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2 **Non-Legal Definitions**

Proximate – adj., from the Latin "proximus," meaning nearest, next, or near

Proximate – adj., meaning closest in space or time, or approximate. Oxford English Dictionary

Proximate - adj., meaning immediately preceding or very near. Merriam-Webster Dictionary

3 **Earliest Use of Proximate Cause**

- The term "proximate cause" began appearing in English common law very early – the exact origin date and source are unknown. Courts did not, however, provide any uniform definition (or much explanation), for the term.
- 1596, Sir Francis Bacon published "Maxims of the Law." Synthesized English case law and concluded that the law only considers an act or event a "legal" or "proximate" cause of an occurrence if it is the nearest cause. "*In jure non remota causa sed proxima spectator*," or "in law, one looks to the near cause, not the remote one."
- In other words, according to Bacon, "it were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of the acts by that, without looking to any further degree."
- In other words, there could be only one proximate cause of an event under Bacon's view of the law.

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1687 - Sir Isaac Newton published his tome, "Philosphiae: Naturalis Principia Mathematica." This addressed the idea, mathematically, as to what might be considered the cause of an event. According to Newton, the only act that can be considered the actual cause of an event is the initial act – the kinetic energy that sets the events in motion.

Seizing on Newton's theory, a different line of cases began to define "proximate cause" as that cause which set the events in motion, culminating in the effect in issue. Like Bacon, though, only one act -- the initial precipitating act – could be considered the "legal" cause of an event.

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1841, doctrine of only one cause began to erode.

Lynch v. Nurdin, 113 Eng. Rep. 1041 (Q.B. 1841), owner who negligently left horse cart unattended in an area where children were known to play held liable for harm to a boy who fell off the cart when another boy started the horse: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third... the sufferer might have redress against both or either of the two, but unquestionably against the latter."

In 1847, New York court held that a man who chased a boy through the street and into the plaintiff's shop was a proximate cause of damage caused to a wine cask in the store when the running boy knocked off the faucet. Even though "the injury was not the necessary consequence of the wrong done by the defendant... the wrong was of such a nature that it might very naturally result in an injury to some third person." *Vandenburgh v. Truax,* 4 Denio 464 (N.Y. 1847).

6 **Three closely interrelated concepts evolve:**

- Can there be two or more legal causes of an event?
  - Short answer: Yes, so long as it can be said that "but for" each act, the event would not have occurred.
- If so, what degree of relationship between the act and the resulting occurrence is necessary before the former can be recognized as a legal cause of the latter?
  - Short answer: Foreseeability of the consequence as a result of the act.
- If foreseeability is the key, is it a necessary element of legal recognition of a duty or a necessary element to establish proximate cause?
  - Short answer: Depends on whose ox is being gored.
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"But for" causation + foreseeability at crux of expansion of "proximate cause" definition.

Two schools of thought developed:

(a) Foreseeability is an element of duty, which must be decided by the court; and

(b) Foreseeability is an element of causation, which must be decided by the jury.

Key case: *Palsgraf v. Long Island RR,* 248 NY 339 (1928). Two boys running for a train; railroad employee aboard reached out to help. Boy dropped a small non-descript package on the tracks. Fireworks inside the package exploded, causing a scale some distance away to fall, striking and injuring the plaintiff. Plaintiff sued the railroad for employee's negligence in pulling the boy on the train. Jury found for the plaintiff, with no limitation on foreseeability as to cause on this charge:

> "If they omitted to do the things which prudent and careful trainmen do for the safety of those who are boarding their trains, as well as the safety of those who are standing upon the platform waiting for other trains, and that the failure resulted in the plaintiff's injury, then the defendant would be liable."

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Palsgraf majority, Cardozo, J., held that foreseeability is an element of duty. Here, risk to uninvolved passenger of helping boy on the train was not was not foreseeable risk, therefore no duty to avoid. "The risk reasonably to be perceived defines the duty to be obeyed."

Dissent by Andrews, J., saw foreseeability as an element of proximate cause: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. [The actor is liable to anyone who is foreseeably injured], even if he be outside what would generally be thought the danger zone.... But there is one limitation.

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• *Palsgraf,* Andrews *dissent* (cont.):

"The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former...."
"The proximate cause... must be, at the least, something without which the event would not happen."
"The court must ask itself whether there was a natural and continuous sequence between cause and effect."
"Was the one a substantial factor in producing the other?"
"Was there a direct connection between them, without too many intervening causes?"
"Is the effect of cause on result not too attentuated?"
"Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen?"
"Is the result too remote from the cause, and here we consider remoteness in time and space."
Andrews would have affirmed, based on the failure of the defense to request a foreseeability instruction in the charge.
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10 **Age of Enlightenment in Texas begins. Court recognizes duty to prevent as potential proximate cause, despite absence of act setting kinetic energy in motion**

H & T.C. Ry. Co. v. Sympkins, 54 Tex. 615 (1881).
Issue arose in context of contributory negligence bar to recovery. Plaintiff hit while negligently standing on a railway track is barred from recovery because the plaintiff's act is "too direct" a cause of his own injury, meaning that the engineer's negligence in failing to stop is too remote an event to be a proximate cause as a matter of law.

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However, if the plaintiff went on the track at a time when no danger was imminent and through no fault of his own thus became "insensible" and incapable of removing himself from the tracks, the engineer's negligence in failing to prevent the harm became the direct cause and the plaintiff's act too remote to be considered a proximate cause because a "providential dispensation" broke the causal connection between the plaintiff's act and her injury.
It is solely for the jury to determine whether the plaintiff was drunk when laying on the tracks or had a fit, and whether engineer negligently failed to stop.

12 **Texas recognizes concurrent cause doctrine**

Markham v. Houston Direct Nav. Co., 11 S.W. 131 (Tex. 1889)
Pleasure passenger aboard a tugboat injured when tug ran against a rope stretched at night across the bayou without lights. Sues company who left rope -- defends on basis that they gave verbal warnings to tugboat crew, who ignored same. Accordingly, claimed their negligence in putting rope across bayou was not a proximate cause of the injury.
Verdict for the defense, on charge that: ""If the testimony satisfies you that defendant's employees hailed said tug and notified those on board of it of the danger in time to have prevented the accident, then you will find for defendant."

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Markam (cont.). Court holds:

"If both the defendant and the managers of the tug were negligent she could have maintained a joint action against both, and by proving that both were negligent could have recovered against both. In that case either defendant could have successfully defended only by proof that it was not negligent at all. But proof by either that notwithstanding its own negligence no injury to plaintiff's wife would have resulted if the other had not been guilty of concurring negligence would have been no defense to either.

"A jury may be able to say, and under the evidence in a given case it may become proper for them to say by their verdict, that hailing with the human voice a steam tug in motion from the bank of a navigable stream to prevent it from running upon an unseen obstruction on a dark night is equivalent to and dispenses with the use of a warning light. It was not proper to so declare in this case as matter of law."

14 **Mid 1980's, Texas recognizes foreseeability as light burden on plaintiff to demonstrate duty, jury fact determination on question of foreseeability as element of proximate cause**

Nixon v. Mr. Prop. Mgmt., 690 S.W.2d 546 (Tex. 1985), held it was reasonable for trial court to interpret a city ordinance requiring locks on vacant apartments as designed to protect the general public from criminal acts in unlocked apartments, thus satisfying foreseeability element of duty as a matter of law.

Existence of prior violent crimes occurring in and around apartment complex were sufficient to create fact issue as to whether defendant's violation of ordinance was a proximate cause of the plaintiff's assault.

15 **Age of enlightenment takes a big step forward....**

El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987).

Texas first dramshop case. Court held foreseeability of injury to third parties from intoxicated patron, combined with statutory duty not to serve intoxicated persons, sufficient to recognize duty to general public as a mater of law.

On proximate cause, defense contended act of intoxicated driver getting behind the wheel destroyed causal connection as a matter of law. Court held: "The determination of proximate cause and intervening cause in cases involving a licensee's liability for knowingly serving alcohol to an intoxicated patron rests with the jury, as in any other action grounded in negligence. Issues of concurrent causation are not outside the competence of our judicial system. While a jury may find a licensee's conduct is not the proximate cause of an injury, the inquiry should be made on a case-by-case basis, not a rule of law denying recovery in all cases."

16 **El Chico v. Poole (cont.)**

"The creation of new concepts of duty in tort is historically the province of the judiciary.... While as citizens we applaud the legislature's efforts to discourage and deter alcohol abuse and drunk driving, we as a court cannot cower from our obligation to recognize a legitimate cause of action grounded in negligence and based upon every person's duty to exercise reasonable care to avoid a foreseeable risk of injury to others. It is the duty of the courts of this state to resolve disputes between parties who invoke the authority of the judiciary. And since the "no liability"

rule is a judge-made rule of common law, we will not idly stand by and wring our hands at the unfairness which we ourselves have created.... When the ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred."

17 **The dark clouds gather....**

Lear Siegler, Inc. v. Perez, 819 S.W.2d 470 (Tex. 1991). Perez was driving a truck, towing an arrow sign behind him to warn traffic to move out of that lane. For unknown reasons, Perez stopped the truck and got out. Lerma, asleep at the wheel, ran into the sign, which in turn struck and ultimately killed Perez. Products liability/negligence claim brought against sign manufacturer, which sought MSJ on basis of no proximate cause as a matter of law.

Plaintiffs contended that Perez had to get out because sign was malfunctioning. Court of Appeals agreed fact issue existed as to whether but for sign failure accident would not have occurred and whether this injury was reasonably foreseeable consequence of defective sign. Supreme Court held did not matter. Even assuming the sign was defective, it was not a sufficiently substantial factor in causing the injury to be deemed a proximate cause as a matter of law.

18 **It gets even darker....**

Union Pump Co. v. Allbritton, 898 S.W.2d 793 (Tex. 1995). Fire at plant caused by a leaky pump. After fire extinguished, worker walked over wet pipe rack, slipped and fell. Sued pump manufacturer, principally under a negligence theory. Trial court granted MSJ on proximate cause issue, court of appeals reversed, holding that question of reasonable foreseeability of injury presented issue of fact for jury determination.

Texas Supreme Court reverses and renders, holding that: "Legal cause is not established if the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible."

Net result is that jury is not allowed to determine proximate cause, nor is court of appeals allowed to weigh the evidence supporting the jury verdict.

19 **Texas Supreme Court faces hurdle in further proximate cause constriction by Constitutional limitation**

- Texas Constitution gives final appellate jurisdiction to the courts of appeals over questions of fact. Tex. Const. art. 5 sec. 6.
- This means traditionally that if a jury determines a defendant's conduct or product was a proximate or producing cause of the event, only court of appeals can reverse and remand for finding that the verdict is against the "great weight and preponderance" of the evidence.
- This is an application of the court's equity jurisprudence, to prevent a miscarriage of justice.

20 **Texas Supreme Court rethinks *Nixon,* toughening foreseeability element on duty issue, and equating foreseeability in context of duty and proximate cause**

Mellon Mtg. Co. v. Holder, 5 S.W.3d 654 (Tex. 1999). Woman abducted by HPD officer, taken to unsecured garage at 3 a.m., and sexually assaulted. Sues garage owner. Evidence uncontradicted many prior instances of crimes of violence in garage against paid parkers. However, Supreme Court holds that not only must plaintiff show criminal act was foreseeable,

but new second element as well: that it was specifically foreseeable that this plaintiff, or someone in her class, was likely to be injured as a result. Here, foreseeable that employees using the garage might be assaulted, but not that someone might be assaulted after hours. Therefore, no duty as a matter of law.

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Plurality opinion, by Justice Abbott, examines the two *Palsgraf* opinions and states that the Cardozo approach – foreseeability as a legal issue on duty – is the one most followed.
Then concludes, however, that the two foreseeability tests are the same.
Result is that if the courts want to get rid of the case pre-emptively, they can affirm a summary judgment on duty as a matter of law if they find event not sufficiently foreseeable.
If case submitted to a jury that finds for the plaintiff, then Supreme Court can re-examine the finding by looking to whether there was a legal duty in the first place, disregarding jury's determination on foreseeability.

22 **Texas Supreme Court decides to judicially override Constitutional limitation on its jurisdiction**

- *City of Keller v. Wilson,* 168 S.W.3d 802 (Tex. 2005). The Texas Supreme Court ruled that there is no difference between a legal sufficiency and factual sufficiency review.
- While Justice Brister's reasoning is not illogical, it allows the Supreme Court appellate review jurisdiction over equitable factual determinations by court of appeals, in clear violation of Tex. Const. art. 5 sec. 6.

23 **So, the circumstantial evidence supports the inference found by the jury as to causation, the plaintiff should be okay. But wait....**

Not if, on appellate review, the appellate court determines that some inference other than the one found by the jury was equally likely based on "meager" circumstantial evidence. *Hammerly Oaks, Inc. v. Edwards,* 958 S.W.2d 387 (Tex. 1997).

24 **So, if the jury finds that the defendant's conduct was a substantial factor in causing the event in question, the plaintiff should be okay. But wait....**

Not if on appellate review the appellate court determines that the link between the defendant's conduct and the injury was "too attenuated" to constitute a "substantial factor" as a matter of law. *IHS Cedars Treatment Ctr. of DeSoto, Inc. v. Mason,* 143 S.W.3d 794 (Tex. 2004) (Negligent discharge of psychiatric patient too attenuated from injuries suffered in car accident when discharged patient went into psychotic rage behind wheel of Corvette).

25 **So, if an expert opines that the defendant's negligence was a substantial factor in causing the injury, the plaintiff should be okay. But wait....**

Not if an appellate court determines the opinion was "conclusory." *Ham v. Equity Res. Prop. Mgmt. Svcs. Corp.,* 315 S.W.3d 627 (Tex.App.-Dallas 2010, pet. denied) (security expert's testimony that extremely lax security measures failed to deter "risk averse" assailant from entering the property too conclusory because plaintiff could not prove assailant entered property specifically at area where security was lax).