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# Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.

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# INSURANCE CAUSATION ISSUES: THE LEGACY OF *BIRD V.* *ST. PAUL FIRE & MARINE INS. CO.*

Peter Nash Swisher\*

In jure non remota causa, sed proxima, spectatur. [In law not the remote cause, but the proximate, is looked to.]

Lord Chancellor Bacon's *First Maxim of Law*<sup>1</sup>

## I. INTRODUCTION

In all of Anglo-American law, there is no concept that has been as pervasive – and yet so elusive – as the causation requirement; and even today this causation requirement in American law has resisted all efforts to reduce it to a useful, understandable, and comprehensive formula regarding its underlying nature, content, scope, and significance.<sup>2</sup> Indeed, no less an authority than William Lloyd Prosser has stated that there “is perhaps nothing in the entire field of the law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion” than legal causation issues, “despite the manifold attempts which have been made to clarify the subject.”<sup>3</sup> Accordingly, various commentators over the years have analyzed, criticized, and discussed legal causation issues from a traditional negligence perspective,<sup>4</sup> from

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<sup>1</sup> Reprinted in 7 SPEDDING, ELLIS & HEATH, THE WORKS OF FRANCIS BACON 327 (1870).

<sup>2</sup> See, e.g., Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737 (1985).

<sup>3</sup> PROSSER AND KEETON ON TORTS 263 (5th ed. 1984). I still remember the day Professor Prosser introduced me and my first year Torts class to proximate cause in 1971 with these introductory remarks: “Now we will analyze proximate cause. I have studied proximate cause issues for well over sixty years now, but I’m still not sure that I fully understand the concept. It will, however, be on your final examination.”

<sup>4</sup> See, e.g., Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); James A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1929); Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 229 (1932); William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936); Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 71 (1950); William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369 (1950); Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761 (1951); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1957); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991).

a law and economics approach,<sup>5</sup> and even from the framework of chaos theory.<sup>6</sup>

Most research and analysis into causation has occurred in the context of tort law,<sup>7</sup> and since insurance law is something of a hybrid between tort and contract,<sup>8</sup> a number of courts traditionally applied “classic tort” causation principles to insurance contract disputes as well.<sup>9</sup> However, in recent years, causation in insurance law has evolved dramatically from a traditional “classic tort” causation framework to take on a separate interpretive life of its own. Indeed, if the concept of proximate cause “so nearly does the work of Aladdin’s lamp”<sup>10</sup> then Justice Benjamin Cardozo arguably was the Genie in Aladdin’s lamp, in creating magnificent and wondrous principles of legal causation in tort law<sup>11</sup> and insurance law<sup>12</sup> as these two interpretive roads diverged in the challenging and foreboding bramble bush forest of insurance coverage disputes.

This Article will analyze the highly significant evolution of legal causation from its hybrid tort and insurance law origins, and discuss the dramatic effect that Benjamin Cardozo’s seminal landmark causation decisions still have on present-day insurance law.

## II. LEGAL CAUSATION: THE TORT LAW FOUNDATION

Despite the fact that some commentators tend to look upon causation’s “mystifying riddles” as “the last refuge of muddy thinkers,”<sup>13</sup> a few brave souls

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<sup>5</sup> See, e.g., William Landes & Richard A Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984).

<sup>6</sup> See, e.g., Edward S. Adams et al., *At the End of Palsgraf, There is Chaos: An Assessment of Proximate Cause in Light of Chaos Theory*, 59 U. PITT. L. REV. 507 (1998).

<sup>7</sup> See generally H.L.A. HART & A.M. HONORE, *CAUSATION IN THE LAW* 84 (2d ed. 1985) (“The most important modern literature on causation in the law is concerned almost exclusively with the extent of liability for the tort of negligence.”).

<sup>8</sup> See, e.g., JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* § 7.01, at 7-5 (2d ed. 1999).

<sup>9</sup> See, e.g., Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147, 149 (2000). “Proximate cause is a factor in all three types of civil actions seeking damages: common law torts, common law contract, and statutory. However, tort actions have been the subject of most of the judicial and scholarly attention devoted to proximate cause.” *Id.* at 149. See also *infra* note 67 and accompanying text.

<sup>10</sup> See, e.g., Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950):

Having no integrated meaning of its own, [proximate cause’s] chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No court that takes refuge in “proximate cause” can ever be convicted of error except by a higher court that does likewise. . . . No other formula . . . so nearly does the work of Aladdin’s lamp.

<sup>11</sup> See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). See generally *infra* notes 40-51 and accompanying text.

<sup>12</sup> See, e.g., *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (N.Y. 1918). See generally *infra* notes 77-94 and accompanying text.

<sup>13</sup> See, e.g., Kenneth Vinson, *Proximate Cause Should be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215 (1985) (“In tort law’s darkest corner lurks the concept of proximate cause. Causation’s mystifying riddles constitute the last refuge of muddy thinkers. . . . When lawyers and judges toss causation rhetoric into briefs and opin-

nevertheless have attempted to analyze and define legal causation principles in tort law, beginning with significant and authoritative causation articles written by Professor Joseph H. Beale<sup>14</sup> and his former law student James A. McLaughlin<sup>15</sup> in the 1920s; continuing with insightful articles by Charles E. Carpenter<sup>16</sup> and William Lloyd Prosser<sup>17</sup> in the 1930s; including reevaluations of legal causation written by Professors William Lloyd Prosser<sup>18</sup> and Fleming James Jr.<sup>19</sup> during the 1950s; and culminating in a number of more recent contemporary causation articles written in the 1980s and 1990s<sup>20</sup> and at the beginning of the new millennium.<sup>21</sup>

#### A. *Causation in Fact* (“*But For*” Causation)

Initially, a number of early commentators attempted to find some underlying meaning to the legal causation enigma that had been so “overworked” by the courts.<sup>22</sup> First, they defined *causation in fact* to mean causation *sine qua non*, “that is, if the harm would not have happened but for the act, the act in fact caused the damage.”<sup>23</sup> Or, stated a little differently, “but for the defen-

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ions, the resulting babble smothers common sense and further corrupts legal English.”). So Professor Vinson’s article arguably targets me a double-dipper “muddy thinker” because not only am I writing about legal causation issues, but I am also “wandering outside negligence law” into the legal abyss of causation issues inherent in insurance coverage disputes. *See also supra* note 10 and accompanying text.

<sup>14</sup> Beale, *supra* note 4.

<sup>15</sup> McLaughlin, *supra* note 4.

<sup>16</sup> Carpenter, *supra* note 4.

<sup>17</sup> Prosser, *The Minnesota Court on Proximate Cause*, *supra* note 4.

<sup>18</sup> Prosser, *Proximate Cause in California*, *supra* note 4.

<sup>19</sup> James & Perry, *supra* note 4.

<sup>20</sup> *See, e.g.*, Wright, *supra* note 4; HART & HONORE, *supra* note 7; Kelley, *supra* note 4.

<sup>21</sup> *See, e.g.*, John F. Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690 (2001).

<sup>22</sup> *See, e.g.*, McLaughlin, *supra* note 4, at 151-53:

Probably few students of [legal causation] would disagree with the statement that the law of proximate causation has been overworked in the cases. Many decisions speaking of proximate cause seem much more satisfactorily rationalized by disposing of them on the ground that there was no breach of duty by the defendant, that the plaintiff was contributorily negligent; or that there was no causation in fact, proximate or otherwise. . . . So many cases say that the defendant was not the proximate cause when some other bar to liability is much more easily and satisfactorily applicable [and] this caution can be emphasized scarcely enough.

*See also* Carpenter, *supra* note 4, at 246:

There has been a tendency on the part of courts to overwork proximate cause. Frequently courts attempt to determine liability by means of the formula of proximate cause when resort should have been made to some other requisite or prerequisite of legal liability. Such cases are not useful authorities on proximate cause.

*And see* James & Perry, *supra* note 4, at 761:

In the progress of negligence law . . . the concept of proximate cause has been greatly overworked to limit or control both the liability of the defendant and the effect of contributory negligence because of many considerations which can be treated in a more meaningful and significant way in connection with other issues, such as that of duty, standard of conduct, and the like.

*See generally* LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* 78, 122 *et seq.* (1927).

<sup>23</sup> McLaughlin, *supra* note 4, at 153.

dant's act, the consequence in question would not have occurred."<sup>24</sup> The major problem with causation in fact standing alone, however, is the problem of unlimited causal liability often based upon remote causation. According to Professor Carpenter, this cause in fact test "would often impose liability for acts very remote in time or space, and where the defendant's act was a most insignificant and incidental factor. It would frequently require the imposition of liability in cases where it would be absurd to do so."<sup>25</sup> Likewise, Professor Fleming James Jr. noted that this legal causation test:

includes a requirement that the wrongful conduct must be a *cause in fact* of the harm; but if this stood alone the scope of liability would be vast indeed, for "the causes of causes [are] infinite" – "the fatal trespass done by Eve was the cause of all our woe." But the law has not stopped there – it has developed further restrictions and limitations. The concept this development has produced is generally called "proximate" or "legal" cause.<sup>26</sup>

A second important legal concept involving causation in fact involves *multiple concurrent causation* and the *substantial factor rule*. The substantial factor rule may be briefly summarized as follows: if two [or more] causes concur to bring about an event and either one of them, operating alone, would have been sufficient to cause the identical result, then each cause in fact has played so important a part in producing the result that legal responsibility should be imposed upon it as a "substantial factor" of the ultimate result.<sup>27</sup> For example, if a defendant sets a fire which merges with another fire from some other source, and the combined fires destroy plaintiff's property – but either fire would have done it alone – then defendant's act is a "substantial factor" of plaintiff's loss.<sup>28</sup> Case law in a majority of states today broadly recognizes this "substantial factor" concept,<sup>29</sup> and it has likewise been incorporated into the *Restatement (Second) of Torts*.<sup>30</sup> So although the "substantial

<sup>24</sup> Carpenter, *supra* note 4, at 235. See also James & Perry, *supra* note 4, at 762-83; and PROSSER AND KEETON ON TORTS, *supra* note 3, at 263-72.

<sup>25</sup> Carpenter, *supra* note 4, at 235.

<sup>26</sup> James & Perry, *supra* note 4, at 761.

<sup>27</sup> See, e.g., Carpenter, *supra* note 4, at 242-44; and PROSSER AND KEETON ON TORTS, *supra* note 3, at 265-68. See also 3 STUART M. SPEISER, CHARLES F. KRAUSE & ANDREW W. GANS, THE AMERICAN LAW OF TORTS §11:2, at 384-87 (1986).

<sup>28</sup> See, e.g., Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45 (Minn. 1920). The court was no doubt influenced by the "substantial factor" test suggested by Professor Jeremiah Smith in *Legal Causes of Actions in Torts*, 25 HARV. L. REV. 101, 223, 229 (1911). See also PROSSER AND KEETON ON TORTS, *supra* note 3, at 267 n.29.

<sup>29</sup> See, e.g., Bockrath v. Aldrich Chem. Co. Inc., 86 Cal. Rptr. 2d 846 (1999) (holding that the "substantial factor" standard of proving causation is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, a force that plays only an infinitesimal or theoretical part in bringing about an injury or loss, is *not* a substantial factor). See also Sharp v. Fairbanks N. Star Borough, 569 P.2d 178, 181 (Alaska 1977); Ekberg v. Greene, 588 P.2d 375, 377 (Colo. 1979); Flom v. Flom, 291 N.W.2d 914, 917 (Minn. 1980); Clark v. Leisure Vehicles Inc., 292 N.W.2d 630, 632 (Wis. 1980).

<sup>30</sup> THE RESTATEMENT (SECOND) OF TORTS § 431 (1965) states that an actor's negligent conduct is a legal cause of harm to another if his or her conduct is a substantial factor in bringing about the harm. See also Thacker v. UNR Indus. Inc., 603 N.E.2d 449 (Ill. 1992) (holding that under the "substantial factor" test of the RESTATEMENT SECOND OF TORTS § 431, the defendant's conduct is said to be the cause of the event if it was a material

factor” rule may not be completely synonymous with the “but for” rule, many courts nevertheless usually lump these two rules together in determining causation in fact.<sup>31</sup>

### B. Proximate (or Legal) Cause

Since “but for” causation, standing alone, would often impose liability for remote and insignificant causes,<sup>32</sup> there remains the crucial question of whether or not the actor should be legally liable for such injury or loss; and whether the defendant’s conduct has been “so significant and important a cause that the defendant should be legally responsible.”<sup>33</sup> The concept of *proximate or legal cause* therefore involves a *limitation of liability* for public policy reasons.<sup>34</sup> For example, assume that sparks from a negligently managed railroad engine set fire to plaintiff’s woodshed, then to plaintiff’s house, then to a number of other houses, and then to the whole town. Clearly the defendant would be the *cause in fact* for all of the concurrent fire losses in a causal chain of events. But should the defendant be legally liable as the *proximate cause* for all the resulting fire losses? In the classic causation case of *Ryan v. New York Central Railroad Co.*,<sup>35</sup> the New York Court of Appeals held that the defendant railroad company’s legal liability was limited only to the first building, and that the “second, third, or twenty-fourth” buildings destroyed by the resulting fire were “too remote” to constitute legal liability under New York proximate cause law.<sup>36</sup> Likewise, in the more recent case of *Enright v. Eli Lilly & Co.*,<sup>37</sup> the New York Court of Appeals again held, for public policy reasons, that proximate cause limited the recovery of persons who were injured by the miscar-

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element and a substantial factor in bringing the event about; in other words, the test requires that the alleged tortfeasor’s conduct be somehow “responsible” for producing the injury at issue).

<sup>31</sup> See, e.g., *Sharp*, 569 P.2d at 180 (“Normally, in order to satisfy the substantial factor test it must be shown *both* that the accident would not have happened ‘but for’ the defendant’s negligence and that the negligent act was so important in bringing about the injury that reasonable men [and women] would regard it as a cause and attach responsibility to it.”). See also SPEISER, KRAUSE & GANS, *supra* note 27, at 386-87.

<sup>32</sup> See *supra* notes 25-26 and accompanying text.

<sup>33</sup> See generally PROSSER AND KEETON ON TORTS, *supra* note 3, § 42, at 243.

<sup>34</sup> *Id.* at 243:

This is not a question of causation, or even a question of fact; but quite far removed from both . . . . The term “proximate cause” is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

<sup>35</sup> 35 N.Y. 210 (1866).

<sup>36</sup> *Id.* New York courts later modified this rule to allow recovery for the first adjoining landowner as distinct from the first building. See *Webb v. Rome, W. & O. R. Co.*, 49 N.Y. 420 (1872). But see also *Atchison, Topeka, & Santa Fe R.R. Co. v. Stanford*, 12 Kan. 354 (1874), where the Kansas Supreme Court held that the owner of a farm nearly four miles away from site where the fire originally began *did* have a valid cause of action against the railroad company under proximate cause principles, and finding that the loss of the farm property was *not* a remote or unforeseeable consequence. This judicial perception of proximate cause in a largely rural and agricultural state, versus the differing perceptions of proximate cause limitations of liability in a more urbanized and industrialized state (as well as the corporate headquarters of the New York Central Railroad Company) suggest different underlying public policy rationales supporting each judicial decision.

<sup>37</sup> 568 N.Y.S.2d 550 (1991).

riage preventative drug DES *only* to those mothers who ingested DES and to their children who were injured by *in utero* exposure to DES, even though “the rippling effects of DES exposure may extend for generations”; since it “is our duty to confine liability within manageable limits.”<sup>38</sup>

A central element of proximate causation from early Anglo-American law to the present era involves the concept of *foreseeability*.<sup>39</sup> Foreseeability is framed by some courts within the concept of *duty*,<sup>40</sup> and is framed by other courts within the concept of *proximate cause*,<sup>41</sup> or a combination of these two concepts.<sup>42</sup>

For example, in *Palsgraf v. Long Island Railroad Co.*,<sup>43</sup> arguably the most celebrated (and, some would argue, the most notorious) torts case in American jurisprudence,<sup>44</sup> the New York Court of Appeals arrived at conflicting conclusions as to whether proximate cause should be characterized in terms of *duty* to an *unforeseeable plaintiff*, or whether proximate cause should more properly be based upon *foreseeable or unforeseeable causal consequences*. The facts presented before the court were these. A passenger was running to catch one of defendant’s trains in a railroad station. Defendant’s guards, attempting to assist the passenger in boarding the train, negligently dislodged a package from the passenger’s arms, causing it to fall on the rails. The package contained fireworks, which exploded with some violence. The concussion allegedly over-

<sup>38</sup> *Id.* at 555.

<sup>39</sup> Baron Pollock, whose work on tort law was long the leading British authority on the subject, for example, insisted that the extent of liability for negligence was measured by what was *foreseeable* at the time of the act or omission complained of. See POLLOCK, TORTS 8, 24 (14th ed. 1939). See also James & Perry, *supra* note 4, at 785-801; PROSSER AND KEETON ON TORTS, *supra* note 3, at 272-80.

<sup>40</sup> See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) [*Palsgraf-Cardozo*]. See also *Chavez v. Tolleson Elementary Sch. Dist.*, 595 P.2d 1017, 1021-22 (Ariz. Ct. App. 1979) (holding that foreseeability “is not only involved in the determination of proximate cause, it is also one of the yardsticks by which duty is measured.”); *George Hormel & Co. v. Maez*, 155 Cal. Rptr. 337, 340 (Ct. App. 1979) (“Certainly, the most important consideration in determining whether a duty exists is whether the harm suffered was foreseeable to the defendant. The most important of these considerations in establishing duty is foreseeability. As a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct.”).

<sup>41</sup> See, e.g., *Palsgraf*, 162 N.E. at 101 (dissenting opinion) (*Palsgraf-Andrews*). See also *Firestone Tire & Rubber Co. v. Lippincott*, 383 So. 2d 1181, 1182 (Fla. Ct. App. 1980) (“A foreseeable consequence is one which a prudent man [or woman] would anticipate as likely to result from an act.”); *Meadowlark Farms Inc. v. Warken*, 376 N.E.2d 122, 129 (Ind. Ct. App. 1978) (“Factual causation becomes proximate causation under the test of foreseeability.”).

<sup>42</sup> For a good overview of how American courts have characterized and employed the tort law concept of foreseeability, see generally Annotation, *Foreseeability as an element of negligence and proximate cause*, 100 A.L.R.2d 942 (1965) and Later Case Service (Cum. Supp. 2001).

<sup>43</sup> 162 N.E. 99 (N.Y. 1928), *reargument denied*, 164 N.E. 564 (N.Y. 1928).

<sup>44</sup> See, e.g., PROSSER AND KEETON ON TORTS, *supra* note 3, at 284 (“[*Palsgraf*] has become the most discussed and debated of all torts cases, and over which the argument still goes on.”); SPEISER, KRAUSER & GANS, *supra* note 27, §11:7, at 400 (“The *Palsgraf* case is probably the most celebrated of all American tort cases. Certainly it is the most debated, most argued decision wrestled with by virtually all scholars, commentators, pundits, and legal philosophers.”).

turned some scales “many feet” from where the package fell, which in turn injured Mrs. Palsgraf, a prospective railroad passenger, who had bought a ticket and was waiting on the station platform for another train to depart.<sup>45</sup>

In a 4-3 New York Court of Appeals decision written by then Judge Benjamin Cardozo speaking for the majority, the court defined proximate cause in terms of *duty*. Negligence, wrote Cardozo, “imports a term of relation; it is a risk to another or to others within the range of apprehension”<sup>46</sup> and consequently no duty would be owed to an “unforeseeable” plaintiff such as Mrs. Palsgraf.<sup>47</sup> *The Restatement of Torts* (to which Cardozo conveniently served as an Adviser) Section 281, comment *c* “almost immediately afterward” accepted Cardozo’s view in the *Palsgraf* case that there is no duty, and hence there is no negligence and no liability, to an unforeseeable plaintiff who is not within a foreseeable “zone of danger.”<sup>48</sup>

Three judges, however, dissented in *Palsgraf* in an equally persuasive opinion written by Judge Andrews. Judge Andrews voiced the traditional view that proximate causation “is a term of convenience, of public policy, of a rough sense of justice.” Hence:

[d]ue care is a duty imposed upon each one of us to protect society from unnecessary danger, not to protect A, B, or C alone. . . . Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured even if he be *outside* what would generally be thought the danger zone.<sup>49</sup>

Andrews therefore characterized proximate cause more in terms of *foreseeability of harm* and *causation* rather than as a *duty* to the plaintiff.<sup>50</sup> Not surprisingly, the *Restatement (Second) of Torts* also adopted Judge Andrews’ rationale of proximate cause as well.<sup>51</sup>

Which is the better reasoned view? A number of other influential tort cases appear to follow Andrews’ more traditional *direct versus indirect harm* rationale for proximate causation, rather than Cardozo’s *duty-relation-risk* formula. For example, the theory of direct causation was applied with a ven-

<sup>45</sup> *But see also* PROSSER, WADE & SCHWARTZ, TORTS 311 (10th ed. 2000):

A study of the record in this case indicates that as described in the opinion, the event could not possibly have happened [that way]. These were apparently ordinary fireworks, not bombs . . . An appreciable interval elapsed after the first noise and smoke, during which Mrs. Palsgraf said to her daughter, “Elizabeth, turn your back.” Then “the scale blew and hit me in the side.” The platform was crowded, and there was no evidence of any other damage to anybody or anything. Plaintiff’s original complaint, before amendment, alleged that the scale was knocked over by a stampede of frightened passengers . . . [Also] Plaintiff on a motion for reargument pointed out that Mrs. Palsgraf stood much closer to the scene of the explosion than the majority opinion would suggest . . . .

And see William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

<sup>46</sup> 162 N.E. at 100.

<sup>47</sup> See also SPEISER, KRAUSER & GANS, *supra* note 27, § 11.7, at 403 (“Cardozo suggested that the existence of duties in negligence turned on foreseeability, as determined by physical proximity [or a so-called “zone of danger.”]).

<sup>48</sup> See generally PROSSER AND KEETON ON TORTS, *supra* note 3, at 285. See also RESTATEMENT (SECOND) OF TORTS, § 281, cmt g.

<sup>49</sup> 162 N.E. at 103 (emphasis added).

<sup>50</sup> *Id.* See also *supra* note 40 and accompanying text.

<sup>51</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 435. See also *supra* note 41 and accompanying text.

geance in the English case of *In re Polemis*.<sup>52</sup> In *Polemis*, a plank negligently dropped by one of defendant's workman into the hold of the ship created a spark that exploded gasoline vapor in the hold, which in turn destroyed the ship and its cargo. Although arbitrators found that this loss was not a foreseeable result of defendant's negligence, Lord Justice Bankes in his *Polemis* decision disagreed. Utilizing a *direct causation* rationale, Lord Justice Bankes held that the negligent dropping of the plank was the proximate cause of the loss by fire, even though the defendant could not have foreseen the exact harm that it would cause.<sup>53</sup>

The *Polemis* case, however, was later overruled by two other "British Boat Cases," *Wagon Mound No. 1*,<sup>54</sup> and *Wagon Mound No. 2*.<sup>55</sup> In *Wagon Mound No. 1* the crew of an oil tanker negligently allowed furnace oil from their ship to overflow into Sydney Harbor in Australia, where it flowed to and under the plaintiff's dock, some 600 feet away. Plaintiff's workmen were using torches to repair the dock, and molten metal falling from the dock ignited cotton waste floating on the oil. The waste acted as a wick for the molten metal, which in turn ignited the oil, and burned the dock. The *Wagon Mound* court repudiated the "direct causation" rule of *Polemis*, and adopted a limitation to liability based on *foreseeability* of the risk. Six years later, in *Wagon Mound No. 2*, involving damage to other ships in Sydney Harbor from the same defendant's acts, the Privy Council further discussed the various elements that had to be proven in determining such *foreseeability of harm*. In this particular case, the plaintiff was able to show through a preponderance of the evidence that the ship's engineer *should* have known that it was possible to ignite this type of oil on the water, and accordingly the *type of damage* in *Wagon Mound No. 2* was foreseeable, and therefore defendant's negligent conduct was the proximate cause of the damage to the ships. So six years after the original *Wagon Mound* case, the plaintiffs finally "got it right," and were able to demonstrate the necessary *degree* of foreseeability to establish the causal nexus to defendant's negligence.

*So query*: why did Cardozo insist on applying a duty-relation-risk formula to proximate cause instead of applying the more traditional – and more generally accepted – direct and foreseeable causation formula as expounded by Judge Andrews and a majority of other courts? According to Professor Jerry Phillips:

Why does Cardozo confuse generations of law students by talking about duty instead of foreseeability? Is it because New York was stuck with the direct-cause rule of proximate causation, and he wanted to avoid applying the rule? Then why not change the rule, from direct cause (*Polemis*) to foreseeability (*Wagon Mound*), instead of talking about duty? Of course Cardozo was not the first to confuse duty with proximate cause.<sup>56</sup>

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<sup>52</sup> *In re Arbitration Between Polemis and Funes, Withy & Co. Ltd.*, 3 K.B. 560 (Court of Appeal 1921).

<sup>53</sup> *Id.*

<sup>54</sup> *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Eng'g Co. Ltd.* ("Wagon Mound No. 1"), [1961] A.C. 388 (Privy Council 1961).

<sup>55</sup> *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.* ("Wagon Mound No. 2"), [1967] 1 A.C. 617 (Privy Council 1966).

<sup>56</sup> Jerry L. Phillips, *Law School Teaching*, 45 St. Louis U. L.J. 725, 727 (2001).

The American analogy to *Wagon Mound* arguably can be found in the *Kinsman* cases,<sup>57</sup> where employees of the Kinsman Transit Company improperly moored a ship, the *Shivas*, at a dock in the Buffalo River, three miles above a lift bridge maintained by the city of Buffalo. Due to ice and debris in the river, the mooring lines pulled out from the improperly anchored mooring block. The *Shivas* broke loose and drifted downstream, colliding with another ship, the *Tewksbury*, and both ships went down the river together toward the bridge. Frantic telephone calls to workers on the bridge to raise it in time for the ships went unanswered since one bridge crew had gone off duty, and the other bridge crew was late. The ships crashed into the center of the bridge, causing it to collapse, backing up the river, and causing extensive property damage up and down the river. The trial court found negligence and liability on the part of Kinsman and the City of Buffalo, and the appellate court affirmed. Judge Friendly stated:

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked . . . . Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise serious doubt whether the concept is meaningful; indeed we wonder whether the British courts are not finding it necessary to limit the language of the *Wagon Mound* [cases] . . . . [Most courts realize] however that there must be some limitation to this. "Somewhere a point will be reached when courts will agree that the [causal] link has become too tenuous – that what is claimed to be consequence is only fortuity" . . . .<sup>58</sup>

Judge Friendly's concern was that some American courts may extend the test of foreseeability "to such unforeseen lengths as to raise serious doubt whether the concept is meaningful." A number of American courts, for example, have made a distinction in determining foreseeability between the *particular manner of harm* and the *general type of harm*, as proposed by Professors Fowler Harper and Fleming James Jr. in their influential torts treatise.<sup>59</sup> The

<sup>57</sup> See *Petition of Kinsman Transit Co.*, 338 F.2d 708 (3d Cir. 1964) ("Kinsman No. 1"); and *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) ("Kinsman No. 2").

<sup>58</sup> 338 F.2d at 724-25. Professor Prosser analyzes the two *Kinsman* cases in this manner:

The [first *Kinsman*] court, bound by New York law, proceeded to limit the *Palsgraf* rule by holding that if any harm to the plaintiff was foreseeable, the defendant was liable for unforeseeable consequences to the plaintiff. In the second [*Kinsman*] case [388 F.2d 821] the action was for pecuniary loss due to the necessity of transporting ship cargoes around the jam. The court was unwilling to hold that there could be no liability for pecuniary loss caused by negligence, and held instead that the connection between the negligence and these damages was too "tenuous and remote" to permit recovery. Just what this may mean would appear to be anybody's guess.

PROSSER AND KEETON ON TORTS, *supra* note 3, § 43, at 297.

<sup>59</sup> See, e.g., 4 FOWLER HARPER, FLEMING JAMES JR. & OSCAR GRAY, *THE LAW OF TORTS* (2d ed. 1986) § 20.5, at 162-63 ("Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen."). Professors Harper and James argued for a more expansive application of proximate cause and foreseeability to many tort law disputes:

As the fact of insurance and loss distribution increasingly permeates our system and the importance of individual blameworthiness wanes, the limitations (of proximate cause, or duty, etc.) may be expected to take on more and more the character of limitations measured by what is felt to be normally incidental to the kind of activity or enterprise that is footing the bill . . . .

celebrated “flaming rat” case<sup>60</sup> is one such illustration. In this case, the defendant told his employee to clean a coin-operated machine with gasoline in a small room where there was a lighted gas heater nearby with an open flame. While the plaintiff was cleaning the machine with gasoline, a rat escaped from under the machine, and ran to take refuge under the heater, where its fur, now impregnated with gasoline fumes, caught fire from the flame. The rat then “returned in haste and flames to its original hideout” under the coin-operated machine, which then exploded in flames, injuring the plaintiff. The court held that although the *particular manner of harm* was unforeseeable (i.e. a “flaming rat” returning to his hideout under the coin-operated machine) nevertheless the *general type of harm* was foreseeable (i.e. that the use of gasoline near to an open flame may foreseeably cause an explosion and fire).<sup>61</sup>

Another equally bizarre case involved an eleven-year-old boy who was riding a canister vacuum cleaner as if it were a toy car. His penis slipped through an opening in the canister casing, and was amputated by the vacuum cleaner fan blades traveling at 20,000 revolutions per minute. Although the particular manner of harm was unforeseeable (as almost everyone would agree in analyzing the facts of this particular case) the general type of harm – the possibility of cutting off one’s finger or another appendage from the unprotected fan blades – was foreseeable.<sup>62</sup> Accordingly, the *Restatement (Second) of Torts*, Section 435, has attempted to provide some flexible parameters regarding the foreseeability of harm and the manner of its occurrence:

- (1) If the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable [*but*]
- (2) The actor’s conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.<sup>63</sup>

What is *foreseeable harm*, and what is *highly extraordinary conduct*, therefore, still may be subject to judicial discretion, despite the philosophical differences among various academic lawyers.<sup>64</sup>

*Id.* at 131. Professor Prosser, like Judge Friendly, was more skeptical of Harper and James’ more expansive approach to proximate cause and foreseeability. “Harper and James’ tort treatise is impressive and comprehensive,” he told our law school Torts class, “but it can be summarized in one sentence: *The Plaintiff always wins.*”

<sup>60</sup> United Novelty Co. v. Daniels, 42 So. 2d 395 (Miss. 1949).

<sup>61</sup> *Id.*

<sup>62</sup> See Larue v. Nat’l Union Elec. Corp., 571 F.2d 51 (1st Cir. 1978).

<sup>63</sup> RESTATEMENT (SECOND) OF TORTS § 435.

<sup>64</sup> Professors Harper and James expressed the following opinion of RESTATEMENT (SECOND) OF TORTS § 435:

The formula chosen by the Restatement in its sections on proximate cause, with its emphasis on what seems “extraordinary” in the light of hindsight, seems to abandon the foreseeability test. But careful analysis shows that it does not. “When we have hindsight nothing is extraordinary, for we can see each step following inevitably on the other. . . .” The proposed test probably does, however, amount to an invitation to take a broad view towards what is foreseeable. The same is probably true of the use of the word *normal* (rather than foreseeable or probable) as the opposite of extraordinary. It is too bad that this formula was not used in defining the negligence issues where such consideration more appropriately belongs.

Finally, general rules of proximate causation also recognize that there may be an *unforeseeable intervening, superceding cause* that may cut off the liability of an original tortfeasor whenever the intervening cause was an unforeseeable intentional or criminal act, rather than a “normal” intervening cause.<sup>65</sup>

### III. LEGAL CAUSATION IN INSURANCE LAW

Since most research and analysis of legal causation issues have largely occurred in the context of tort law,<sup>66</sup> many courts applied these “classic tort” proximate cause principles to insurance contract disputes as well. Indeed, an early commentator noted that:

Among the decided cases, it is generally taken to be beyond dispute that proximate cause is proximate cause, whenever it may be found, and the court is content with a brief definition in the traditional [tort] manner. The rule in insurance cases appears to be that the definition of proximate cause which should be applied is the same or substantially the same as in negligence cases.<sup>67</sup>

However, a growing body of case law and legal commentary<sup>68</sup> has demonstrated many important *differences*, as well as similarities, between legal causation issues in tort and insurance law. Indeed, the general rules of proximate causation are applied quite differently in insurance law, than for a general breach of contract suit or a tort action, since the term itself arguably has a different – and more literal – meaning in insurance cases than in tort or other contract disputes.<sup>69</sup> According to Mr. Justice Frankfurter in the 1950 case of *Standard Oil Co. v. United States*:<sup>70</sup>

Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed.

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HARPER, JAMES & GRAY, *supra* note 59, § 20.5, at 168. This was another “dig” at Professor Prosser, who was the Reporter for the RESTATEMENT (SECOND) OF TORTS. Apparently there was little love lost between Professor Prosser and Professor James on the issue of proximate cause in particular, and tort law in general.

<sup>65</sup> See, e.g., PROSSER AND KEETON ON TORTS, *supra* note 3, § 44, at 301-19. This concept, in itself, is worthy of assessment (and reassessment) in a separate law review article, or number of articles. To quote Scarlett O’Hara, “There will always be a tomorrow.”

<sup>66</sup> See *supra* note 7 and accompanying text.

<sup>67</sup> William C. Brewer, Jr., *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141, 1167 (1961). See also JEFFREY W. STEMPER, LAW OF INSURANCE CONTRACT DISPUTES §§ 7.01-7.04 (2d ed. 1999 & Supp. 2001) (discussing causation in insurance law).

<sup>68</sup> See, e.g., Brewer, *supra* note 67; Sidney I. Simon, *Proximate Cause in Insurance*, 10 AM. BUS. L.J. 33 (1972-73); Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 THE FORUM 385 (1985); Douglas Houser & Christopher Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, 21 TORT & INS. L.J. 573 (1985-86); Craig Litsey, *Property Insurance Coverage and Policy Exclusions: Problems of Multiple Causation*, 35 FED. INS. COUNSEL Q. 415 (1985); Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569 (1987-88); Douglas G. Houser, *The Rise and Fall of Concurrent Causation: Background and Current Trends Affecting Property Insurance Coverage*, 44 FED. INS. & CORP. COUNS. Q. 3 (1993); Mark D. Wurefel & Mark Koop, “Efficient Proximate Causation” in the Context of Property Insurance Claims, 65 DEF. COUNS. J. 400 (1998); Peter C. Haley, *Paradigms of Proximate Cause*, 36 TORT & INS. L.J. 147 (2000).

<sup>69</sup> Simon, *supra* note 68, at 35.

<sup>70</sup> 340 U.S. 54 (1950).

Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an insurance] policy. It is one thing for the law to impose liability by its own notions of responsibility [as in a tort context] and quite another to construe the scope of engagements bought and paid for [as in an insurance context].<sup>71</sup>

Professor Banks McDowell also distinguishes between the *prima facie* elements to establish a typical tort action, and the necessary elements in an insurance coverage dispute. In order to establish a bona fide *tort* cause of action, according to Professor Prosser, the plaintiff must prove by a preponderance of the evidence that: (1) defendant owed plaintiff a duty of due care recognized by the law, requiring defendant to conform to a certain standard of conduct for the protection of others against unreasonable risk; (2) defendant breached this duty of due care to the plaintiff; (3) defendant's acts were the causal connection between the conduct and the resulting injury; that is to say, the cause in fact and the proximate cause of plaintiff's loss; and (4) actual loss or damage occurred to plaintiff as a result of defendant's actions.<sup>72</sup> In insurance situations, however, argues Professor McDowell, the following four *different* factors need to be considered: (1) the coverage provisions of an insurance policy (or more generally, the promise in the contract); (2) the occurrence of the event (or more generally in contract, the breach); (3) the loss or damage; and (4) the "connector" between the event and the loss.<sup>73</sup> Note that Professor Prosser and Professor McDowell *both* speak of these respective causation requirements as a "connector" or "connection" between the occurrence and the loss. So there are also important similarities, as well as important differences, within this tort/contract causal conundrum.

How "proximate" must this causal "connector" actually be in insurance law? According to one commentator:

The insurance rule is that only the proximate cause of the loss, and not the remote cause, is to be regarded in determining whether recovery may be had under an insurance policy, and that loss must have been proximately caused by a peril insured against. If the nearest efficient cause of a loss is indeed one of the perils insured against, the court need look no further. [But the] insurer is not relieved from respon-

<sup>71</sup> *Id.* at 66. See also McDowell, *supra* note 68, at 574:

[T]he allocation of causal responsibility [in contract and insurance cases] . . . is reinforced by the fact that the contracting parties, like many tort theorists, share the wish to avoid the costs and uncertainties of litigation about "proximate cause." Unlike the parties in tort contexts, where neither can control or bargain from the position of victim or actor, the contracting parties can define their obligation in ways that successfully avoid [or attempt to avoid] causation litigation.

And see Bragg, *supra* note 68, at 386:

[P]roximate cause has a different meaning in insurance cases than it has in tort cases. In tort cases the rules of proximate cause are applied for the single purpose of fixing culpability, and for that reason the rules reach back to both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated; in insurance cases the concern is not with the question of culpability or why the injury occurred, but only with the nature of the injury and how it happened.

<sup>72</sup> See, e.g., PROSSER AND KEETON ON TORTS, *supra* note 3, at 164-65.

<sup>73</sup> McDowell, *supra* note 68, at 575. McDowell goes on to state that causation "should be limited to the connector between what, consistent with insurance terminology, may be called an "occurrence," and the loss suffered by the insured . . ." *Id.* at 575-76.

sibility by showing that the property was brought within the peril so insured against by a cause not mentioned in the insurance policy.

An insurer may contract for a more limited liability in insuring a risk, but it is up to him to express it with precision. Doubts in the contract he writes are resolved against him, especially where he purportedly attempts to exclude losses partially attributable to causes other than those insured against. Where two concurrent causes unite in a result, the question of proximate cause in insurance is not necessarily settled by testing whether the result would have followed "but for" the other contributing cause. Rather, the court asks, for instance, in an accident insurance case, was the woman insured's fall or her pregnancy the efficient predominant and thus proximate cause of her miscarriage, the one that necessarily sets the other causes in motion . . . .

The proximate cause of loss or damage to an insured's property or injury to his person is not necessarily the last link in the chain of preceding events, but the procuring, efficient cause from which the effect might be expected to follow without concurrence of any unforeseen circumstances.<sup>74</sup>

This "general rule" of insurance proximate causation, however, is not as simple and as straightforward as Professor Simon suggests, and requires further analysis and inquiry into its underlying rationale, justification, and applicability. And, once again, where we must begin our initial inquiry into insurance proximate causation is – like proximate causation in tort law – with Benjamin Cardozo.

#### A. *Benjamin Cardozo and Bird v. St. Paul Fire & Marine Insurance Co.*

If the fact situation in *Palsgraf v. Long Island Railroad Co.*<sup>75</sup> is a tort professor's dream,<sup>76</sup> then the fact situation in *Bird v. St. Paul Fire & Marine Insurance Co.*<sup>77</sup> is an insurance law professor's dream, and it remains, after so many years, my favorite insurance causation case.<sup>78</sup> The facts of *Bird* are as follows. Like *Polemis*, *Wagon Mound*, and the *Kinsman* cases,<sup>79</sup> the *Bird* case involved a damaged vessel, which was insured under a marine and fire insurance policy by the St. Paul Insurance Company. On the night of July 30, 1916, a fire broke out from an unknown cause beneath some railroad freight cars in New York harbor. The railroad cars were loaded with explosives, and after the fire had burned for approximately thirty minutes, the contents of the cars exploded. This explosion caused another fire, which in turn caused another and much greater explosion of a large quantity of dynamite and other explosives stored in the freight yard. This last explosion caused a concussion of air, which damaged plaintiff's vessel about 1000 feet distant, to the extent of \$675. No

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<sup>74</sup> Simon, *supra* note 68, at 35-36.

<sup>75</sup> See *supra* notes 44-45 and accompanying text.

<sup>76</sup> See, e.g., PROSSER AND KEETON ON TORTS, *supra* note 3, at 285: "What the *Palsgraf* case actually did was to submit to the nation's then most excellent state court a law professor's dream of an examination question . . . ."

<sup>77</sup> 120 N.E. 86 (N.Y. 1918).

<sup>78</sup> I need to point this fact out, since this Symposium is about our favorite insurance law cases. I originally intended only to discuss the *Bird* case, but one thing led to another, and I expanded this article more than I originally intended.

<sup>79</sup> See *supra* notes 52-58 and accompanying text.

fire reached the vessel, the damages being solely from the concussion caused by the second explosion. The question for then Judge Cardozo was whether this loss was covered under the fire insurance policy provisions.<sup>80</sup> Although Cardozo conceded that there “is no doubt when fire spreads to an insured building and there causes an explosion, the insurer is liable for all damages”<sup>81</sup> and although the trial court had found for the plaintiff, Cardozo nevertheless reversed and rendered judgment for the defendant insurer largely based on insurance law proximate cause principles.

Initially, Cardozo’s reasoning appeared to parallel a direct-versus-indirect-cause type of argument utilized in *Polemis*<sup>82</sup> and *Palsgraf-Andrews*.<sup>83</sup> First, Cardozo opined that the damage to the vessel constituted “damage by concussion; and concussion is not fire nor the immediate consequences of fire.”<sup>84</sup> Then Cardozo discussed the important proximate cause issues involved in this particular case:

We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that, within the meaning of the policy of insurance, he had suffered loss by fire. A philosopher or a lawyer might persuade him that he had, but he would not believe it until they told him. He would expect indemnity, of course, if fire reached the thing insured. He would expect indemnity, very likely, if the fire was near at hand, if his boat or his building was within the danger zone of ordinary experience, if damage of some sort, whether from ignition or from the indirect consequences of fire, might fairly be said to be in the range of normal apprehension. But a different case presents itself when the fire is at all times so remote that there is never exposure to its direct perils, and that exposure to its indirect perils comes only through the presence of extraordinary conditions, the release and intervention of tremendous forces of destruction.

The case comes, therefore, to this. Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability. Then only is it the proximate cause, because then only may we suppose that it was within *the contemplation of the contract*. In the last analysis, therefore, it is something in the minds of men, *in the will of the contracting parties*, and *not merely in the physical bond of union between events*, which solves, at least for the jurist, this problem of causation.<sup>85</sup>

Here, then, was the underlying rationale – and the genius – of Cardozo’s proximate cause analysis of this particular insurance law dispute. Proximate cause in insurance law should *not* be determined through an objective tort test of foreseeable harm, as analyzed in the *Wagon Mound* and *Kinsman* cases.<sup>86</sup> Rather, proximate cause in insurance coverage disputes should be determined according to the *reasonable expectations of the contracting parties*:

<sup>80</sup> 120 N.E. at 86.

<sup>81</sup> *Id.*

<sup>82</sup> See *supra* notes 52-53 and accompanying text.

<sup>83</sup> Indeed, Judge Andrews cited Cardozo’s *Bird* decision in support of his dissenting opinion in *Palsgraf*, 162 N.E. at 104; as well as citing to the *Polemis* case. *Id.* at 103.

<sup>84</sup> 120 N.E. at 87.

<sup>85</sup> *Id.* at 88 (emphasis added).

<sup>86</sup> See *supra* notes 54-58 and accompanying text.

General definitions of a proximate cause give little aid. Our guide is the *reasonable expectation and purpose* of the ordinary business man when making a business contract. It is *his intention, express or fairly to be inferred* that counts.<sup>87</sup>

This evolutionary—some would say revolutionary—definition of proximate cause principles in an insurance law context, applicable to both the insured and insurer alike,<sup>88</sup> arguably was an important precursor to Professor Arthur L. Corbin's famous first maxim of contract law: "The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises."<sup>89</sup> Moreover, Cardozo's contractually based "reasonable expectations" doctrine enunciated in *Bird* arguably led to an increased utilization of important insurance law interpretive rules in order to determine the scope of the parties' intent, contractual duties and obligations, and the meaning of disputed terms in an insurance contract, through a number of contractually based "reasonable expectations" rights and remedies including: (1) the doctrine of ambiguities; (2) contract unconscionability and public policy issues; (3) equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and contract reformation; and (4) a number of other interpretive rules applied to standardized insurance contracts as contracts of adhesion.<sup>90</sup> Indeed, this contractually based "reasonable expectations" doctrine was firmly established at the time Professor (now Judge) Robert Keeton propounded his ground-breaking 1970 "rights at variance with policy language" "reasonable expectations" doctrine.<sup>91</sup>

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<sup>87</sup> 120 N.E. at 87 (emphasis added). See also Adam F. Scales, *Man, God and the Serbian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173, 265 (2000):

In Cardozo's view [in *Bird*] the problem of causation was not to be addressed as "one of philosophy" but according to the reasonable expectations of the policyholder . . . . A few years later in *Goldstein v. Standard Accident Ins. Co.* [140 N.E.2d 235 (N.Y. 1923)] [Cardozo] used [this case] to deny coverage where an insured had suffered one injury which in turn caused a second, permanently disabling condition. Referring to *Bird*, he rejected the analogy to tort law proximate cause (otherwise the plaintiff clearly would have prevailed) and instead relied on the parties' [contractual] intentions to define the role of causation.

<sup>88</sup> In a subsequent decision, *Smith v. Northwestern Fire & Marine Insurance Co.*, 159 N.E. 87, 93 (N.Y. 1927), Cardozo recognized that insurers as well as insureds could invoke this contractually based "reasonable expectations" doctrine. See also Robert Jerry II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 32 (1998-99) ("Cardozo viewed reasonable expectations as a two-way street; each party was entitled to assert them at the other. Thus, in an insurance setting, Cardozo thought it as important to consider the reasonable expectations of insurers as it was to examine the expectations held by the insureds.").

<sup>89</sup> 1 CORBIN ON CONTRACTS § 1.1 (1952). See also GORDON SCHARBER & CLAUDE ROWHER, CONTRACTS §88, at 147 (3d ed. 1990) ("One purpose of contract law is to protect the reasonable expectation of persons who become parties to the bargain.").

<sup>90</sup> See generally Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000).

<sup>91</sup> See Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (Part I); 83 HARV. L. REV. 1281 (1970) (Part II). As propounded by Professor Keeton, this functional (as opposed to contractual) "reasonable expectations" doctrine is based upon a two-prong rationale: (1) that an insurer should be denied any unconscionable advantage in an insurance contract; and (2) that the reasonable expectations of insurance applicants and intended beneficiaries regarding the terms of insurance coverage should be honored, even though a painstaking study of the policy provisions contractually would have negated those expectations. *Id.* at 963-64. A small minority of state courts today have adopted this insurance law doctrine of reasonable expectations *at variance* with the

A final important causation issue for Benjamin Cardozo in the *Bird* case had to do with his *proximity and remoteness* test. "Precedents are not lacking for the recognition of the space element as a factor in causation," he wrote. "This is true even in the law of torts where there is a tendency to go farther back in the search for causes than there is in the law of contracts . . . . Especially in the law of insurance, the rule is "You are not to trouble yourself with distant causes . . . ." <sup>92</sup> So did Judge Cardozo employ a tort-oriented causal chain of events analysis in the *Bird* case; a contractually-oriented remoteness in space analysis; or both? The answer appears to be "both":

For our present purposes, it is enough that, alike in contract and in tort, contiguity or remoteness in space may determine either the existence or the measure of liability. In doubtful situations a jury must say where the line is to be drawn . . . . There is nothing absolute in the legal estimation of causation. Proximity and remoteness are relative and changing concepts. It may be said that these are vague tests, but so are most distinctions of degree. On one hand, you have distances so great that as a matter of law the cause becomes remote; on the other, spaces so short that as a matter of law the cause is proximate . . . . Between these two extremes there is a borderland where juries must resolve the doubt. <sup>93</sup>

### B. "Immediate" Cause versus "Efficient" Proximate Cause

An important legacy of *Bird v. St. Paul Fire & Marine Insurance Co.* is the issue of whether the necessary causal nexus for an insurance loss needs to be the *immediate cause* of the loss, or whether it can also be the "efficient" or "dominant" proximate cause along a causal chain of events. American courts have split on this important legal concept. The traditional insurance law rule, apparently based on earlier English precedent, <sup>94</sup> is that the cause of loss in an insurance law context must be the *immediate cause* of the injury, as opposed to the *proximate cause* of the injury. <sup>95</sup> The underlying rationale behind this "immediate cause" test was explained in a 1950 Washington State Supreme Court decision <sup>96</sup> in this manner:

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insurance policy language. See generally Symposium, *The Insurance Law Doctrine of Reasonable Expectations After Three Decades*, 5 CONN. INS. L.J. 1 (1998-99). A majority of courts, however, still recognize a *contractually based* insurance law doctrine of reasonable expectations. See *supra* notes 87-89 and accompanying text.

<sup>92</sup> 120 N.E. at 88. Cardozo cited as authority for this "immediate cause" rule, *Fenton v. Thorley & Co.*, (1903) A.C. 443, 454:

In an action on [an insurance] policy, the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the *causa causans* is by no means disregarded. This rule "is based" it is said "on the intention of the parties." Reicher v. Borwick, 1892, 2 Q.B. 550.

See also *McDonald v. Snelling*, 96 Mass. 290, 294 (1867) ("[C]ausa proxima, in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort, while in insurance cases . . . it is limited in the immediately operating cause of the loss or damage.").

<sup>93</sup> 120 N.E. at 88 (citations omitted).

<sup>94</sup> See *supra* note 92.

<sup>95</sup> See, e.g., *Nat'l Fire Ins. Co. v. Valero Energy Co.*, 777 S.W.2d 501, 505 (Tex. Ct. App. 1989); *Ovbevy v. Cont'l Ins. Co.*, 613 F. Supp. 726, 728-29 (N.D. Ga. 1985); *Frontier Lanes v. Canadian Indem. Co.*, 613 P.2d 166, 169 (Wash. Ct. App. 1980). See generally 1 ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* § 6.07, at 389-92 (3d ed. 1995).

<sup>96</sup> *Bruener v. Turin City Fire Ins. Co.*, 222 P.2d 833 (Wash. 1950).

In the rare instances where proximate cause has any bearing in contract cases, it has a different meaning than when used in tort . . . . In tort cases, the rules of proximate cause are applied for the single purpose of fixing culpability, with which insurance cases are not concerned. For that purpose, the tort rules of proximate cause reach back [to] both the injury and the physical cause to fix the blame on those who created the situation in which the physical laws of nature operated. The happening of an accident does not, in itself, establish negligence and tort liability. The question is always, why did the injury occur. Insurance cases are not concerned with why the injury occurred or the question of culpability, but only with the nature of the injury and how it happened.<sup>97</sup>

This “immediate cause” rule, however, is not an inflexible or absolute rule. The insurance policy language itself may require the application of a “proximate cause” rule in some cases,<sup>98</sup> and other circumstances may exist where a strict application of the “immediate cause” rule would be unfair and “contrary to common sense and reasonable judgment.” For example, in the case of *Blaine Richards & Co. v. Marine Indemnity Insurance Co. of America*,<sup>99</sup> the Second Circuit Court of Appeals wrote:

We do not agree that proximate cause in insurance matters is to be determined by resort to “but for” causation. As this Circuit has noted, “the horrendous niceties of the doctrine of so-called ‘proximate cause’ employed in negligence suits, apply in a limited manner to insurance policies.” . . . . At the same time, the single cause nearest to the loss in time should not necessarily be found to be the proximate cause . . . . Instead, in accord with the reasonable understanding and expectations of the parties we must attempt to ascertain . . . “the predominant and determining” . . . cause of loss . . . . Determination of proximate cause in these cases is thus a matter of applying common sense and reasonable judgment as to the source of the losses alleged.<sup>100</sup>

A growing number of American courts, however, has rejected the *immediate cause rule* in favor of an “efficient” or “dominant” proximate cause rule.<sup>101</sup> Under this tort-oriented proximate cause rule, there will be coverage if a risk of loss that is specifically insured against in the policy sets in motion, in an unbroken sequence, the events that cause the ultimate loss, even though the last “immediate cause” in the chain of causation is an excluded cause.<sup>102</sup> For

<sup>97</sup> *Id.* at 834-35. *Bruener*, however, was subsequently overruled in *Graham v. Pub. Employees Mut. Ins. Co.*, 656 P.2d 1077, 1081 (Wash. 1983) which adopted the proximate cause rule.

<sup>98</sup> *See, e.g.*, *State Farm Mut. Ins. Co. v. Partridge*, 109 Cal. Rptr. 811, 815-16 (1973); *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 684-85 (Colo. 1989).

<sup>99</sup> 635 F.2d 1051 (2d Cir. 1980) (applying New York law).

<sup>100</sup> *Id.* at 1054-55 (citations omitted). *See also* *John Dreenon & Sons v. N.H. Ins. Co.*, 637 S.W. 339, 341 (Mo. Ct. App. 1982) (similar holding).

<sup>101</sup> *See, e.g.*, *TNT Speed & Sport Ctr. Inc. v. Am. States Ins. Co.*, 114 F.3d 731, 733 (8th Cir. 1997) (applying Missouri law); *Assurance Co. of Am. v. Jay-Mar, Inc.* 38 F. Supp. 2d 349, 353-54 (D.N.J. 1999); *State Farm Mut. Auto Ins. Co. v. Roberts*, 697 A.2d 667 (Vt. 1997). *See generally* STEMPER, *supra* note 8, §7.02. Professor Stempel characterizes these two inquiries as: (1) the cause nearest the loss; and (2) the dominant cause of the loss. *Id.* § 7-5.

<sup>102</sup> *See, e.g.*, *Graham*, 656 P.2d at 1081 (Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not

example, in the case of *Safeco Insurance Co. v. Hirschmann*,<sup>103</sup> wind and rain caused a mudslide, resulting in extensive damage to the policyholder's property. The court held that there was coverage, although damage from mudslides was excluded under the policy, because "where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss."<sup>104</sup>

Which is the better-reasoned rule: the *immediate cause* rule or the *proximate cause* rule?

Clearly, the "immediate cause" rule cannot be applied in all circumstances, especially when it is unfair and contrary to the intent of the contracting parties. On the other hand, the "efficient" or "dominant" proximate cause rule should not be applied to insurance coverage disputes when the initial cause in the causal chain of events is too remote. The better reasoned view, therefore, in order to validate the reasonable expectations of the contracting parties, and following the well-reasoned precedents found in the *Bird*, *Blaine Richards*, and *Hirschmann* cases, would be to permit a court to apply *either* the "immediate cause" rule *or* the "efficient" or "dominant" proximate cause rule according to which rule would provide coverage in a particular insurance contract dispute, especially if there was policy language that was arguably ambiguous.<sup>105</sup>

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necessarily the last act in a chain of events); *John Drennon & Sons Co.*, 637 S.W.2d at 341 (The direct cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event and without which the event would not have occurred. "Direct" as used in an insurance policy relates to causal connection and is to be interpreted as the immediate or proximate cause as distinguished from the remote cause. A cause is proximate if it is the efficient cause which sets in motion the chain of circumstances leading up to the damage, and which is a natural, continuous sequence, unbroken by a new and independent cause, produced the damage. The product of two or more concurrent and contributing causes is the direct result of each, although neither is the sole cause.).

<sup>103</sup> 760 P.2d 969 (Wash. Ct. App. 1988).

<sup>104</sup> *Id.* at 972-73.

<sup>105</sup> *See, e.g.*, *Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co.*, 881 P.2d 201, 206 (Wash. 1994). *See also* WINDT, *supra* note 95, at 623:

[W]hether a court applies the immediate cause rule [or the "efficient" or "dominant" proximate cause rule] might depend upon whether one is considering a "cause" that would exclude coverage or one that would create coverage. If the policy language is ambiguous, a court should adopt the immediate cause rule when the rule would serve to render an exclusion inapplicable, even though the court would apply [the "efficient" or "dominant" proximate cause rule] when applying a policy provision extending coverage.

*And see* STEMPER, *supra* note 101, at 7-9:

The common thread running through these decisions appears to be one in which courts are more attracted to a strict proximity [or "immediate cause"] rule and focus on the cause physically nearest the loss (the last event in the causal chain) where this benefits the policyholder in a coverage dispute, either by bringing the claim within the scope of the policy, or avoiding the potential application of an exclusion. Conversely, where the causes physically closest to the loss are uncovered, courts will implicitly or expressly use ["efficient" or "dominant" proximate cause] analysis to find a more remote but covered peril to constitute the "efficient proximate cause" of the loss. Not surprisingly, the tendency is more pronounced where the potentially excluding policy language is arguably ambiguous.

### C. Multiple Concurrent Causation Issues

American courts have utilized three different approaches with insurance causation disputes involving multiple concurrent causation. On one extreme, some courts still apply the *traditional minority approach* which tends to restrict coverage in most concurrent causation situations. Under this traditional minority approach, if a covered cause combines with an excluded cause to produce a loss, then the insured cannot recover under the policy based on the underlying rationale that an insurer should not be held responsible for any loss caused by an excluded peril.<sup>106</sup> The weakness of this traditional approach, however, is that the reasonable expectations of the insured to coverage – even under a “common insured in the marketplace” standard<sup>107</sup> – are easily frustrated and abrogated.

On the other extreme, some courts have adopted the so-called *California approach*, holding that when loss occurs through the concurrence of covered and excluded risks, the insurer would be liable for the entire loss so long as at least one of the covered risks was a proximate cause of the loss.<sup>108</sup> The advantage of this liberalized California approach, at least for the insured policyholder, is that when various causes combine to produce an insured loss, a “dominant” or “predominant” cause need *not* be shown – only a minimally “sufficient” proximate cause. The major disadvantage of this liberalized concurrent causation rule, however, is that the insurer probably never intended to provide such broad coverage under its policy and, not surprisingly, a number of commentators in insurance defense journals have savagely attacked this so-called California approach.<sup>109</sup> Subsequently, the California Supreme Court under then-Chief Justice Malcolm Lucas’ more formalistic contractual

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<sup>106</sup> See, e.g., *Lydick v. Ins. Co. of N. Am.*, 187 N.W.2d 602, 605 (Neb. 1971) (holding that this “general rule” is if a covered hazard combines with a hazard expressly excluded from the policy coverage to produce a loss, the insured may not recover); *Graff v. Farmer’s Home Ins. Co.*, 317 N.W.2d 741 (Neb. 1982) (similar holding).

<sup>107</sup> See *supra* note 87 and accompanying text. See also *Dixon v. Gunter*, 636 S.W.2d 437, 441 (Tenn. Ct. App. 1982); *Barber v. Old Republic Life Ins. Co.*, 647 P.2d 1200, 1202 (Ariz. Ct. App. 1982) (both stating that an insurance contract should be given a fair and reasonable construction consonant with the plain intention of the parties, a construction that would be given to the contract by “an ordinary intelligent business man” or “an average layperson who is untrained in either law or insurance”).

<sup>108</sup> See, e.g., *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir. 1982) (applying California law); *Sabella v. Wisler*, 27 Cal. Rptr. 689 (Cal. 1963); *State Farm Mut. Auto Ins. Co. v. Partridge*, 109 Cal. Rptr. 811 (Cal. 1973). See also *Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156 (Ill. 1983); *Henning Nelso Const. Co. v. Firemen’s Fund*, 361 N.W.2d 446 (Minn. Ct. App. 1985); *Vormelker v. Oleksinski*, 199 N.W.2d 287 (Mich. Ct. App. 1972); *Benke v. Mukwonago Vernon Mut. Ins. Co.*, 329 N.W.2d 243 (Wis. 1982).

<sup>109</sup> See, e.g., *Bragg, supra* note 68; *Houser & Kent, supra* note 68; *Litsey, supra* note 68; *Houser, supra* note 68; *Wurefel & Koop, supra* note 68.

These commentators make a careful distinction between *property insurance* concurrent causation issues (i.e. *Sabella*) and *liability insurance* concurrent causation issues (i.e. *Partridge*). In *Sabella*, the insureds sought coverage under their homeowners policy, and they also brought a tort action against the contractor who built their house on inadequately compacted land fill. The court held under the property insurance claim, that the settling exclusion in the homeowners policy did not preclude liability because a leaking pipe was the proximate cause of the loss, not the settling. In the tort action, the *Sabella* court held that the insureds could also recover against the contractor due to his negligent construction.

approach to insurance coverage disputes,<sup>110</sup> has repudiated this so-called “California approach” in favor of requiring a “dominant” or “predominant” causal nexus involving issues of concurrent causation.<sup>111</sup>

The more realistic and better reasoned approach to concurrent causation, in order to validate both the insurer’s contractual rights and obligations as well as the insured’s reasonable expectation of coverage, is to require the finding of a covered *dominant* or *predominant cause* in any concurrent causation controversy. Under this “middle ground” concurrent causation approach, which is the prevailing rule in a majority of jurisdictions today, if multiple concurrent causes exist, and if the dominant or predominant cause is a covered peril, then coverage would exist for the entire loss, even though other concurrent causes are not covered under the policy.<sup>112</sup> If neither cause is dominant, loss will

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In *Partridge*, no first-party policy was involved. It was a personal liability case, involving an automobile, brought by a passenger against the driver. The passenger was injured when the insured driver negligently drove off a paved highway while pursuing a rabbit, and a .357 Magnum pistol which the insured had filed down so the pistol would have a “hair trigger,” went off injuring the passenger. The driver sought liability coverage under both his automobile insurance policy, which covered injuries arising out of the “use” of the automobile, and his homeowners policy, which explicitly excluded injuries arising out of the “use” of the automobile. Neither the negligent driving nor the “hair trigger” alone would have caused the injury. The California Supreme Court in *Partridge* opined:

[T]he “efficient cause” language is not very helpful, for here both causes were independent of each other: the firing of the trigger did not “cause” the careless driving, nor vice versa. Both, however, caused the injury. In traditional tort jargon, both are concurrent proximate causes of the accident, the negligent driving constituting an intervening, but non-superceding, cause of the accident.

Although there may be some question whether either of the two causes in the instant case can be properly characterized as the “prime,” “moving,” or “efficient” cause of the accident, we believe that coverage *under a liability insurance policy* is available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries. That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act.

*Partridge*, 514 P.2d at 130-31 n.10 (emphasis added). See generally Houser & Kent, *supra* note 68, at 575-83.

<sup>110</sup> See, e.g., Bill Blum, *The California Supreme Court: Toward a Radical Middle*, 77 A.B.A. J. 48 (Jan. 1991):

[T]he court has expressed a preference for deferring policy judgments affecting important social issues and commercial relationships to legislative decision making. Some court watchers see this as a healthy return to the proper role of the court as an interpreter, rather than a maker of law. Others . . . think the court is too deferential . . . “In the area of the common law,” says former Justice Grodin, I think the [Lucas court’s] conservatism is reflected in the notion that it is unwise to expand liability, that liability on the whole should be contracted, that contract principles should be applied strictly and without regard, or with very little regard, for differences in bargaining power between the parties, and in the tendency toward the insistence upon clear, bright lines and rules. *Id.* at 50

<sup>111</sup> See, e.g., *Garvey v. State Farm Fire & Cas. Co.*, 257 Cal. Rptr. 292 (1989); *State Farm Fire & Cas. Co. v. Von der Leith*, 2 Cal. Rptr. 2d 183 (1991).

Property insurance companies also began adding additional exclusions for third party contractor negligence (and other third party negligence) into their policies that had become contentious issues in these prior coverage disputes. See generally Houser & Kent, *supra* note 68; Litsey, *supra* note 68; Houser, *supra* note 68.

<sup>112</sup> See, e.g., *Goodman v. Fireman’s Fund Ins. Co.*, 600 F.2d 1040 (4th Cir. 1979) (applying Maryland law); *Ovbevy v. Cont’l Ins. Co.*, 613 F. Supp. 726 (N.D. Ga. 1985), *aff’d*, 728 F.2d 178 (11th Cir. 1986); *Von der Leith*, 2 Cal. Rptr. 2d 183; *Hahn v. MFA Ins. Co.*, 616 S.W.2d

probably be attributed to the cause that would result in coverage.<sup>113</sup> For example, in *Shirone, Inc. v. Insurance Co. of North America*,<sup>114</sup> the insured's cattle were killed during a violent storm that produced high winds, damp snow, and muddy field conditions. The insurance policy insured livestock against death by windstorm, but did not provide coverage for any loss caused by "dampness of the atmosphere or extremes of temperature." Expert witnesses testified that the cattle died due to a combination of concurrent causes, including wind, cold temperature, snow, muddy conditions, lack of adequate wind protection, and the size and age of the cattle. The jury found that the windstorm was the dominant, efficient, and proximate cause of the loss, notwithstanding the contributions of the other noncovered factors, and this jury verdict was affirmed on appeal.<sup>115</sup>

This middle ground "dominant" or "predominant" concurrent causation approach therefore is justified, not only because it honors the reasonable expectation of the policyholder to coverage and disallows the insurer any unconscionable advantage, but it is also justified based on the rationale of liberally resolving any ambiguities regarding coverage in favor of the insured, and strictly construing such ambiguities against the insurer.<sup>116</sup>

#### D. Establishing a "Substantial" or "Sufficient" Causal Nexus

Even though a majority of courts arguably apply a "dominant" or "predominant" proximate cause approach to concurrent causation disputes in an insurance law context,<sup>117</sup> one commentator notes that the major problem with this proximate cause approach is that "courts have applied the concept inconsistently by giving different meanings to various aspects of the concept at different times" as to what is a "substantial cause" and what is not.<sup>118</sup> Ultimately, he concedes that courts and juries must rely on "common sense and reasonable judgment" to identify what constitutes a "substantial" cause of the loss. As Professor Prosser eloquently notes, it is a decision "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."<sup>119</sup> Another commentator, however, has questioned whether these traditional proximate cause definitions are now an "empty concept":

Today it is difficult to remember how intellectually isolated the legal profession was when Prosser did his earlier work. Law professors and lawyers had nowhere near the

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574 (Mo. Ct. App. 1981); *Grace v. Litiz Mut. Ins. Co.*, 257 So. 2d 217 (Miss. 1972); *Yunker v. Republic-Franklin Ins. Co.*, 442 N.E.2d 108 (Ohio Ct. App. 1982); *King v. N. River Ins. Co.*, 297 S.E.2d 637 (S.C. 1982).

<sup>113</sup> See, e.g., *Aetna Cas. & Sur. Co. v. Lumbermens Mut. Cas. Co.*, 527 N.Y.S.2d 143, 145 (App. Div. 1988); *Wasecu Mut. Ins. Co. v. Noska*, 331 N.W.2d 917, 920-23 (Minn. 1983).

<sup>114</sup> 570 F.2d 715 (8th Cir. 1978) (applying Iowa law).

<sup>115</sup> *Id.*

<sup>116</sup> See generally ROBERT JERRY II, UNDERSTANDING INSURANCE LAW § 67 (2d ed. 1996); ROBERT KEETON & ALAN WIDISS, INSURANCE LAW §5.5 (1988); William Lasher, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982).

<sup>117</sup> See *supra* notes 112-16 and accompanying text.

<sup>118</sup> See Litsey, *supra* note 68, at 436-37.

<sup>119</sup> *Id.* (citing PROSSER ON TORTS § 41, at 237 (4th ed. 1971)).

kind of contact with other professionals as they do today.<sup>120</sup> This was by no means always a bad thing, but it obscured to some extent the complexities of judicial reasoning.

Prosser's rather in-grown analysis no longer suffices in today's more complicated legal world. Any updated analysis of proximate cause must take into account: (a) the substantial increase in statutory-based actions; (b) the growth of class actions in politically charged cases such as those involving guns and cigarettes; (c) the increasing judicial skepticism toward both "junk science" and doubtful expert testimony in general; and (d) the judicial favoritism for insureds in coverage cases involving causation issues . . . .

Judges who stretch causation rules in insurance coverage litigation also can be said to be playing with institutional reform, in the sense that they rewrite insurance contracts in obeisance to an idealized contract formation process that never existed. For these judges, ambiguity rules have at times become post-hoc equalizers of bargaining power. The implicit assumption in such decisions is that, while private parties are properly delegated the right to make their own contract law, the process must be fair, or, if not fair, it must be sanitized after the fact. Contract language spelling out causation requirements often is a focus of such interventions.<sup>121</sup>

However, whether a judge is a legal formalist<sup>122</sup> or a legal functionalist<sup>123</sup> in interpreting insurance coverage disputes, *both* jurisprudential schools still

<sup>120</sup> Maybe so, but Mr. Haley might have overlooked the fact that Mr. Prosser was a successful trial lawyer in Minnesota before he became an esteemed academic lawyer.

<sup>121</sup> Haley, *supra* note 68, at 149-50.

<sup>122</sup> Legal Formalism, also known as Legal Positivism, is the traditional view that correct legal decisions are determined by pre-existing judicial and legislative precedent, and the rule of law is viewed as a complete, autonomous system of logical, socially-neutral principles, and rules. Judging under this formalistic theory is thus a matter of logical necessity rather than a matter of choice. See, e.g., MARIO JORI, *LEGAL POSITIVISM* (1992). See also Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (discussing how Legal Formalism still serves a legitimate function today in limiting judicial discretion and judicial activism).

In an insurance law context, Legal Formalism is best exemplified by the seminal writings and major influence of Professor Samuel Williston relating to American contract law in general, and American insurance law in particular. The bedrock principle underlying Williston's formalistic view of insurance contract interpretation is that an insurance policy must be construed and enforced according to general principles of contract law, and courts therefore are not at liberty to reinterpret or modify the terms of a clearly written and unambiguous insurance policy, but must look at the "plain meaning" of the insurance contract. 2 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 6:3 (4th ed. 1998). See generally Swisher, *supra* note 90, at 748-52.

<sup>123</sup> Legal Functionalism, also known as Legal Realism, is based on the belief that the Formalist theory of a logical and socially neutral legal framework is rarely attainable, and may be undesirable in a changing society, and the paramount concern of the law should not be logical consistency, but socially desirable consequences. Thus, where Legal Formalism is more logically-based and precedent-oriented, Legal Functionalism is more sociologically-based and result-oriented. See, e.g., WILIFRED E. RUMBLE JR., *AMERICAN LEGAL REALISM* (1968); GARY AICHELE, *LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE* (1990).

In an insurance law context, Legal Functionalism is best exemplified by the seminal writings and major influence of Professor Arthur Corbin relating to American contract law in general and American insurance law in particular. Professor Corbin was a major critic of Professor Williston's "plain meaning" analysis of insurance contracts. According to Profes-

agree that if an insurance contract *is* deemed to be unfair to the parties, then a judge *does* have the right and the power to address this situation through a number of well-recognized contractual remedies,<sup>124</sup> and through causation principles as well. Accordingly, courts and juries have agonized over many years and in many insurance coverage disputes as to how “substantial” or “sufficient” this causal nexus needs to be, but there does not appear to be any overarching rule in answer to this basic question. For example, in fire and property insurance coverage disputes, the courts are split as to whether or not damage by heat, smoke, or soot would come within fire insurance coverage as a “direct loss”<sup>125</sup> caused by fire.<sup>126</sup> While some courts interpret a “direct loss” caused by fire to require actual ignition, burning, or charring,<sup>127</sup> the better reasoned “reasonable expectation” rule is to allow recovery for smoke and soot damage as a sufficient causal nexus to constitute a “direct loss” caused by fire.

A second example involving fire and property insurance involves a number of cases where coverage is provided for any loss “by explosion” even though there is a policy exclusion for “water damage.”<sup>128</sup> Again, it would be up to the court and trier of fact to determine in each particular case which of these concurrent causes were “dominant” or “predominant,” and whether or not a sufficient causal nexus had in fact been established.<sup>129</sup>

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sor Corbin, “[t]he main purpose of contract law is the realization of the reasonable expectations” of the contracting parties, and there is “no single rule of interpretation of language, and there are no rules of interpretation taken all together, that will infallibly lead to the one correct understanding and meaning.” 1 CORBIN ON CONTRACTS § 1:1, at 535 (1993 rev. ed.). See generally Swisher, *supra* note 90, at 753-58.

<sup>124</sup> See, e.g., Swisher, *supra* note 90, at 755:

Accordingly, Professor Corbin – like Professor Williston – was not willing to reject a number of well-established rules of contract interpretation in pursuit of his more functional and contextual approach to contract law, and Professor Corbin – like Professor Williston – therefore continued to recognize a large number of traditional interpretive rules of contract interpretation to help ascertain the parties’ reasonable expectation to coverage including: contract ambiguity and the doctrine of *contra proferentem*; contract unconscionability and public policy issues; and equitable remedies such as waiver, equitable estoppel, promissory estoppel, election, and reformation of contract. A fair reading of both *Williston on Contracts* and *Corbin on Contracts* therefore suggest that there are far more similarities than differences in their respective approaches to contract law in general, and insurance coverage disputes in particular.

<sup>125</sup> Proximate cause in the construction of an insurance policy is generally synonymous with “direct cause,” and “efficient” cause generally means the “dominant” or “predominant” cause. See Simon, *supra* note 68, at 36.

<sup>126</sup> See generally A.M. Vann, Annotation, *Loss by Heat, Smoke, or Soot Without External Ignition As Within A Standard Fire Insurance Policy*, 17 A.L.R.3d 1155 (1968).

<sup>127</sup> See, e.g., Wash. State Hop Producers Inc. v. Harbor Ins. Co., 660 P.2d 768 (Wash. Ct. App. 1983) (holding that there was no evidence of any flame or glow to constitute a “direct loss by fire” when 253 bales of hops stored in plaintiff’s warehouse were damaged by “browning”).

<sup>128</sup> See generally L.S. Tellier, Annotation, *Coverage of Clause of Fire Policy Insuring Against Explosion*, 28 A.L.R.2d 995 (1953) and Later Case Service.

<sup>129</sup> See, e.g., Chicago, R.I. & P.R. Co. v. Aetna Ins. Co., 308 P.2d 119 (Kan. 1957) (holding that where concrete sides of a grain elevator disintegrated due to flood waters which caused the grain to expand and gases to form causing an explosion, damage was caused by an “explosion” within the policy terms, rather than coming under the “water damage” exclusion); Hartford Fire Ins. Co. v. Bulch, 350 P.2d 514 (Okla. 1960) (holding that where water damage resulted from a hot water system, and the break in a copper water pipe resulted from

Automobile liability insurance coverage disputes likewise frequently involve the determination of a causal nexus from a loss "arising out of the ownership, maintenance, or use" of an automobile or another insured vehicle. Although some earlier courts applied a very restrictive interpretation of the word "use" of an automobile to mean the actual "operation" of the vehicle,<sup>130</sup> a majority of courts today have held that the "use" of an automobile is *not* necessarily synonymous with "driving" or "operating" the vehicle, and it is sufficient to show only that the accident "was connected with," "grew out of," or "flowed from" the "use" of the automobile.<sup>131</sup>

The courts are split, however, as to whether a "substantial" causal nexus involving the "use" of the automobile is required, or only a minimal or "sufficient" causal nexus is required in order to honor the insured's reasonable expectation of coverage.<sup>132</sup> For example, some courts have held that when a plaintiff is injured as a result of an object thrown from an automobile, only a minimal or "sufficient" causal nexus is required to find coverage, such as an egg thrown from the window of a moving automobile which struck and injured a pedestrian in California,<sup>133</sup> or a beer mug thrown from a moving vehicle that struck and killed a pedestrian in Florida.<sup>134</sup> Other courts, however, have required a more substantial causal nexus between the thrown object and the "use" of the vehicle. For example, no causal nexus was found between throwing a bottle from the rear of a pickup truck in South Carolina and the "use" of that vehicle,<sup>135</sup> or throwing a firecracker from the rear of an automobile in

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excessive temperature and pressure, the damage was due to an "explosion" rather than from "water damage"). *Query*: would the result in either case have been different if the court had utilized: (1) an "immediate cause" test; or (2) an "efficient" proximate cause test?

<sup>130</sup> See, e.g., *Kienstra v. Madison County Mut. Auto. Ins. Co.*, 44 N.E.2d 944 (Ill. Ct. App. 1942) (defining "use" as the "operation" of the vehicle).

<sup>131</sup> See, e.g., *Unigard Mut. Ins. Co. v. Abbott*, 732 F.2d 1414 (9th Cir. 1984) (applying Montana law); *State Farm Mut. Ins. Co. v. Smith*, 691 P.2d 1289 (Idaho Ct. App. 1984). See generally Larry D. Schaefer, Annotation, *Automobile Liability Insurance: What Are Accidents or Injuries "Arising Out of Ownership, Maintenance, or Use" of an Insured Vehicle*, 15 A.L.R.4th 10 (1982); George Sayers, *Coverage Problems Relating to the Policy Term "Arising Out of the Use" of a Vehicle*, 36 INS. COUNSEL J. 253 (1969).

<sup>132</sup> Compare *Lumbermen's Mut. Cas. Co. v. Logan*, 451 N.Y.S.2d 804 (App. Div. 1982) (holding that an automobile insurer was not liable to its insured for an accident "arising out of the ownership, maintenance, or use" of the automobile when the injury resulted from the insured's fall in an icy automobile parking lot) with *Novak v. Gov't Employees Ins. Co.*, 424 So. 2d 178 (Fla. Dist. Ct. App. 1983) (holding that an insured was covered for loss "arising out of the ownership, maintenance, and use" of her automobile when she was shot in her driveway after refusing an assailant's request to give him a ride in her car).

<sup>133</sup> See, e.g., *Nat'l. Am. Ins. Co. v. Ins. Co. of N. Am.*, 140 Cal. Rptr. 828 (Ct. App. 1977) (holding that a sufficient causal connection had been established when a teenage boy threw an egg from the window of a moving automobile, which struck a pedestrian in the eye, and the injury was exacerbated by the automobile's forty m.p.h. speed).

<sup>134</sup> See, e.g., *Valdes v. Smalley*, 303 So. 2d 342 (Fla. Dist. Ct. App. 1974), *cert. denied*, 341 So. 2d 975 (Fla. 1974). See also *Westchester Fire Ins. Co. v. Cont'l Ins. Co.*, 312 A.2d 664 (N.J. Super. 1973), *aff'd*, 319 A.2d 732 (N.J. 1974) (stick thrown from a moving vehicle struck and injured a bicyclist).

<sup>135</sup> See, e.g., *Gov't Employees Ins. Co. v. Melton*, 357 F. Supp. 416 (S.C. 1972) (applying South Carolina law), *aff'd*, 473 F.2d 909 (4th Cir. 1973).

Michigan.<sup>136</sup> Still other courts have held that if the vehicle is moving, and the speed of the vehicle contributes to the impact of the thrown object (and consequently to the extent of the injury), then there would be a sufficient causal nexus with the “use” of the vehicle and the injury.<sup>137</sup> However, if an object thrown from an automobile is “inherently dangerous” in itself, such as an M-80 explosive firework device, then there would *not* be a sufficient causal nexus between the injury and the “use” of the vehicle.<sup>138</sup> This same causal conundrum is illustrated in a number of cases discussing whether or not the accidental discharge of a firearm in an automobile constitutes the “use” of that vehicle. Not surprisingly, the courts are split on this causal issue as well.<sup>139</sup>

*So query:* is this causation conundrum between a “substantial” and a “sufficient” causal nexus in insurance coverage disputes only one more example of the continuing jurisprudential “battle” between legal formalists<sup>140</sup> and legal functionalists<sup>141</sup> for the “heart and soul” of insurance contract law?<sup>142</sup> Perhaps

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<sup>136</sup> See, e.g., *Richland Knox Mut. Ins. Co. v. Kallen*, 376 F.2d 360 (6th Cir. 1967) (applying Michigan law). See also *Mazon v. Farmers Ins. Exch.*, 491 P.2d 455 (Ariz. 1971) (no causal connection was found between a stone thrown by an unknown person in an unidentified car and the “ownership, maintenance, or use” of that vehicle).

<sup>137</sup> See, e.g., *Nat'l Am. Ins. Co.*, 140 Cal. Rptr. 828.

<sup>138</sup> See, e.g., *Farm Bureau Ins. Co. v. Evans*, 637 P.2d 491, 494 (Kan. 1981) (M-80 firecracker thrown from the back seat of a station wagon landed in a glass of beer held by the plaintiff and exploded, causing serious injuries).

<sup>139</sup> Compare *S.E. Fid. Ins. Co. v. Stevens*, 236 S.E.2d 550 (Ga. Ct. App. 1977) and *Fid. & Cas. Co. v. Lott*, 273 F.2d 55 (5th Cir. 1950) (applying Texas law) (both finding coverage) with *U.S. Fid. & Guar. Co. v. W. Fire Ins. Co.*, 450 S.W.2d 491 (Ky. 1970) and *State Farm Mut. Auto. Ins. Co. v. Centennial Ins. Co.*, 543 P.2d 645 (Wash. Ct. App. 1975) (both finding no coverage). See generally Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 625-29 (1996).

<sup>140</sup> See note 122 *supra* and accompanying text.

<sup>141</sup> See note 123 *supra* and accompanying text.

<sup>142</sup> See, e.g., *Robert Jerry II*, *supra* note 88, at 55-56:

On one side are the formalists or classicists, whose champions are Professor Williston and the first *Restatement of Contracts*. The formalists care mightily about texts and the four corners of documents. They believe that words often have a plain meaning that exists independently of any sense in which the speaker or writer may intend the words. They insist that a court or a party can discern the meaning of contractual language without asking about the intentions or expectations of the parties. They contend that interpretation is appropriate only if an ambiguity appears on the face of the document, which means that the parties by their own testimony about what they intended or expected cannot create an ambiguity where none exists . . . . In the world of the formalists, an insurer that drafts a clear form should be entitled to rely on that form in setting rates without worrying that a court will disregard the finely tuned, clear language . . . .

The other contestants in the battle for the soul of contract law are the functionalists, who are sometimes also labeled as the progressives, the realists, or the post-classicists. The champions of this side are Professor Corbin and the *Restatement (Second) of Contracts*. The functionalists care less about the text of contracts, believing it to be most useful as an articulation of the objective manifestations of the contracting parties and as a means to understanding their intentions and expectations . . . . Text does not have inherent meaning, but text means what the drafter or speaker knows or should know the other side will understand those words to mean in context . . . . Where a form is standardized, the functionalists substitute objectively reasonable expectations for whatever the particular recipient of the form understood, given that the recipient has less reason to know what the drafter means, while the drafter has insights into what the ordinary, reasonable recipient of the form is likely to understand.

in part. But since *Bird v. St. Paul Fire & Marine Insurance Co.*,<sup>143</sup> most courts and commentators now agree that the underlying causation rationale for insurance coverage disputes is *not* solely based on the objective tort concept of foreseeable harm, but also is interpreted according to the *reasonable expectations of the contracting parties*.<sup>144</sup> Accordingly, whether this “reasonable expectations” test is contractually-based<sup>145</sup> or whether it is based on a Keetonian “rights at variance with the policy language” rationale,<sup>146</sup> when justice and equity so requires, courts ought to be able to recognize *either* a “substantial” or a “sufficient” causal nexus test in insurance coverage disputes, and therefore,

[j]udges in jurisdictions that continue to recognize a pro-Williston “plain meaning” approach to insurance contract disputes, as well as judges in jurisdictions that have adopted a more pro-Corbin functionalistic approach to insurance contract disputes, are both still able to “do justice and equity” in recognizing and validating the reasonable expectations of the parties to coverage. . . .<sup>147</sup>

### E. Coverage for Acts “Expected or Intended” by the Insured

Since insurance normally is intended to cover only accidental or unintended losses, any losses that are intentionally caused by an insured generally are *not* covered in property insurance<sup>148</sup> and liability insurance<sup>149</sup> policies. Likewise, in life, health, and accident insurance policies, an “accidental” death

*Id.* See also Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1039-58 (1991).

<sup>143</sup> See *supra* notes 77- 94 and accompanying text.

<sup>144</sup> See *supra* notes 87-88 and accompanying text.

<sup>145</sup> See *supra* notes 89-90 and accompanying text.

<sup>146</sup> See *supra* note 91 and accompanying text.

<sup>147</sup> Swisher, *supra* note 90, at 757-58. In many cases, a “dominant” and “substantial” causal nexus may be required, but not always. For example, an underlying public policy rationale for automobile liability insurance is to secure compensation for third party victims of highway accidents. See KEETON & WIDISS, *supra* note 116, at 385-86. Accordingly, many courts in automobile insurance coverage disputes tend to apply a minimal or “sufficient” causal nexus requirement. See *supra* notes 132-39 and accompanying text. As Benjamin Cardozo reminds us:

One of the most fundamental social interests is that law shall be uniform and impartial . . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness . . . .

BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921).

<sup>148</sup> See, e.g., *Neises v. Solomon State Bank*, 696 P.2d 372 (Kan. 1985); *St. Paul Fire & Marine Ins. Co. v. Cuminsky*, 665 P.2d 223 (Mont. 1983). See also JERRY, *supra* note 116, § 63A at 384:

If the insured intentionally causes damage to his or her own property, the loss is not covered. The public policy supporting this exclusion is identical to that which supports the insurable interest requirement. Insureds should not receive coverage for destroying their own property. Otherwise, insureds would have an incentive in many instances to destroy their property and collect the proceeds.

*Id.*

And see Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand By You?*, 68 TENN. L. REV. 1 (2000) (arguing that courts expanding bases of liability against family members should interpret homeowners’ insurance policies liberally in order to achieve a coextensive tort-insurance compensation regime and validate the reasonable expectations of insureds to coverage).

generally is defined as a death that is not expected or intended from the viewpoint of the insured.<sup>150</sup> But how have the courts interpreted such loss that is not “expected or intended” from the standpoint of the insured?

In life and accident insurance policies, a confusing and highly technical insurance law doctrine purportedly attempted to distinguish between “accidental means” – which is interpreted as synonymous with “cause” – and “accidental results.”<sup>151</sup> This highly confusing and overly technical legalistic distinction between “accidental means” and “accidental results” was criticized by Justice Benjamin Cardozo in his famous dissent in *Landress v. Phoenix Mutual Insurance Co.*<sup>152</sup> as creating an unwarranted “Serbonian Bog”<sup>153</sup> for the unwary and unsophisticated insured, and the vast majority of courts and commentators over time also have repudiated this archaic and overly-technical legal distinction.<sup>154</sup> And yet, as Professor Adam Scales cautions,

<sup>149</sup> See, e.g., KEETON & WIDISS, *supra* note 116, at 493, 518-33 (“Losses which are intentionally caused by an insured generally are not covered by liability insurance.”). See also James L. Rigelhaupt, Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R.4th 957 (1984); Kimberly J. Winbush, Annotation, *Validity, Construction, and Effect of Assault and Battery Exclusion in Liability Insurance Policy at Issue*, 44 A.L.R.5th 91 (1996).

<sup>150</sup> See, e.g., Scales, *supra* note 87, at 245 (“Because accident insurers did not intend to indemnify against intentional harms . . . they responded by drafting exclusions against intentionally inflicted injuries.”) See also Witt, *supra* note 21, at 690. In the absence of an express statutory or contractual definition, the word “accident” or “accidental” used in life, health, and accident insurance policies generally is given its ordinary and popular meaning as something that happens suddenly or unexpectedly without any intentional design on the part of the insured or the person injured. See generally 10 COUCH, CYCLOPEDIA OF INSURANCE LAW §41:7-8 (Mark S. Rhodes ed., rev. 2d ed. 1984).

<sup>151</sup> See, e.g., *Linder v. Prudential Ins. Co.*, 250 S.E.2d 662, 665 (N.C. Ct. App. 1979). See generally Rothman, *The Meaning of the “Accidental Means” Clause in Accident Insurance Policies*, 48 INS. COUNS. J. 231 (1981); Annotation, *Insurance: “Accidental Means” as Distinguished from “Accident,” “Accidental Result,” “Accidental Death,” “Accidental Injury,” Etc.*, 166 A.L.R. 469 (1947).

<sup>152</sup> 291 U.S. 491 (1934) (dissenting opinion). The issue in *Landress* was whether or not the insured, who died of sunstroke during a golf game, was covered under the “accidental death” provision in his life insurance policy. See also Kristine Karnezis, Annotation, *Heart Attack Following Exertion or Exercise as Within Terms of Accident Provision of Insurance Policy*, 1 A.L.R.4th 1319 (1980).

<sup>153</sup> See, e.g., *Equitable Life Assurance Soc’y of the U.S. v. Hemenover*, 67 P.2d 80, 81 (Colo. 1937) (“Whatever kind of a bog that is, we concur”). Milton describes the Serbonian Bog as “betwixt Damiata and Mount Casius [in Egypt]” “where [Pharaoh’s] Armies [and Fallen Angels] have sunk.” JOHN MILTON, *PARADISE LOST*, Book II 46 (Merritt Hughes ed., 1962). Some courts have argued that Cardozo’s Serbonian Bog is still with us today:

The “Serbonian Bog” is not the distinction between means and results; it is rather the entire field of accident law. As long as we cannot control historical facts or ignore the language of contracts, we will be forced to slough through the bog. The necessity of that march will not be avoided by saying, as Justice Cardozo would have us do, that the word, “means,” is equivalent to another, “cause.”

*Gordon v. Metro. Life Ins. Co.*, 260 A.2d 338, 340 (Md. 1970).

<sup>154</sup> See, e.g., *Burr v. Commercial Travelers Mut. Accident Ass’n*, 67 N.E.2d 248, 251-52 (N.Y. 1946) (“Legal scholars have spent much effort in attempts to evolve a sound theory of causation and to explain the nature of an ‘accident’ . . . . Our guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract such as we have here . . . . In this State there is no longer any distinction made between

the victory is illusory. Litigation does not seem to have slowed in the wake of Cardozo's ascendancy. Courts rejecting the distinction in the name of policyholder expectations or conceptual clarity have not found resolving accidental death claims any easier. This is not surprising. Merely rejecting "means" in favor of "results" leaves unanswered the question of what is accidental – a persistent conundrum not easily answered simply by posing it in a slightly different way.<sup>155</sup>

Part of this "persistent conundrum" is the fact that the courts are widely split regarding what constitutes an "accidental" death in life, health, and accident insurance policies. On one hand, a number of courts employ an *objective* or "classic tort" doctrine that if an injury or death was reasonably foreseeable as a natural consequence of an intentional act, then it could *not* be accidental.<sup>156</sup> Other courts, however, have adopted a more liberal *subjective* definition of what constitutes an "accidental" death, holding that when a particular insured commits a voluntary act, not intending to cause himself harm, this act would constitute an accidental death within the terms of the policy coverage.<sup>157</sup>

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accidental death and death by accidental means, nor between accidental means and accidental results.").

*See also* Scales, *supra* note 87, at 266:

This repudiation [of the accidental-means-accidental result distinction] has received essentially unanimous approval, or at least acceptance, from commentators unaffiliated with the insurance industry. It has been expressly endorsed by the National Association of Insurance Commissioners, which in 1974 recommended that policies be interpreted consistent with "accidental results" language, regardless of the use of "accidental means" language. Moreover, this principle has been implemented by statute and regulation in several states. Since the 1940s, courts have shown a definite trend toward abolishing the distinction, relying explicitly on Cardozo's dissent . . . it appears that the pro-Cardozo forces have recently achieved majority status at the state level and have firmly conquered federal courts developing the common law of ERISA. Finally, in a sign of capitulation, for several decades insurers have been slowly removing "accidental means" language from their policies, referring instead simply to "accidents" or recursively-defined coverage triggers like "accidental bodily injury."

<sup>155</sup> *Id.* at 267.

<sup>156</sup> Courts applying this "classic tort" approach tend to look at the insured's voluntary acts from an objective "reasonable insured" viewpoint. *See, e.g.,* Jones v. Fireman's Fund Am. Life Ins. Co., 731 S.W.2d 532 (Tenn. Ct. App. 1986) (holding that there was no accidental death by a handgun during an ensuing struggle since the death was a foreseeable consequence of a deliberate act when the husband aimed the pistol at his wife's head); Nicholas v. Providential Life & Accident Ins. Co., 457 S.W.2d 536 (Tenn. Ct. App. 1970) (playing "Russian roulette" with a loaded pistol does not constitute an accidental death since the consequences of the insured's act are foreseeable). *See also* Wooden v. John Hancock Life Ins. Co., 139 S.E.2d 801 (Va. 1965) (holding that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act or misconduct, or if the insured provokes an act which causes death or injury, it is not an accidental death, even though the result may be accident). *Cf.* Cockrell v. Life Ins. Co., 692 F.2d 1164 (8th Cir. 1982) (applying Arkansas law) (pointing out that Arkansas state courts have declined to adopt the "classic tort" concept that one intends the natural and foreseeable consequence of one's deliberate acts so as to bar recovery for unintended results).

<sup>157</sup> Courts applying this approach tend to look upon the insured's voluntary acts from a subjective "particular insured" viewpoint. *See, e.g.,* N.Y. Life Ins. Co. v. Harrington, 299 F.2d 803 (9th Cir. 1962) (applying California law) (The insured shot and killed himself by placing a loaded gun to his temple and pulling the trigger, mistakenly thinking that the safety catch was engaged. The court ruled his death was accidental); Knight v. Metro. Life Ins. Co., 437 P.2d 416 (Ariz. 1968) (The insured died after a voluntary dive from atop the Coolidge Dam in Arizona, a height of more than 139 feet. He had previously made dives from heights of 25, 40, 50, and 75 feet from diving boards, ship decks, rocky ledges, and box canyons,

In practice, however, these two interpretive approaches are difficult to apply.<sup>158</sup>

One rather bizarre example of this interpretive conundrum of what constitutes an “accidental” death is found in a number of life insurance coverage disputes brought by the beneficiaries of insureds who died as a result of intentionally “hanging” themselves in order to create an asphyxial state for an allegedly heightened autoerotic experience.<sup>159</sup> Not surprisingly, a number of courts that utilize an objective “classic tort” analysis for determining what a “reasonable insured” would do, have held that these intentional acts on the part of the insured would *not* constitute an “accidental” death since death was a foreseeable consequence of the insured’s intentional act of self-induced asphyxiation.<sup>160</sup> Other courts, however, employing a subjective “particular insured” standard, have held that even though the insured committed voluntary autoerotic asphyxiation, he did not intend to ultimately kill himself by hanging, and therefore this *would* constitute an “accidental” death.<sup>161</sup>

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and he stated (correctly) that the Coolidge Dam venture would be his last dive. The court ruled the insured’s death was accidental). *But see* Scales, *supra* note 87, at 241: “Yet hard cases make bad law, and the focus of the insured’s subjective expectations created a doctrinal instability from which accident insurance has never recovered.”

<sup>158</sup> Compare *Bias v. Advantage Int’l Inc.*, 905 F.2d 1558 (D.C. Cir. 1990) (applying D.C. law) (holding that an insurance agent was not liable for failing to procure insurance coverage on basketball star Len Bias, since Bias’s death from cocaine intoxication was a foreseeable consequence of a deliberate act and *not* an accidental death), *cert. denied*, 498 U.S. 958 (1990) with *Marsh v. Metro. Life Ins. Co.*, 388 N.E.2d 1121 (Ill. Ct. App. 1979) (holding that an insured’s death by a self-administered overdose of heroin was an accidental death). See generally Jay M. Zitter, Annotation, *Death or Injury From Taking Illegal Drugs or Narcotics as Accidental or the Result of Accidental Means Within Insurance Coverage*, 32 A.L.R.5th 629 (1995).

<sup>159</sup> Autoerotic asphyxiation is a practice that involves self-induced choking to heighten sexual pleasure during masturbation, and apparently there are hundreds of these atypical “accidental death” cases each year. See, e.g., Alan Stevens, Annotation, *Accident or Life Insurance: Death by Autoerotic Asphyxiation as Accidental*, 62 A.L.R.4th 823 (1988); COUCH, *supra* note 150, §41:16; Jane Uva, *Autoerotic Asphyxiation in the United States*, 40 J. FORENSIC SCI. 574 (1995).

<sup>160</sup> See, e.g., *Sigler v. Mut. Life Ins. Co.*, 663 F.2d 49 (8th Cir. 1981) (applying Iowa law) (holding that since a reasonable person would have recognized that an insured’s act of “hanging” himself to create an asphyxial state for a heightened masturbating experience could have resulted in death, this was not an accident, and recovery was barred under the policy exclusion for intentional acts). See also *Int’l Underwriters Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981) (applying Virginia law) (similar holding); *Runge v. Metro. Life Ins. Co.*, 537 F.2d 1157 (4th Cir. 1976) (applying Virginia law) (similar holding); *Sims v. Monumental Gen. Ins. Co.*, 960 F.2d 478 (5th Cir. 1992) (denying coverage under the policy’s intentional injury exclusion).

<sup>161</sup> See, e.g., *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Ct. Civ. App. 1981) (holding that, based upon the testimony of two physicians, the insured’s death by autoerotic asphyxiation was unforeseeable and unintended, and therefore the insured’s death was an accidental death); *Kennedy v. Wash. Nat’l Ins. Co.*, 401 N.W.2d 842 (Wis. 1987) (holding that the insured, an orthopedic surgeon, knew of the medical risks of asphyxiation, and although his conduct was bizarre and unusual, his death nevertheless was unintended and accidental); *Todd v. AIG Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995) (finding that death by autoerotic asphyxiation in a ERISA coverage dispute was not “highly likely to occur” and thus was accidental). *But see contra Int’l Underwriters*, 662 F.2d 1084 (holding that even though the insured, a civil engineer, constructed a “fail safe” device to prevent autoerotic

Is there any viable way to resolve this interpretive conundrum on what constitutes, or should constitute, an “accidental” death? The First Circuit Court of Appeals employed a very persuasive and realistic interpretive approach in the case of *Wickman v. Northwestern National Insurance Co.*<sup>162</sup> where the court attempted to apply federal common law under ERISA. The facts in this particular case were that the insured, Wickman, fell from a railroad bridge forty to fifty feet above the railroad tracks. Before his fall, a witness said he saw Wickman standing on the outside of the bridge’s guard rail, holding on to it with only his right hand. When asked in the hospital emergency room, before he died, what had happened, Wickman replied, “I jumped off.”<sup>163</sup> Wickman’s accidental death and dismemberment insurance policy specifically provided that benefits would *not* be paid “for loss directly or indirectly caused by suicide” or “intentionally self-inflicted injury” whether the insured was sane or insane.<sup>164</sup> The lower court magistrate held, and the appellate court affirmed, that there were only three possible explanations for Wickman’s actions: (1) he intended to commit suicide; (2) he intended to seriously injure himself; or (3) having so positioned himself on the bridge, he inadvertently or mistakenly fell.<sup>165</sup> Under the first two scenarios, the policy would have excluded coverage.

The *Wickman* court then had to devise a test that, following Justice Cardozo’s dissent in the *Landress* case,<sup>166</sup> rejected the archaic and hyper technical accidental-means accidental-result distinction, yet could not permit the “insured’s subjective, yet unreasonably optimistic” expectation of coverage.<sup>167</sup> The *Wickman* court selected the “reasonable expectations of the insured” as a starting point of its analysis. The court then articulated a three-step process. First, the trier of fact is to determine *what the insured’s subjective expectation was*, i.e., whether the insured actually “expected an injury similar in type or kind to that suffered.” If not, the second question was whether *the insured’s expectations were reasonable*, taking into account the *particular insured’s personal characteristics and experiences*. And third, if the trier of fact is unable to determine what the insured’s actual subjective expectations were, then an *objective “reasonable insured” standard* is required.<sup>168</sup>

“In practice,” observes Professor Adam Scales, “*Wickman*’s [widely influential] three step test has been collapsed into the quasi-objective inquiry contained in step three. Courts invariably bottom conclusions as to coverage upon a determination of what someone like the insured would have expected to result from [his or her] assertedly accidental conduct.”<sup>169</sup> Other courts, however, have interpreted *Wickman* to preclude coverage only when death or serious

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asphyxiation that unfortunately malfunctioned, the insured’s death was not an accident, since it still was a foreseeable consequence of the insured’s deliberate act).

<sup>162</sup> 908 F.2d 1077 (1st Cir. 1990). This case involved an employee’s accidental death and dismemberment insurance coverage as part of a ERISA plan under 29 U.S.C. § 1101 *et seq.*

<sup>163</sup> *Id.* at 1080.

<sup>164</sup> *Id.* at 1084.

<sup>165</sup> *Id.* at 1083.

<sup>166</sup> See *supra* notes 152-54 and accompanying text.

<sup>167</sup> See generally Scales, *supra* note 87, at 294-96.

<sup>168</sup> *Wickman*, 908 F.2d at 1088-89.

<sup>169</sup> Scales, *supra* note 87, at 296.

injury is "highly likely to occur."<sup>170</sup> In conclusion, the three-step *Wickman* analysis for determining whether an insured's death is "accidental" or not, however imperfect it may be, nevertheless brings back some interpretive objectivity (or quasi-objectivity) in order to try and determine the intent of an insured who, being dead, cannot assist the trier of fact in this rather difficult task, rather than totally relying on an often specious and unsupportable subjective test of what a particular insured *might* have intended.

There is also a great deal of litigation in liability insurance coverage disputes regarding whether or not an insured's actions resulting in bodily injury or property damage were "expected or intended from the standpoint of the insured."<sup>171</sup> Paralleling interpretive disputes involving accident insurance,<sup>172</sup> American courts are also split in liability insurance coverage disputes on how to characterize an insured's intentional acts. A number of courts continue to apply the "classic tort" doctrine of looking to the natural and probable consequences of the insured's intentional act. Thus, where an intentional act by the insured results in personal injuries or property damage which are a natural and foreseeable result of that act, then such injuries or property damage are deemed to be intentional for purposes of the intentional injury exclusionary clause (i.e. acts that are "expected or intended" from the standpoint of the insured) in liability insurance policies.<sup>173</sup>

A number of other courts, however, have specifically *rejected* this "classic tort" doctrine, and hold instead that the insured must have had the intent to cause the *specific type of harm or injury* suffered by the third party plaintiff in order to come under the intentional injury exclusionary clause in a liability

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<sup>170</sup> See, e.g., *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1455-56 (5th Cir. 1995) (applying *Wickman* to find coverage in an autoerotic asphyxiation case since death or serious injury was not "highly likely to occur"). *But query*: couldn't a trier of fact in autoerotic asphyxiation cases, applying a quasi-objective "reasonable insured" standard under *Wickman*, also find that death was "highly likely to occur?" See *supra* note 160 and accompanying text.

<sup>171</sup> For example, contemporary liability insurance policies often state that insurance is provided for damages that are caused by an "occurrence" which is defined as an "accident" that "results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured*" (emphasis added). See generally 11 COUCH, CYCLOPEDIA OF INSURANCE LAW § 44:285 (Mark S. Rhodes ed., rev. 2d ed. 1984); KEETON & WIDISS, *supra* note 117, § 5.4(d); James L. Rigelhaupt Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by the Insured*, 31 A.L.R.4th 957 (1984).

<sup>172</sup> See *supra* notes 156-57 and accompanying text.

<sup>173</sup> See, e.g., *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297 (Colo. Ct. App. 1998) (holding that injury resulting from the insured tape-recording a sexual encounter and playing that tape to third parties was foreseeable as a matter of law, and thus was within a homeowners' insurance policy intentional acts exclusion since the results of the insured's intentional acts were reasonably foreseeable, even if the insured did not intend to harm his sexual partner); *Erie Ins. Group v. Buckner*, 489 S.E.2d 901 (N.C. App. 1997) (Under Virginia law, the "expected or intended" injury exclusion in a homeowners' policy barred liability insurance coverage for the insured when he struck the plaintiff in the forehead with his fist. The insured should have expected that injury was likely to occur, even if he did not actually intend to injure the third party plaintiff). See also *Cas. Reciprocal Exch. v. Thomas*, 647 P.2d 1361 (Kan. Ct. App. 1982); *N.W. Nat'l Cas. Co. v. Phalen*, 597 P.2d 720 (Mont. 1979); *Vittum v. N.H. Ins. Co.*, 369 A.2d 184 (N.H. 1977); *Argonaut S.W. Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973); *Utica Mut. Ins. Co. v. Traveler's Indem. Co.* 286 S.E.2d 225 (Va. 1982).

insurance policy.<sup>174</sup> Moreover, the courts have applied one of three different approaches to interpret coverage-or exclusion from coverage-for sexual assault or molestation “intentionally caused” or “expected or intended” by the insured. One approach is that the intentional acts exclusion would not apply unless the insured subjectively intended to cause the specific injury.<sup>175</sup> Other courts have applied an objective “classic tort” test for determining what constitutes intentional sexual assault.<sup>176</sup> Still other courts have ruled that in sexual assault and molestation cases, the insured’s intent to cause injury will be inferred from the act as a matter of law,<sup>177</sup> especially when the victim of such sexual assault or molestation is a minor.<sup>178</sup>

Which is the better reasoned interpretive approach for determining whether or not an insured comes under an intentional acts exclusion in liability insurance coverage disputes? On one hand, it can be argued from a persuasive line of precedential authority beginning with Cardozo’s decision in the *Bird* case,<sup>179</sup> that the reasonable expectations of the contracting parties should be utilized rather than applying a “classic tort” foreseeability rule,<sup>180</sup> and therefore the *particular insured’s* subjective intent to cause *specific harm* should be recognized and applied.<sup>181</sup>

On the other hand, when an intentional acts exclusionary provision is clearly and unambiguously written into a liability insurance contract, why shouldn’t the objective intent and the reasonable expectations of a *reasonable insured* to cause *foreseeable harm* not be taken into account?<sup>182</sup> Perhaps the three-step quasi-objective analysis utilized by the *Wickman* court in accident insurance disputes<sup>183</sup> might be applied as well to liability insurance disputes. But realistically, how many insured defendants will admit in court under oath, “well, yes, when I hit the plaintiff upside the head, I really *did* intend to put him in a coma and kill him.” Not very many.

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<sup>174</sup> See, e.g., *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1187 (Idaho 1986) (for an “intentional acts” exclusion to operate, an insurer must be able to show that its insured acted for the purpose of causing a specific injury to a person or property, which resulted. It is not sufficient that the insured’s intentional act, however wrongful, resulted in unintended harm; it is the harm itself that must be intended before the exclusion will apply); *Vt. Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417 (S.C. 1994) (Under South Carolina law, the application of an intentional act exclusion in a homeowners’ policy requires a two-prong analysis: (1) whether the act causing the loss was intentional; and (2) whether the results of the act were intended by the insured). See also *Allstate Ins. Co. v. Sparks*, 493 A.2d 1110 (Md. Ct. App. 1985); *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885 (Minn. 1978); *Oakes v. State Farm Fire & Cas. Co.*, 349 A.2d 102 (N.J. Super. 1975); *Tri-State Ins. Co. v. Bollinger*, 476 N.W.2d 697 (S.D. 1991); *Pachucki v. Republic Ins. Co.*, 278 N.W.2d 898 (Wis. 1979).

<sup>175</sup> See, e.g., *Farmers Ins. Group v. Sessions*, 607 P.2d 422 (Idaho 1980); *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 442 N.Y.S.2d 422 (1981).

<sup>176</sup> See, e.g., *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689 (Ark. 1984).

<sup>177</sup> See, e.g., *Linebaugh v. Berdisch*, 376 N.W.2d 400 (Mich. Ct. App. 1985).

<sup>178</sup> See, e.g., *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815 (D. Alaska 1987); *Allstate Ins. Co. v. Mugavero*, 581 N.Y.S.2d 142 (1992).

<sup>179</sup> See generally *supra* notes 77-94 and accompanying text.

<sup>180</sup> See *supra* notes 87-88 and accompanying text.

<sup>181</sup> See *supra* notes 174-75 and accompanying text.

<sup>182</sup> See *supra* notes 173 and 176 and accompanying text.

<sup>183</sup> See *supra* notes 162-70 and accompanying text.

Since, generally speaking, intentional acts will bar coverage under most property and liability insurance policies,<sup>184</sup> competent policyholder attorneys will often characterize insurable losses in their pleadings *not* in terms of willful or intentional acts by the insured that arguably would be excluded from coverage, but in terms of gross negligence or recklessness on the part of the insured that may be covered.<sup>185</sup>

Finally, a number of courts have held that an “intentional” act does not always bar recovery in various liability insurance coverage disputes. For example, although many courts still interpret accidental and intentional conduct in liability insurance coverage disputes from the standpoint of the insured,<sup>186</sup> a number of other courts, in order to broaden liability insurance coverage to protect injured third-party plaintiffs, also have interpreted accidental or intentional conduct from the viewpoint of the injured party.<sup>187</sup> Thus, in various liability insurance coverage disputes, creative policyholder attorneys, and courts have found coverage when the insured: intentionally shot and wounded another person;<sup>188</sup> assaulted and injured another person with a motor vehicle;<sup>189</sup> and intentionally polluted the environment.<sup>190</sup>

The underlying rationale for this judicial approach expanding liability insurance coverage for acts “expected or intended” by the insured is based on three interrelated factors: (1) that an exclusionary clause for intentional injury in a liability insurance policy is “inherently ambiguous”;<sup>191</sup> (2) that the words “expected” and “intended” are not synonymous for purposes of construing an intentional injury exclusion provision in a liability insurance policy;<sup>192</sup> and (3)

<sup>184</sup> See *supra* notes 148-49 and accompanying text.

<sup>185</sup> See, e.g., W. E. Shipley, Annotation, *Liability Insurance as Covering Accident Injury Due to Wanton or Willful Misconduct or Gross Negligence*, 20 A.L.R.3d 320 (1968).

<sup>186</sup> See, e.g., *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157 (Ill. Ct. App. 1980); *Great Nat'l Ins. Co. v. Legg*, 444 S.W.2d 324 (Tex. Ct. Civ. App. 1969).

<sup>187</sup> See, e.g., *Haser v. Md. Cas. Co.*, 53 N.W.2d 508 (N.D. 1952); *Fox Wis. Corp. v. Century Indem. Co.*, 263 N.W. 567 (Wis. 1935). See generally KEETON & WIDISS, *supra* note 116, at 510-13, 518-44.

<sup>188</sup> See, e.g., *Vanguard Ins. Co. v. Cantrell*, 503 P.2d 962 (Ariz. Ct. App. 1972); *Colonial Penn Ins. Co. v. Hart*, 291 S.E.2d 410 (Ga. Ct. App. 1982); *State Farm Fire & Cas. Co. v. Muth*, 207 N.W.2d 364 (Neb. 1973). But see *contra* *Armstrong v. Sec. Ins. Co.*, 288 So. 2d 134 (Ala. 1973); *Draffen v. Allstate Ins. Co.*, 407 So. 2d 1063 (Fla. Dist. Ct. App. 1981); *Bay State Ins. Co. v. Wilson*, 451 N.E.2d 880 (Ill. 1983).

<sup>189</sup> See, e.g., *Ind. Lumbermen's Mut. Ins. Co. v. Brandum*, 419 N.E.2d 246 (Ind. Ct. App. 1981); *Cincinnati Ins. Co. v. Mosley*, 322 N.E.2d 693 (Ohio Ct. App. 1974); *Peterson v. W. Cas. & Sur. Co.*, 93 N.W.2d 433 (Wis. 1958). But see *contra* *Boyd v. Great Century Ins. Co.*, 401 So. 2d 19 (Ala. 1981); *Wigginton v. Lumbermen's Mut. Cas. Co.*, 169 So. 2d 170 (La. Ct. App. 1964); *Dochood v. Cent. Mut. Ins. Co.*, 264 N.W.2d 122 (Mich. Ct. App. 1978).  
<sup>190</sup> See, e.g., *Steyer v. Westvaco Corp.*, 450 F. Supp. 384 (D. Md. 1978); *Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prod. Corp.*, 256 F. Supp. 145 (D. Or. 1966). But see *contra* *Ashland Oil Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (5th Cir. 1982) (applying Louisiana law).

<sup>191</sup> See, e.g., *Farmers Ins. Group v. Sessions*, 607 P.2d 422 (Idaho 1980); *Home Ins. Co. v. Neilsen*, 332 N.E.2d 240 (Ind. Ct. App. 1975); *N. Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983 (6th Cir. 1997) (applying Michigan law). But see *contra* *Lockhart v. Allstate Ins. Co.*, 579 P.2d 1120 (Ariz. Ct. App. 1978); *Talley v. MFA Mut. Ins. Co.*, 620 S.W.2d 260 (Ark. 1981); *Allstate Ins. Co. v. Miller*, 575 N.W.2d 11 (Mich. Ct. App. 1997).

<sup>192</sup> See, e.g., *Bay State Ins. Co. v. Wilson*, 451 N.E.2d 880 (Ill. 1983); *N.W. Nat'l Cas. Co. v. Phalen*, 597 P.2d 720 (Mont. 1979). But see *contra* *Patrons Oxford Mut. Ins. Co. v.*

that the “classic tort” doctrine of looking at the foreseeable consequences of an insured’s intentional acts<sup>193</sup> is not appropriate in a liability insurance context since an insured must have had the specific intent to cause the specific type of injuries suffered.<sup>194</sup>

#### IV. CONCLUSION

Since most research in the field of legal causation primarily has occurred in the context of tort law, and since insurance law has been defined as somewhat of a hybrid between tort and contract, many American courts traditionally have applied “classic tort” causation principles to insurance coverage disputes as well. Beginning with Benjamin Cardozo’s landmark decision in *Bird v. St. Paul Fire & Marine Insurance Co.*, however, a growing number of American courts have begun to recognize that while most insurance cases still require direct “but for” causation similar to tort law, nevertheless insurance proximate cause issues are *not* primarily based on a foreseeability of harm, but rather upon the reasonable expectations of the contracting parties. Accordingly, over the past eight decades, American courts have struggled mightily to analyze and resolve various insurance causation issues from a number of very different perspectives.

Some courts determine coverage by applying an “immediate cause” rationale, while other courts employ an “efficient” proximate cause “chain of events” doctrine similar to tort law, or utilize a hybrid approach combining both these rules. The courts likewise have employed no less than three different insurance law approaches to address multiple concurrent causation issues, and they have disagreed on whether an “efficient” proximate cause approach to concurrent causation requires a “substantial” causal nexus or only a “sufficient” causal nexus. Finally, the courts have split dramatically on how to determine whether an insured loss is “accidental” or “intentional.” Some courts continue to apply a traditional “classic tort” doctrine which looks at the natural and foreseeable consequences of the insured’s acts from the standpoint of an objective “reasonable insured.” Other courts, however, have expressly rejected this “classic tort” doctrine, and instead view an insured’s acts from the subjective viewpoint of a “particular insured” in order to determine the insured’s “reasonable expectation” of coverage.

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Dodge, 426 A.2d 888 (Maine 1981); *Poston v. U.S. Fid. & Guar. Co.*, 320 N.W.2d 9 (Wis. Ct. App. 1982).

<sup>193</sup> See *supra* note 173 and accompanying text. The insurance industry recently has taken steps to clarify this interpretive conundrum. For example, the 1999 Homeowners 3 sample policy from the Insurance Services Office provides the following exclusion under Coverage E for “Expected or Intended Injury”:

“Bodily Injury” or “property damage” which is expected or intended by an “insured” even if the resulting “bodily injury” or “property damage”:

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity, real or personal property, than initially expected or intended.

However, this Exclusion . . . does not apply to “bodily injury” resulting from the use of reasonable force by an “insured” to protect persons or property.

<sup>194</sup> See *supra* note 174 and accompanying text. See generally Rigelhaupt, *supra* note 149; Swisher, *supra* note 139, at 630-34. But see *contra supra* note 193.

Regardless of which particular standard a court may employ in its attempt to resolve insurance causation issues – and there are many divergent approaches – these interpretive rules must still be sufficiently malleable and flexible when applied to differing circumstances and conditions to validate the reasonable expectations of the contracting parties, however that concept ultimately is determined by a court or a trier of fact. In both tort law and insurance law, then, “common sense and reasonable judgment” ultimately must resolve most of these causation issues, and it still arguably remains “a matter upon which any layman is quite as competent to sit in judgment as the most experienced court.”<sup>195</sup>

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<sup>195</sup> See *supra* notes 100 and 119 and accompanying text.