hen penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action [in tort] for the damage so caused, [but only when] the object of the statute is to confer a benefit on individuals [of the class to which the plaintiff belongs] and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued. ...  

A good modern formulation of the *Gorris v. Scott* criteria is as follows:

In determining whether the violation of a statute or ordinance is negligence per se as to a particular person, it is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against.  

As will appear more fully below, the class-of-persons and type-of-harm criteria emanating from *Gorris* served the same function in negligence *per se* cases that the proximate cause issue served in ordinary negligence cases: confining the defendant's liability to those persons and interests for whose protection the rule of law violated by the defendant was designed. Thus, requiring the plaintiff in a negligence *per se* case to satisfy the proximate cause requirement as well as the *Gorris* criteria involved some duplication—proximate cause was a conceptually redundant hurdle (over which hapless plaintiffs would trip from time to time on a somewhat random basis). Nonetheless, courts routinely engaged in the redundancy.

The Louisiana Supreme Court's 1962 decision in *Dixie Drive It Yourself System v. American Beverage Co.* became famous for attacking that redundancy by holding that the proximate cause hurdle should not be imposed in negligence *per se* cases. The plaintiff's vehicle—negligently driven by one whose negligent conduct was not imputable to the plaintiff—was damaged when it collided with a disabled truck that the defendant had parked on the highway without signal flags in violation of a statute. The lower courts exonerated the defendant on the view that the negligence of the driver of the plaintiff's vehicle was "the sole proximate cause" of the accident. Reversing, the supreme court stated:

> This restrictive [proximate cause] doctrine finds little support in legal theory. We do not subscribe to the formulation as applied in this case.  

The essence of the present inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the
It will be seen that the supreme court’s *Dixie* holding made eminent sense: the court simply applied the *Gorris* criteria and held that they supplanted the conceptually redundant (but randomly dangerous) proximate cause issue.

A decade later, the supreme court took the next big step in *Hill v. Lundin & Associates.* *Hill* was not a negligence *per se* case: defendant’s conduct was wrongful because it fell below the law’s requirement of reasonable care, not because the legislature had prohibited it. That distinction, said the court, made no appreciable analytical difference:

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 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 [scope-of-protection] determination.49

The *Hill* court indicated that the scope-of-protection determination—which in the *Dixie* situation asks about the supposed scope of protection of a legislative rule—is in the *Hill* situation furthered by asking whether there is an “ease of association of the injury with the rule [i.e., the jurisprudentially-imposed requirement of reasonable care] relied upon.”

*Hill* thus took *Dixie* (and *Gorris*) from the field of negligence *per se* into the field of ordinary negligence. The *Hill* decision was heralded as ushering in a new era of Louisiana jurisprudence, in which a carefully articulated scope-of-protection inquiry would replace all references to proximate or legal causation. In this brave new world, “causation” would refer to cause in fact and only that.

47. *Dixie Drive It Yourself*, 242 La. at 488, 137 So. 2d at 304.
49. *Hill*, 260 La. at 549-50, 256 So. 2d at 622-23 (citations omitted).
50. *Hill*, 260 La. at 549, 256 So. 2d at 622.
In the working law, things never work out that neatly. Almost immediately after Hill the supreme court went back to the vocabulary of proximate cause. But over the next decade or so, the word "proximate" fell from favor, to be replaced by "legal," and "legal cause" was repeatedly translated in "scope of protection" terms. The terms are now widely regarded as fully synonymous.

C. Defining Legal Cause

When one tracks the evolution of the scope of protection/legal cause issue from its beginnings in Gorris through Dixie and Hill and into present usage, it can be seen that the question addressed by the issue in both negligence per se and ordinary negligence cases is this: Was the rule of law violated by the defendant designed to protect the plaintiff's general class of persons against the harm the plaintiff suffered?

In a negligence per se case, it is easy to identify the rule of law violated by the defendant: It is the statute invoked by the plaintiff as the basis for the negligence per se allegation.

In an ordinary negligence case, the rule of law violated by the defendant is not quite as easy to identify. But the difficulty is manageable. In an ordinary negligence case, the plaintiff proves that the defendant violated the law by proving that he or she engaged in conduct that was less than reasonable care under the circumstances. In order to establish that the defendant did not exercise reasonable care, the plaintiff must produce persuasive evidence that the defendant's conduct created or exacerbated one or more foreseeable risks of harm to others. That array of risks—the array of foreseeable risks of harm that the defendant should have guarded against—identifies and defines the rule of law the defendant violated. The legal cause issue then becomes: was the injury that befell the plaintiff among or associated with the array of foreseeable risks the existence of which required the defendant to alter his or her conduct?

The foregoing formulation of the legal cause issue serves to define that issue and to foreshadow our discussion in Subsection D below of how to demarcate it from the breach issue. A couple of examples may be useful. In the Texas Supreme Court's decision in Schneider v. Esperanza Transmission Co., the
defendant company negligently allowed one of its employees with a terrible driving record to keep a company truck for his personal use. The employee loaned the truck to a friend of his, and the friend drove negligently and injured the plaintiff. The court's holding was no legal cause. The defendant's conduct was negligent because of an array of foreseeable risks centering on the likelihood that the employee would drive badly enough to hurt someone. The risk that he would loan the truck to another bad driver was neither among nor easily associated with that array. Had the plaintiff proved that the employee was a poor risk with a truck not only because of his history of bad driving but also because of a history of keeping bad company, the plaintiff's legal cause case would have been appreciably stronger.

To take another example, a failure to demarcate the breach and legal cause elements arguably led the Louisiana Third Circuit Court of Appeal to a wrong decision in Charles v. Lavergne, in which the defendant negligently drove his truck at fifty miles per hour through a "Men Working" area of the highway. Defendant's conduct was negligent principally because of the risk of running over one of the work crew. But defendant did not hit one of the crew. Instead, his truck's speed in running over an electrical cable lying across the highway caused the cable to bounce up and become entangled in the truck's rear axle; this in turn pulled down a utility pole atop which the plaintiff, one of the work crew, was busy at the time. When the court of appeal affirmed the trial court's denial of recovery, it seemed to me (and to Judge Domengeaux, dissenting) to ask the wrong question. The court's analysis focused on whether the risk of pulling down a utility pole with a worker atop it was foreseeable enough to require the defendant to slow down. It wasn't, so defendant was exonerated. In my view, the right question would have been whether the particular harm that befell the plaintiff was "easily associated" with the array of foreseeable risks that required the defendant to abate his speed. That question would probably have been answered affirmatively. Judge Domengeaux's dissent put it very well:

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56. Id. at 595.
57. 412 So. 2d 726 (La. App. 3d Cir. 1982).
58. The Charles court raced past the cause-in-fact issue almost as fast as the defendant's truck went through the "Men Working" zone, stating that "there is no question that the accident would not have occurred but for the defendant[']s driving his truck across the cable stretched across the road." Charles, 412 So. 2d at 728. But that wasn't the right cause-in-fact question. As is explained supra in Section V-B, the cause-in-fact inquiry addresses whether the plaintiff's injuries would have been avoided had the defendant avoided the wrongful conduct proved against him. The evidence in Charles showed that the truck was going too fast, but it did not show that a reasonably driven truck would have somehow gone around the cable. Hence, the proper cause-in-fact question was whether the truck's excessive speed caused the cable to bounce up and get tangled in the axle: Would the cable have been engaged had the truck been proceeding at a proper speed? The third circuit assumed no—hence it assumed the presence of cause in fact—as shall we for purposes of discussion.
59. Id. at 729-30.
60. See supra note 50 and accompanying text.
It is quite apparent, at least in my eyes, that the defendant's duty to slow down and proceed cautiously existed not only to prevent motorists from striking workers, . . . but it also existed to avoid any accident which could have reasonably been associated with the work going on in the area. 61

D. Demarcating the Breach and Legal Cause Issues: Why Do We Need Both?

In Inspired Ramblings, Professor Galligan says that "the things juries look at when considering proximate cause overlap with the things they look at when considering breach." 62 This observation leads him to wonder "whether we need two separate elements" and to suggest that the presence of the second—the legal cause element—may be mere window dressing:

Maybe [we have both a breach and a legal cause element] because law has got to have some minimum number of serious elements and if there aren't enough elements to be respectable it's embarrassing. Again, to steal a page from Professor Henderson, maybe the only way to get people to think there is law here is to make it look more like law. Too few elements (articulated criteria upon which to base decision) don't look like law. So adding elements, even if they overlap[,] makes negligence look more like law. 63

In my view, Galligan is twice wrong here. The breach and legal cause elements do not overlap—not when they're done right—so the legal cause element needs no nouveau-realpolitik explanation. 64

One can readily see that the breach and legal cause elements do not overlap simply by imagining a negligence system without the legal cause requirement, viz., one in which the plaintiff's prima facie case in negligence law consisted in the duty, breach, cause-in-fact, and damages elements. 65 Suppose Lewis v.

61. Charles, 412 So. 2d at 731.
62. Galligan, supra note 6, at 1130.
63. Id. Galligan goes on in "[l]ess cynical[]" vein to set forth a more traditional explanation for the presence of the legal cause element. But his favorite is evidently the cynical one quoted in the text above.
64. "Nouveau-realpolitik" may not be a precise description—maybe American Legal Realism Revisited, or Goodnatured Critical Legal Studies, or Nondestructive Deconstructionism would be better—but I feel the need to disagree with Professor Galligan in three languages.
65. No great leap of imagination is entailed. Kerman v. American Dredging Co., 355 U.S. 426, 78 S. Ct. 394 (1958), held that there is no legal cause requirement in seamen's actions against their employers. But the lower courts have refused to follow Kerman—without saying they are refusing—by confining its reasoning in various ways. One recurrent argument for narrowing Kerman looks to Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 117 n.5, 83 S. Ct. 659, 665 n.5 (1963): "Kerman . . . was concerned with . . . [a] statutory or regulatory duty [a Coast Guard regulation] and
Kehoe Academy had arisen in such a system. In that case, the negligence of a day camp for children led to a toddler’s ingesting rat poison. One of the effects of the poison was to exaggerate the appearance of some minor bruises on the child’s body. When the child-protection authorities saw the bruises, they thought the child had been abused and took the child away from the plaintiffs, its custodial parents. In the suit against the day camp for the damages incident to the loss of custody, the duty, negligence, cause-in-fact, and damages elements were all easily established. Yet there was no liability, and I believe most observers would agree with the court that there should not have been:

[T]he operators and employees of a day camp have a duty to exercise reasonable care in preventing the young campers from ingesting rat poison. That duty, however, does not encompass the risk that, if the poison causes accentuation of subsequently incurred bruises, the juvenile court will reach the erroneous conclusion that the child was neglected.

The legal cause element certainly did not overlap with the breach element in Lewis. In Lewis we needed the legal cause element to keep the defendant from being “liable for all consequences [of its conduct] spiralling outward until the end of time.” The duty, breach, cause-in-fact, and damages issues won’t do that—not as those issues are presently constituted. Of course, one could make the legal cause element superfluous—creating a system with four functioning elements rather than five—by altering the breach element in such a way as to make it do the work of legal cause. Analytically, this would be easy: Rather than determining breach (B<PL) as we do now, with PL referring to the full array of foreseeable risks shown by the evidence to have been created or exacerbated by the defendant’s conduct, we could limit the PL

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66. 346 So. 2d 289 (La. App. 4th Cir. 1977).
67. Id. at 291. The child lived with her aunt and uncle.
68. Id. at 292.
69. Id.
70. Roberts v. Benoit, 605 So. 2d 1032, 1052 (La. 1991) (on rehearing). For a fuller expression of the same thought, see Alumni Ass’n v. Sullivan, 535 A.2d 1095, 1098 (Pa. Super. Ct. 1987): “Even where [defendant was guilty of negligent conduct] and that conduct [was a] cause-in-fact of the plaintiff’s harm, the law makes a determination that, at some point along the causal chain, liability will be limited. The term ‘proximate cause,’ or ‘legal cause’ is applied by courts to those considerations which limit liability, even where the fact of causation can be demonstrated. Because of convenience, public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point, as no longer a ‘proximate’ or ‘legal’ consequence naturally flowing from the wrongdoer’s misconduct.”
reference to the particular injury that befell the plaintiff. Thus, in Lewis, the
breach inquiry would change from the present inquiry—whether the risk that
children would eat rat poison and get sick or die was foreseeable and serious
enough to require greater precautions from the day camp—to a new
inquiry—whether the risk that rat poison would mislead the juvenile authorities
into taking a child away from its custodial parents was foreseeable and serious
enough to require greater precautions from the day camp. We answer the actual
breach question (in bold type above) yes, because we want day camps to spend
enough on safety to protect the children. We would answer the hypothesized
new breach question (in italics above) no, because no one should spend a dime
on a risk as farfetched as that. Thus, our altered breach element would get us
the answer we want in Lewis.

But the trouble is, our altered breach element would also get us lots of
answers we don’t want. For example, I believe the third circuit got the wrong
answer in Charles v. Lavergne71 because it effectively coalesced the breach and
legal cause elements into a single inquiry whether the risk that a worker on a
utility pole would be thrown to the ground was foreseeable and serious enough
to require the defendant to slow down. In Wagon Mound I—in the course of
relieving the defendant shipowner from liability for a fire resulting from the
inadvertent discharge of furnace oil onto the surface of Botany Bay—the Privy
Council explicitly adopted just such a coalesced breach/legal cause inquiry.72
Very soon thereafter, in Wagon Mound II, the Privy Council retreated from its
new formulation and imposed liability on the very same defendant for the very
same fire.73 The formulation that coalesces breach and legal cause is simply too
restrictive.74 We need the legal cause requirement to keep negligent defendants

71. 412 So. 2d 726 (La. App. 3d Cir. 1982). See supra text accompanying note 57.
72. Overseas Tankship Ltd. v. Morts Dock & Eng’g Co. (Wagon Mound I), 1961 App. Case
388 (appeal taken from New S. Wales). “Suppose an action brought by A for damage caused by the
carelessness (a neutral word) of B, for example a fire caused by the careless spillage of oil. It may,
of course, become relevant to know what duty B owed to A, but the only liability that is in question
is the liability for damage by fire. It is vain to isolate the liability from its context and to say that
B is or is not liable and then to ask for what damage he is liable. For his liability is in respect of
that damage and no other. If, as admittedly it is, B’s liability (culpability) depends on the reasonable
foreseeability of the consequent damage, how is that to be determined except by the foreseeability
of the damage which in fact happened—the damage in suit?” This is tight reasoning
from a false
premise. When the Privy Council said that culpability “admittedly” depends “on the reasonable
foreseeability of” the “damage in suit,” it generated the false premise. In the traditional formulation,
culpability (negligence; breach) depends on the reasonable foreseeability of the array of risks shown
by the evidence to have been created or exacerbated by the defendant’s conduct, not just the damage
in suit.
Case 617 (P.C. 1966) (appeal taken from New S. Wales).
Leech Brain & Co., [1962] 2 Q.B. 405, show that the English courts do not follow any such
restrictive formula.
from being held liable "for all consequences . . . until the end of time," but we don't want a rule that would routinely exculpate conduct merely because the foreseeable risk that the conduct created does not happen to be the particular risk that befell the plaintiff.

The formulation that coalesces breach and legal cause—sometimes called "the Wagon Mound aberration"—is bad law because it would restrict liability more than anyone seriously thinks liability should be restricted. And it is bad law for another reason as well: It is a distortion of the normal meaning of the term negligent conduct. As Judge Andrews indicated in his famous dissent in *Palsgraf v. Long Island Railroad Co.*, when a motorist speeds through an area crowded with pedestrians, we don't say he wasn't negligent merely because he was lucky enough to avoid hitting anybody that time. Similarly, when a trucker speeds through a gang of workers, managing to miss them all but instead engaging a cable that pulls a worker from atop a utility pole, we don't say the trucker wasn't negligent merely because the worker he managed to injure wasn't part of the core group most seriously threatened by his conduct. If we want to let the trucker go free, it is not because he wasn't at fault. We may sometimes say to either or both of these speeders, "Well, you got away with it this time." But we surely don't say, "Good job, you got through there real quick and missed them all."

**E. Normally the Legal Cause Issue Is For the Trier of Fact**

The Louisiana Supreme Court has vacillated on whether legal cause should be a question of law or a question of fact, and the lower court decisions sometimes reflect the uncertainty. However, prevailing practice treats the issue as one for the trier of fact. Indeed, Louisiana Code of Civil Procedure...
article 1812(C) requires the trial judge to submit a legal cause interrogatory to
the jury if either party wants it.81

Professor Galligan is by no means alone in thinking it would make more
sense to have the legal cause issue decided by the judge rather than the jury. He
takes that position in Inspired Ramblings82 as well as in earlier publications,
stating:

[In negligence per se cases] it is sensible to have the judges make [the
scope-of-protection] decision ... because it is appropriate for judges,
rather than juries, to interpret and decide the scope of statutes. A
statute's scope is a question of legislative intent, purpose and policy for
which judges seem well trained. But if proximate cause in [ordinary]
negligence cases is a question of policy, why don't judges get to decide
proximate cause questions, too?83

Here again I respectfully disagree in part with Professor Galligan. I believe
the answer to his rhetorical question is this: Judges decide the scope-of-
protection issue in negligence per se cases because as a generic matter—as a
matter of institutional tradition entirely extrinsic to the law of negligence—the
business of discerning what was "intended by the legislature"84 falls into the
realm of legal expertise. But in ordinary negligence cases, the rule whose scope
of protection is tested by the legal cause inquiry comes not from the legislature
and not (except in the general form of a breach instruction) from the judiciary,
but from the trier of fact itself. The trier of fact is well situated to determine the
appropriate scope of protection of its own implicitly articulated rule. That rule's
proper scope of protection is a "question of policy," all right. But it is the trier
of fact's own policy.

Let me explain how triers of fact implicitly articulate rules and policies of
negligence law. When a trucker speeds through a "Men Working" area of the
highway, the breach inquiry asks the trier of fact whether the trucker should have
slowed down to avoid injuring the workmen. If the answer to that question is
no, the case is over—no breach, no tort. But if the answer to that question is
yes, the trier of fact has thereby instantiated a rule of negligence law; it has said
to the defendant, "You should have slowed down to reduce the risk of injuring

81. La. Code Civ. P. art. 1812(C): "In cases to recover damages for injury, death, or loss, the
court at the request of any party shall submit to the jury special written questions inquiring as to:
(1) Whether a party from whom damages are claimed, or the person for whom such party is legally
responsible, was at fault, and, if so: (a) Whether such fault was a legal cause of the damages, and,
if so: (b) The degree of such fault, expressed in percentage." Subsections (2) and (3) go on to make
the same provision respecting the fault of nonparty tortfeasors and of plaintiffs. See supra note 2
and accompanying text.
82. Galligan, supra note 6, at 1130-31.
83. Thomas C. Galligan, Jr., Hill v. Lundin & Associates Revisited: Duty Risked to Death?
14 (LSU Law Center 1993).
84. See supra text accompanying note 49.
those workers.” The legal cause/scope-of-protection “question of policy” then becomes whether that rule’s scope of protection extends to the worker atop the utility pole. The trier of fact is well situated to determine the intended scope of protection of its own implicitly articulated rule. It is the trier of fact who should determine whether the risk that befell the plaintiff is properly and easily associated with the array of foreseeable risks that has led the trier of fact to conclude that the defendant’s conduct was blameworthy.

Thus, it makes sense for the trier of fact to make the scope-of-protection/legal cause call because the trier of fact knows—better than virtually anyone else—just why the defendant should be regarded as blameworthy and whether that blameworthiness is extensive enough to embrace the plaintiff’s particular harm.

When the trier of fact is a trial judge, his or her knowledge of why and to what appropriate extent the defendant is blameworthy is superior to everyone else’s. When the trier of fact is a jury, its knowledge on those matters is superior to everyone else’s except the trial judge’s (who, like the jury, has seen the parties, heard the testimony, and viewed the evidence, face-to-face and fact-by-fact). It would be fine for trial judges in jury-tried cases to decide legal cause issues. But under our present conceptual apparatus, effecting that allocation of authority—with the jury deciding the cause-in-fact and breach issues and the trial judge deciding the legal cause issue—would entail calling the legal cause issue an issue of law. And it is not an issue of law. One can intelligently answer the legal cause/scope-of-protection question in a particular case only after hearing enough evidence to know in a fairly precise way why and to what extent the defendant’s conduct was blameworthy. Thus, the legal cause issue should not be denominated an issue of law. It should not be decided by summary judgment except in the most obvious of cases. It should not be reviewed de novo on appeal.

VII. IMPROVING THE JURY’S FOCUS: SUGGESTED CAUSATION INTERROGATORIES AND INSTRUCTIONS

As we will see more fully in Section VIII below, appellate courts frequently have trouble with cases in which juries have answered the breach question yes and the legal cause question no. Sometimes it is hard to tell what the jury meant by such answers. The biggest trouble is that Louisiana Code of Civil Procedure article 1812(C) calls for breach and “legal cause” interrogatories but not for a cause-in-fact interrogatory. Thus, trial judges evidently feel obliged to give the jury a kind of composite “legal cause” question—with accompanying instructions—combining the cause-in-fact and legal cause/scope-of-protection issues into a single interrogatory.

85. “Interrogatories” means specific questions put to juries. See supra note 41. “Instructions” means explanations of the law provided to juries to assist them in answering the interrogatories.
If I am right that it is essential to the intelligent functioning of the negligence-law system for judges and lawyers to keep the cause-in-fact issue and the legal cause/scope-of-protection issue separated, then it is obviously a bad idea to invite juries to put them together. Article 1812(C) needs to be amended to cure this problem. But surely no serious worker in the negligence field wants to go anywhere near the legislature with any of our concerns. Thus, we should investigate what judges might do to cure or alleviate the difficulty.

Most obviously, courts could give juries two causation interrogatories rather than just one. I don’t think anyone will seriously contend that doing so would violate legislative intent. When the legislature used the term “legal cause” in Article 1812(C), it must have meant to include the two agreed constituents—the cause-in-fact and legal cause/scope-of-protection elements. What is now being asked of juries in the form of a single “legal cause” question should be broken out into two questions, seeking the following information: (a) Was the negligent conduct of the defendant a cause [in fact] of the injuries to the plaintiff? (b) Was the event that injured the plaintiff a reasonably foreseeable or easily associated result of the defendant’s negligent conduct?

The foregoing paragraph indicates the thrust and intent of the proposed new interrogatories, but not how to word and explain them to the jury. The proper wording of jury interrogatories and instructions is notoriously difficult business, and all I can offer here are some beginning suggestions. In the four paragraphs immediately below, we will look at the breach, cause-in-fact, and legal cause/scope-of-protection issues in the context of a specific situation and set forth the interrogatories and instructions that I think should be used to enlist the jury’s assistance in resolving these three issues.

For our specific situation, we can use a hypothetical case based on Charles v. Lavergne, in which the truck sped through the “Men Working” zone, became entangled with a cable, and pulled down the utility pole atop which the plaintiff was working. No statutory violation was alleged; the plaintiff’s claim was simply that the trucker failed to use reasonable care under the circumstances.

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86. Writing for the second circuit in Chambers v. Grabiel, 639 So. 2d 361, 366 (La. App. 2d Cir.), writ denied, 644 So. 2d 377 (1994), Judge Norris—whose work is almost always wise and good, in my experience—makes the surprising suggestion that separating the cause-in-fact and legal cause/scope-of-protection interrogatories should be avoided because it would force the jury to “probe the difficult distinction between ‘cause in fact’ and ‘legal cause’ of an accident.” I do not think that is right. I think it would force the trial judge and lawyers to probe that distinction, a little bit, but that it would serve to free juries of any such task. Here it seems to me Norris nodded.

87. See supra note 42.

88. In concocting my proposed interrogatories and instructions, I have borrowed freely from Johnson, supra note 42, from reported decisions, and from the Texas Pattern Jury Charges.

89. The principal hypothetical feature of our case is the use of a jury. Charles v. Lavergne, 412 So. 2d 726 (La. App. 3d Cir. 1982), itself, was a bench trial in which Judge G. Bradford Ware’s exoneration of the trucker was affirmed by the third circuit (Swift and Laborde, JJ. with Domengesaux, J., dissenting).
The three inquiries below indicate what I think the Charles v. Lavergne jury needs to be asked and told (with each suggested interrogatory followed immediately by suggested instructions in italics):90

(1) Was [the trucker's] conduct negligent under the circumstances shown by the evidence?

"Negligent conduct" means conduct that fails to use reasonable care. "Reasonable care" means the degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A person engages in negligent conduct when he or she fails to do what a person of ordinary prudence would have done under the same or similar circumstances, as well as when he or she does something that a person of ordinary prudence would not have done under the same or similar circumstances.91

(2) Was [the trucker's] negligent conduct a cause of the injuries to [the plaintiff]?

"Cause" means a necessary contributing factor. The law recognizes that each event and each injury has many causes. If you believe that the plaintiff would probably not have suffered the claimed injuries in the absence of the defendant's negligent conduct, then you should answer this question yes. If you believe that the plaintiff probably would have suffered those injuries regardless of what the defendant did or failed to do, then you should answer this question no.92

(3) Was the event that injured [the plaintiff] a reasonably foreseeable result of [the trucker's] negligent conduct?

"Event" means the general circumstances of the injury as it befell the plaintiff. If you believe that a person in [the trucker's] situation would have foreseen that [the plaintiff's] injuries, or some similar event,93

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90. The jury should get the interrogatories and instructions in writing. In criminal cases, Official Revision Comment (d) to La. Code Crim. P. art. 801 has been interpreted to preclude written instructions. State v. Strickland, 683 So. 2d 218, 226 (La. 1996). I can find no similar prohibition in La. Code Civ. P. arts. 1792-96.

91. The immediate focus of this portion of this article is how juries should determine the two causation issues. This breach interrogatory—accompanied by instructions—is necessary background.

92. I think "cause" means "cause-in-fact" to laymen. If I am right about that, then adding the words "in fact" to the interrogatory might imply that we are asking about something arcane, whereas what we are trying to do is precisely the opposite. See infra note 95.

93. In Robertson, Common Sense, supra note 15, I set forth a relatively small range of situations in which courts are justified in shifting from the but-for test of cause-in-fact to the less rigorous substantial factor test. In the relatively rare situations in which that shift is justified, the cause-in-fact interrogatory would not be altered, but the accompanying instructions would change. In those situations, the instructions would state: "'Cause' means a substantial contributing factor. The law recognizes that each event and each injury has many causes. If you believe that the defendant's negligence was a substantial factor in bringing about the plaintiff's injuries, then you should answer this question yes. If you believe that the defendant's negligence played no appreciable part in bringing about or contributing to the plaintiff's injuries, then you should answer this question no."
might reasonably result from his conduct, then you should answer this question yes. If you believe that [the plaintiff's] injuries were a wholly unforeseeable event, of a sort not easily associated with the risks involved with [the trucker's] conduct, then you should answer this question no.

Probably no judge or lawyer will find that the foregoing suggested interrogatories and instructions perfectly match his or her understanding of the law of negligence. But I think they get the key questions asked and the key ideas across, with a minimum of fuss. It is easy to err on the side of over-elaborate instructions. Juries know what negligent conduct is; that is why we convene them.\(^9\) They also know what cause means.\(^{95}\) My breach and cause-in-fact instructions and interrogatories enlist the jury's innate and intuitive understanding of blameworthiness and factual causation without perverting it with a flood of legalese.

My suggested legal cause/scope-of-protection interrogatory and instructions are potentially more controversial. My omission of the word “cause” from this inquiry probably will not inspire much debate; it seems obvious that we should avoid using the same word for different purposes when alternative phrasings are readily available. But I think people will want to argue about the rest of it, and particularly with the emphasis on foreseeability. Despite the fact that “ease of association” is the preferred judicial articulation of the key legal cause criterion—as opposed to foreseeability—my suggestion features foreseeability as the dominant concept. I do not think that “ease of association” should be the question put to the jury, because I doubt that ease of association can be made intelligible for juries in any suitably economical way. The core idea of legal cause is that one’s liability for the result of one’s negligent conduct should stop at the point where the consequence is too cockeyed and farfetched. I think my suggestion gets that idea across, using “ease of association” in a subsidiary rather than a dominant role.

VIII. ILLUSTRATIVE RECENT CASES

A. Demarcating the Cause-In-Fact and Legal Cause Issues

The cause-in-fact issue—asking whether the injuries in the suit would have been avoided if the defendant had “acted right”\(^96\)—can do powerful work all by

\(^9\) See supra Section V-A and note 76.

\(^{95}\) See William L. Prosser, Law of Torts § 41, at 237 (4th ed. 1971): “[Cause-in-fact] is a question of fact. It is, furthermore, a fact upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which any layman is quite as competent to sit in judgment as the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.”

\(^{96}\) See supra Section V-C.
itself. For the most part that work is not reflected in reported cases, because cases in which the plaintiff cannot satisfy the cause-in-fact element rarely reach the litigation stage. *Jenkins v. Lindsey* 97 is thus of pedagogical interest. Ms. Jenkins was hurt in a car wreck in March 1995 and further injured in May 1996 when a Wal-Mart employee pushed a string of shopping carts into her, maybe on purpose. Confronting the issue of whether the traffic tortfeasor was responsible for the injuries, the fourth circuit said of course not: “[T]here is no causal relationship as a matter of law between the original automobile accident and the subsequent accident with the shopping carts.” 98 This was a straight cause-in-fact call; the traffic tortfeasor simply had nothing to do with the injuries. The fourth circuit mentioned some other issues on its way to the cause-in-fact conclusion, leading Frank Maraist’s *Louisiana Civil Law and Procedure Newsletter* to present *Jenkins* under the caption “Negligence; Scope of the Risks.” But the cause-in-fact issue was dispositive.

More typically, the cause-in-fact issue shows up in reported litigation in company with the legal cause and/or breach issues. One recurrent trouble area involves jury interrogatories: in cases in which the evidence would support a finding of cause in fact, how should the question be put to the jury? Recent cases suggest three answers, none of them very satisfactory in my opinion. (a) In *Clement v. Griffin* the fourth circuit concluded that the “legal cause” interrogatory and instructions used by the trial court failed to put the cause-in-fact issue before the jury at all. 99 (b) In *Chambers v. Graybiel* 100 and *Weaver v. Valley Electric Membership Corp.* 101 the second circuit was satisfied with interrogatories that evidently tucked the cause-in-fact issue into the breach issue. (c) More typically, courts seem to use a single “legal cause” interrogatory that is deemed to combine the cause-in-fact and legal cause/scope-of-protection inquiries. 102

Obviously, aside from cases in which the facts support and the trial judge intends a directed verdict on the issue, failing to put the cause-in-fact issue to the jury is unacceptable. Tucking the cause-in-fact issue into the breach issue will no doubt often permit the jury to do justice but as a general proposition seems too uncertain in focus. In *Chambers* the jury was asked whether an allegedly

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97. 693 So. 2d 238 (La. App. 4th Cir. 1997).
98. Id. at 241.
100. 639 So. 2d 361 (La. App. 2d Cir. 1994), writ denied, 672 So. 2d 907 (1996).
101. 615 So. 2d 1375 (La. App. 2d Cir. 1993).
102. See Bannerman v. Bishop, 688 So. 2d 570, 572 (La. App. 2d Cir. 1996), writ denied, 685 So. 2d 146 (1997) (quoting interrogatories asking the jury (a) whether the defendant was “guilty of any fault or negligence” and (b) whether “the negligence or fault of [defendant was] a proximate cause” of the injuries in the suit); Johnson v. Terrebonne Parish Sheriff’s Office, 669 So. 2d 577, 581 (La. App. 1st Cir.), writ denied, 672 So. 2d 907 (1996); Norris v. Guthrie, 641 So. 2d 978, 979 (La. App. 5th Cir.), writ denied, 646 So. 2d 382 (1994); Rabito v. Otis Elevator Co., 633 So. 2d 368, 371 n.1 (La. App. 4th Cir.), writ granted and case remanded, 638 So. 2d 1075 (1994); Magee v. Coats, 598 So. 2d 351, 355 (La. App. 1st Cir. 1992).
negligent motorist was guilty of "negligence which was the cause of this
accident." The Weaver opinion does not quote the question put to the jury
but indicates that in the particular circumstances presented there, the term
"negligence" alone was deemed adequate to carry the cause-in-fact freight. 

Tucking the cause-in-fact issue into the legal cause/scope-of-protection
issue—in the form of a single "legal cause" interrogatory deemed to combine
both elements, evidently the standard approach—is also problematic, most often
because it can leave the trial and appellate judges in the dark as to what the jury
might have meant by a negative answer to the interrogatory. In Bannerman v.
Bishop, a 14-year-old motorist ran a stop sign and collided with an 81-year-old
motorist whose car then struck a tree, causing fatal injuries. The jury found that
the kid was "guilty of . . . fault or negligence" but that his "negligence or fault
[was not] a proximate cause" of the woman's injuries and death. On
original hearing, the second circuit affirmed the resultant judgment for the
defendant, concluding that when the jury said "no legal cause" it probably meant
"no cause in fact." (There was evidence that the 81-year-old woman may have
fainted before the collision and that her car might have been headed for the tree
regardless of the impact with the boy's car.) The court then reversed itself on
rehearing, concluding that neither of the potential meanings of the jury's "no
legal cause" conclusion was supportable. As to cause in fact: "To suggest that
this accident would have occurred without Godfrey's [the 14-year-old's]
negligence is fanciful supposition. Godfrey's negligence was a cause in fact of
the accident and resulting injuries." As to legal cause/scope of protection:
"Clearly, the scope of protection against a motorist running a stop sign protects
this driver from this type of harm arising in this manner."

It will be seen that, with the issues of cause in fact and legal cause/scope of
protection properly separated in Bannerman, the majority of the second circuit
on rehearing found each relatively easy to deal with. Perhaps the case would
not have needed to go through the rehearing stage if the issues had been
separated for the jury in the first place.

103. Chambers, 639 So. 2d at 368.
104. See Weaver, 615 So. 2d at 1378: "[T]he jury's answers to interrogatories . . . first declared
that the defendant power company, VEMCO, was negligent, but secondly and on the other hand, that
VEMCO's negligence was not a 'legal cause' of the accident." Id. at 1379: "Negligence, by
definition, is conduct which breaches a legal duty owed by a defendant to a plaintiff and causes in
fact injury to plaintiff." (emphasis in original; citation omitted). Id. at 1382: "Here we have no
difficulty with the factual inquiry and conclusion of the jury [that] VEMCO's [conduct] was a cause-
in-fact of the harm that befell Weaver." (emphasis in original).
105. 688 So. 2d 570, 572 (La. App. 2d Cir. 1996), writ denied, 685 So. 2d 146 (1997).
106. Bannerman, 688 So. 2d at 579.
107. Id. at 580.
108. Judges Sexton and Hightower dissented on rehearing, believing the jury's cause-in-fact
resolution to be adequately supported by the record.
109. On how to separate cause in fact from legal cause, I note a number of cases stating: "The
cause in fact test requires that but for the defendant's conduct, the injuries would not have been
Section VI-D above asserts that "[t]he breach and legal cause elements do not overlap . . . when they're done right." Often the separation between the two elements is crystal clear. For example, in *Daigrepont v. State Racing Commission*, a jockey who fell during a race when another horse came into his lane sought to hold the racing stewards responsible for his injuries because of their fault in allowing the other horse’s rider—an alien with an expired U.S. Employment Authorization Card—to participate. That argument went nowhere: "[T]he stewards owed Daigrepont no duty to remove Vilchis because of his subsequent immigration status. To make an association between Vilchis's subsequent immigration status and Daigrepont’s head injuries is simply unrealistic." It may be worth pausing for a moment to examine why the court’s conclusion strikes us as so obviously correct. It is because the rule allegedly violated by the stewards—try to see that all the alien jockeys have proper work authorizations—is clearly designed to protect against harms to the economy (and perhaps the polity) rather than for safety reasons. If there is any basis for believing that illegal aliens are more dangerous riders than legal ones, the *Daigrepont* plaintiff failed to invoke it.

It will sometimes be to the defendant's advantage to point out and develop the clear separation between the breach and legal cause elements. In *Norris v. Guthrie*, the defendant was an 18-year-old whose fault consisted in buying illegal beer for a 17-year-old. Later that evening the 17-year-old attacked and injured the plaintiff, who was dating the 17-year-old’s former girlfriend. Upholding a judgment on a jury verdict that found the 18-year-old negligent but not a legal cause of the plaintiff's injuries, the fifth circuit said only: “The sustained. The legal causation test requires that there be a substantial relationship between the conduct complained of and the harm incurred.” *Fowler v. State Farm Fire & Cas. Ins. Co.*, 485 So. 2d 158, 170 (La. App. 2d Cir.), *written denied*, 487 So. 2d 441 (1986) (citing *Sinitiere v. Lavergne*, 391 So. 2d 821 (La. 1980)); *Mack v. City of Monroe*, 595 So. 2d 353, 355-56 (La. App. 2d Cir.), *written denied*, 599 So. 2d 314 (1992) (quoting *Nichols v. Nichols*, 556 So. 2d 876, 879 (La. App. 2d Cir.), *written not considered*, 561 So. 2d 92 (La. 1990)). This use of the but-for test for cause in fact and a “substantial relationship” test for legal cause nicely captures the distinction between the two elements, and does so in an economical and evocative way. My only concern is that the term “substantial” is busy doing other work—in the “substantial factor” test for cause in fact, an alternative to the but-for test that is appropriate in a limited but recurrent range of situations—and any time we try to use the same term for different purposes, we end up confusing ourselves sooner or later. See generally Robertson, *Common Sense*, supra note 15.

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10. See supra text accompanying note 64.
12. *Id.* at 1293.
13. Cause-in-fact considerations don’t explain it. If the stewards had removed Vilchis, the replacement jockey would not have ridden the race the same way Vilchis did, and the odds are that the particular encounter that hurt Daigrepont would not have come about.
instant jury was not clearly wrong in finding [the 18-year-old] guilty of some negligent acts but not responsible for the fight that resulted in [plaintiff's] injuries." Here again, a ready justification for the court's conclusion can be found in the clear separation between the breach and legal cause elements: The rule violated by the beer buyer was designed to protect the morals of minors and perhaps against traffic and similar accidental injuries incident to teen-age intoxication. Its protection does not sensibly extend to a neighborhood fight that could well have occurred without the assistance of alcohol.

When separating the breach and legal cause elements is not helpful to their positions, defendants often try the opposite tack of urging a coalesced breach-legal cause question—the Wagon Mound aberration—on the court. The defendant hospital in Smith v. Louisiana Health and Human Resources Administration failed to keep close watch on a mentally unstable patient, who stole an ambulance and hurt himself by crashing it into a construction barricade. The hospital urged the Wagon Mound aberration on the fourth circuit by arguing that the particular risk that befell the plaintiff—that he would "go to the emergency room ramp and take an ambulance" and then crash it—was too unforeseeable to require the defendant to take precautions against it.

The fourth circuit's opinion in Smith rejected the Wagon Mound aberration by carefully separating the breach and legal cause inquiries. The breach inquiry—B<PL—came out in plaintiff's favor because on the PL side of the scale belonged not just the risk that a deranged patient would steal and crash an ambulance but an entire range of "[e]veryday hazards in and around a hospital in the middle of a major city, . . . such as stairs, machinery, or traffic, [that] are dire threats to a person in a confused and disoriented mental state." Once the breach issue was separated from the legal cause issue and properly formulated, the fourth circuit found the legal cause issue relatively easy:

While the particular harm that befell Mr. Smith might not have been foreseeable, that harm lay within the scope of the general range of risks to which Mr. Smith was peculiarly subject due to his mental state. The particular harm which befell Mr. Smith, while unusual, is easily enough associated with the failure to keep Mr. Smith either under restraint or under continuous observation. It is also easily associated with other foreseeable harms that could have befallen Mr. Smith, so that it is within the scope of the risk to be protected against by the breached duty.

115. Id. at 981.
116. It is unclear whether Norris has an alternative cause-in-fact justification. We don't know what the 17-year-old would have done if he had been sober when he rode past and saw the plaintiff with his old girlfriend.
117. See supra notes 72-77 and accompanying text.
118. 637 So. 2d 1177, 1181 (La. App. 4th Cir. 1994).
119. Id. at 1183.
120. Id. at 1184.
C. Staying on the Right Page: Demarcating the Legal Cause and Victim Fault Issues

The adoption of a "pure" comparative negligence statute like Louisiana Civil Code article 2323 imposes some hard choices on the courts. In a pure comparative negligence system, the fault of the victim never bars recovery; a plaintiff who is assigned 99.9% of the fault is still entitled to 0.1% of his damages. This result can often seem harsh or ludicrous. Maybe we would be better off with a "modified" system whereby victims at 80% or higher are barred.121

Meanwhile, courts are routinely invited to bring the old contributory negligence doctrine back into the law "through the back door" by holding that highly negligent victims are themselves the "sole proximate cause" or "sole legal cause" of their injuries. I call this defensive argument the "Johnson heresy," after Alston Johnson, if not its inventor then certainly its most articulate and relentless advocate.122 To me, the argument is heretical for two reasons: (a) it contradicts Article 2323;123 and (b) as indicated in Section III above, it transfers the affirmative defense of victim fault from Page Two to Page One, thereby transmogrifying its substance as well as shifting the burden of proof on the issue from defendant to plaintiff.

In two recent cases, courts rejected the Johnson heresy with some vehemence.124 The defendant power company in Weaver v. Ward argued that the fault of an electrocution victim—the operator of a tall cotton-picking machine who should have known better than to get close to defendant's high-voltage wire—was so great and dramatic as to prevent defendant's fault (in having the wire too low for conditions) from being a legal cause of the accident. Not so, said the second circuit:

121. The two prevalent "modified" versions cut the plaintiff off at 50% (see, e.g., Ark. Code Ann. § 16-64-122 (Michie Supp. 1995)) or at 51% (see, e.g., Mont. Rev. Code Ann. § 27-1-702 (Smith 1995)). But there is nothing magic about those numbers.

122. Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988). See also Justice v. CSX Transp., Inc., 908 F.2d 119, 124 (7th Cir. 1990) (labeling a defensive argument "a transparent effort to circumvent Indiana's comparative negligence statute by relabeling negligence as proximate cause").

123. See H. Alston Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319 (1980); and Robertson, Ruminations, supra note 15. In Maraist and Galligan, supra note 1, at 374-76, Maraist and Galligan summarize the Johnson-Robertson debate and report that the courts have not definitively resolved it.

124. In its pre-1996 version, Louisiana Civil Code article 2323 began with the phrase "[w]hen contributory negligence is applicable," allowing Johnson to argue for judicial flexibility in treating victim fault. See Maraist and Galligan, supra note 1, at 374. That phrase is now gone. Article 2323 by its terms now covers "any action for damages where a person suffers injury, death, or loss."

The suggestion that VEMCO’s negligence is somehow legally subsumed by Weaver’s alleged greater negligence is nothing more than an assertion either that Weaver was 100 percent at fault or that he assumed the risk of the harm that befell him by climbing atop the cotton picker in the face of the known danger after the picker snagged the lower wire. Weaver’s negligent conduct is not a legitimate, or a “policy,” reason that excuses VEMCO’s negligence. In such cases, “the claim for damages shall not be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury . . . .” C.C. Art. 2323.126

In Ventress v. Union Pacific Railroad Co., a train that did not give an adequate warning of its approach struck a pickup truck whose bad brakes prevented its stopping in time to avoid the train. The Johnson heresy came to court wrapped up in an argument that the “failure of the [pickup’s] brakes was the sole cause of the accident.”127 This “sole cause” argument had a potential cause-in-fact dimension, which the fourth circuit answered by pointing to evidence that a proper warning of the train’s approach “would have provided the plaintiff with sufficient time in which to stop in spite of the defective brakes.”128 The fourth circuit then made short shrift of the Johnson heresy: “The duty owed by the locomotive is to all approaching vehicles, not just to those with good brakes.”129

Judging from Weaver and Ventress, the Johnson heresy is easy to spot and easy to reject once spotted. But one cannot so generalize: the heresy sometimes persuades.130 In Freeman v. Julia Place Limited Partners, a pathologist was out walking his dog about eleven o’clock one night when he got a pager call

126. 615 So. 2d 1375, 1384 (La. App. 2d Cir. 1993) (emphasis in original).
128. Ventress, 666 So. 2d at 1214.
129. Id. at 1215.
130. In addition to the Freeman and Fowler cases discussed in the text, see Mack v. City of Monroe, 595 So. 2d 353, 357-58 (La. App. 2d Cir.), writ denied, 599 So. 2d 314 (1992) (holding that the city’s lack of alacrity in arresting the plaintiff’s violent ex-boyfriend was not a legal cause of injuries that the court felt she had brought upon herself by not avoiding him more assiduously).

Cases like Mallery v. International Harvester Co., 690 So. 2d 765, 768 (La. App. 3d Cir. 1996) (holding that a “sophisticated user” of a product is not entitled to a warning of defects of which he should be aware), may be instances of the success of the Johnson heresy but are also possibly explained as no-breach cases. The no-breach explanation would be roughly as follows: Products like the one at stake in Mallery threaten only sophisticated users. Respecting the B side of the B<PL? scale: It would be costly to warn such users, and the warning would have a very limited benefit; all it would do would be to remind the product’s users of what they already know. Respecting the PL side: the likelihood of sophisticated users forgetting what they already know, so that they need the reminder that the warning would have given, is not very great. On balance, therefore, B > PL; we don’t want manufacturers to incur the cost of such limited-utility warnings.
telling him to scurry to the hospital where he worked. When he found that
he couldn’t get back into his apartment complex because the gate lock was
faulty, the pathologist tried to climb the spiked security fence and hurt himself.
He lost his lawsuit alleging negligent maintenance of the lock at the summary
judgment stage. Affirming that disposition, the fourth circuit stated:

Reasonable minds could not conclude that the non-functional lock
was the legal cause of Freeman’s injury. Freeman argues that it is
foreseeable that a tenant who is locked out would attempt to jump the
gate and there is an easy association between Julia Place’s duty to
maintain the gate and Freeman’s injury.

The spiked gate is not an ordinary fence and was obviously built as
a security gate to prevent access to the premises by an intruder.
Freeman’s attempt to climb the gate was grossly unreasonable and
reckless. A lessor’s duty to maintain a security gate lock does not
encompass the risk (or even the possibility) that a tenant would attempt
to scale such an obviously dangerous gate. We conclude that Julia
Place is not liable under the duty-risk analysis as a matter of law.

Fowler v. State Farm Fire & Casualty Insurance Co. was a doctrinally
identical case to Freeman in which a homeowner’s negligence caused herself and
the plaintiff to be locked out on a second-floor balcony along with two whiny
children. Soon despairing of being rescued, the plaintiff—5’10”, 218
pounds—tried to jump and broke his leg. Affirming a bench-trial judgment for
the defendant, the second circuit stated that “the true legal cause of the
accident” was the plaintiff’s own foolhardy conduct.

It is hard to see Freeman and Fowler as anything other than contributory
negligence for the fully feckless. I think one can tell that is what they are—as
opposed to “legitimate” legal cause determinations—by positing otherwise
identical situations in which the victims were innocent. If the victim in Freeman
had been fleeing a mugger rather than hurrying to get to work, would the
defendant have escaped liability on legal cause grounds? Would the Fowler
court have let the homeowner off the hook if the plaintiff’s jump had been
necessitated by an acute medical need of one of the children? In each case, I
think not. And I think this shows that the cases were de facto applications of the

132. A red flag goes up in my mind whenever I see the phrase “the cause.” On both the cause
in-fact and legal cause fronts, the plaintiff satisfies his burden by showing that the defendant’s
negligent conduct was a cause. The “the cause” locution almost always encodes unstated reasons
for denying recovery; I would prefer to see the reasons spelled out.
133. Freeman, 663 So. 2d at 519.
134. 485 So. 2d 168, 169 (La. App. 2d Cir.), writ denied, 487 So. 2d 441 (1986).
135. See supra note 132.
136. Fowler, 485 So. 2d at 170.
old doctrine of contributory negligence or assumed risk, both of which have supposedly been wholly absorbed into the percentage-fault system.

We obviously need some way to say no to plaintiffs like Dr. Freeman and Mr. Fowler. But I don’t think the present law affords a way. In my view, the way found by the Freeman and Fowler decisions—which I would characterize as instances of ad hoc and selective victim-fault barring—costs the negligence-law system too much. As long as there is even a single reported authority coming out that way, well-represented defendants will press the argument on the courts in every case in which it has the slightest hope of succeeding. I don’t think we want the Weaver and Ventress defendants to fight the legal cause issue quite as hard as they fought it. I don’t think they would have fought it that hard if cases like Freeman and Fowler had not been on the books. Until and unless the law changes to say that at some point victim fault is great enough to defeat recovery, we are better off with heavily discounted awards in high-victim-fault cases than with acknowledging the occasional legitimacy of a contributory negligence/assumed risk doctrine in “sole legal cause” disguise.

D. Postscript: “An Alternative Design Capable of Preventing the Damage”

The Louisiana Products Liability Act conditions a manufacturer’s liability for a product’s design defect on a showing by the plaintiff that “[t]here existed an alternative design for the product that was capable of preventing the claimant’s damage.” In Bernard v. Ferrellgas, Inc., the manufacturer of a custom-made meat smoker argued that this provision required the plaintiff to show that the proposed alternative design would have “totally prevented” the injuries in suit. The third circuit rejected that argument, reading the statute to require only a showing that the alternative design “would have significantly reduced the chances” of an accident of the sort that befell the plaintiff. A recent federal district court decision is in accord, holding:

“Capable” does not mean that the alternative design definitely or completely would have prevented the damage. It does mean, however, that the alternative design would have been significantly less likely than the chosen design to cause the damage for which the claimant has filed suit or that the alternative design would have significantly reduced such damage.

138. 689 So. 2d 554, 560 (La. App. 3d Cir. 1997).
139. Id.
IX. CONCLUSION: THE HIGH MIDDLE GROUND

Professor Galligan’s *Inspired Ramblings* shows great wisdom and insight in reminding us that the essence of negligence law is its zeal for fair resolutions, a zeal that guarantees that the process will always exhibit remarkable flexibility. The trick is to maintain flexibility while avoiding the appearance or reality of ad hoc adjudication. The law needs to stay in the middle ground between rigidity and opportunism.

The negligence system takes that high middle ground when it upholds the distinctions among the five issues on Page One and honors the separateness between the matters treated on Pages One and those relegated to Pages Two and Three. The care and upkeep of these boundary fences is the principled business entailed in maintaining negligence as a legal system. That is what all this fuss has been about.