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## CONCURRENT CAUSATION IN INSURANCE CONTRACTS

*William Conant Brewer, Jr.\**

### I. INTRODUCTION

**M**OST property and liability insurance contracts are classified by causation, and contain in their insuring clauses the words, "loss caused by . . ." or their equivalent. The phrase is deceptively simple. Within it lie a multitude of vexing legal and philosophical problems, not the least of which is the problem of concurrent causation.

When an insured cause joins with one or more additional causes, which may be uninsured or may be insured under a separate contract, concurrent causation can be said to exist. A dispute may then arise between the insurance carrier and the insured as to whether the damage was caused by an insured event or by an event which is either specifically excluded from coverage or simply not within the scope of the contract; or in the alternative, a dispute may arise between companies as to which of two insurance contracts applies.

To illustrate the first of these problems, assume that a factory which is surrounded by rising flood waters and devoid of normal fire protection catches fire and is destroyed. If the fire could have been easily extinguished in the absence of flood waters, shall an exclusion of flood damage in the insurance policy take precedence over the insurance of loss by fire? Or to illustrate the second problem, assume that a driver, blinded by a sudden fire in his car, collides with a tree and damages the vehicle. Shall the loss be covered by his fire policy or his collision policy?

A problem in concurrent causation assumes that at least two identifiable causes have been isolated and described for the court. At what point in time or circumstances does an event attain the

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The author is indebted to Professor Robert E. Keeton of Harvard Law School for reading an earlier draft of this article and making several valuable suggestions thereon, although the conclusions reached are of course the responsibility of the author. — *W.C.B.*

dignity of a cause? This is the problem of remoteness, and it is different from that of concurrent causation. If fire causes an explosion, and the concussion from the explosion damages property at a distance, can the fire be said to be a cause of the damage for the purposes of the litigation? If so, a selection might then have to be made between the fire and the explosion for insurance purposes, and a concurrent causation problem would exist. Both problems have been traditionally considered under the heading of proximate causation, but they are distinct. Proximate, in its accepted meaning of close or near, would be better suited to dealing with the problem of remoteness. It is to the difficulties presented by the need for selecting one of two or more established causes that this article is addressed.

Causation problems must also be distinguished from the numerous problems of definition and status which are encountered in insurance litigation. These problems place emphasis upon the identity of the insured interest, or the time or place in which the insurance shall be effective. They do not customarily deal with the characterization of those sudden and unexpected events which we have come to regard as causes, but rather inquire into the application of the contract to normal existing conditions. An electrical cable, for example, is damaged by external forces while disconnected from the source of electric energy. Is the loss insured under a policy which requires that it be connected and ready for use at the time the damage occurs? Or is the passenger on a commercial airline insured under a life policy which excludes death while engaged in aviation?

A great deal of work and thought has been devoted to concurrent causation problems in the field of torts. Less attention has been paid to the insurance cases, and no serious effort has been made to formulate the separate rules applicable to them. It is the thesis of this article that concurrent causation problems which arise under an insurance contract must be handled somewhat differently from those which arise in connection with tort litigation, and that the tendency to borrow rules of law from the larger tort field and apply them to the smaller volume of insurance cases can only retard the development of sound doctrine in the field of insurance law.

## II. A VOCABULARY OF CAUSATION

Philosophers, groping among intangibles, are apt to be as dissatisfied with existing vocabulary as with existing philosophers. A

common remedy is to create a new vocabulary of their own. So it has been with the courts and commentators who have sought to impose order on the elusive phenomena of causation.

Since the middle of the nineteenth century, the phrase "proximate cause" has dominated the vocabulary of legal causation.<sup>1</sup> For the most part it has been used to indicate that single cause to which legal consequences are attached, which need not be the most "proximate" in time or space.<sup>2</sup> From time to time it is said that there may be several proximate causes;<sup>3</sup> at least one court has said that the presence of an exclusion in an insurance policy meant that it was unnecessary to have a proximate cause at all.<sup>4</sup>

Synonyms and definitions which have been employed by the decided cases to clarify the meaning of proximate cause are legion. The most widely-quoted definition in the insurance cases is that set forth by the court in *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.*<sup>5</sup>

"The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases."

The elements of this statement — the active cause and the lack of an intervening force — are common to many definitions.

Where concurrent causes are involved, one finds a similar practice of introducing new adjectives to supply a definition without really clarifying the method of application. Substantial use is made of the word "efficient." An example is the well-known statement found in *Phillips on Insurance*: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster."<sup>6</sup>

<sup>1</sup> The Marine Insurance Act of 1906, codifying the existing law of England to that time, states at § 55 (1): "[T]he insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against." Marine Ins. Act, 1906, 6 Edw. 7, c. 41. A comparable provision appears in the California Insurance Code: "Proximate Cause. An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." CAL. INS. CODE § 530.

<sup>2</sup> *Insurance Company v. Boon*, 95 U.S. 117 (1877).

<sup>3</sup> *Votrian v. Quick*, 271 Ill. App. 259 (1933); *Sweet v. Perkins*, 196 N.Y. 482, 90 N.E. 50 (1909).

<sup>4</sup> *Newark Trust Co. v. Agricultural Ins. Co.*, 237 Fed. 788 (3d Cir. 1916).

<sup>5</sup> 158 Mass. 570, 575, 33 N.E. 690, 691 (1893).

<sup>6</sup> PHILLIPS, *INSURANCE* § 1132, p. 678 (5th ed. 1867).

As a result of differences in usage, there has been some desire to find a new terminology which would be free from the accretions of history. The word "actual"<sup>7</sup> has been suggested, while Lord Dunedin in *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc'y*<sup>8</sup> makes his selection by choosing "what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two." The *Restatement* uses the phrase "legal cause."<sup>9</sup> Whatever the terminology may be, three types of causes must be distinguished in any intelligible discussion of causation, and it will greatly facilitate such discussion if a separate word can be found for each.

In the first place, there are those causes in fact which are infinite in number and which, as we shall see, radiate in every direction from any given event. Such a cause may be passive, active, expected, unexpected or of any other nature, but in each case it is a physical prerequisite to the event in question, which would not have occurred "but for" the various causes in fact. This type of cause is important only because legal consequences will not flow from an event (with a few rare exceptions where two events are simultaneous and their consequences indivisible) unless it meets the test of being such a cause in fact.<sup>10</sup> For such a cause the phrase "actual cause" seems appropriate and will be used.

In the second place, there are often two or more actual causes of loss (the proper term in insurance cases) or damage (the proper term in tort cases), each of which has passed the test of remoteness, from which one cause with legal consequences must be chosen. This is the problem of concurrent causation. A generic word must be found to indicate the type of cause from which such a choice can legitimately be made. While there are various choices, the word "substantial" has the advantage of an excellent definition in the *Restatement of Torts*.<sup>11</sup> This is the best available phrase and will be used.

<sup>7</sup> *Brady v. Northwestern Ins. Co.*, 11 Mich. 425 (1863).

<sup>8</sup> 32 T.L.R. 569 (1916), *aff'd*, [1917] 1 K.B. 873 (C.A.), *aff'd* [1918] A.C. 350, 363.

<sup>9</sup> RESTATEMENT, TORTS § 431 (1934). See Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911).

<sup>10</sup> For this purpose Professor Carpenter uses both "actual cause" and "cause in fact." The groups of causes from which a single "proximate" or responsible cause can be chosen thus become "actual substantial causes" or "substantial causes in fact" in Professor Carpenter's words. Carpenter, *Proximate Causation*, 15 SO. CAL. L. REV. 187, 188-91 (1942). Compare Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956). Professors Hart and Honoré speak of "conditions" or "mere conditions," which constitute the normal causal framework of an event, and are distinguished from "causes," which are abnormal. HART & HONORÉ, CAUSATION IN THE LAW 30-41 (1959).

<sup>11</sup> RESTATEMENT, TORTS § 431, comment a (1934), states: "The word 'substantial' is

Finally, a word or phrase is needed to indicate that single substantial cause to which legal consequences attach in the context of the particular case. This is of course the sense in which proximate cause has frequently been used. Because of the confusion with questions of remoteness and other unfortunate historical associations, however, it seems best to make a clean start, and to use some term which is more descriptive of the true intent in concurrency cases. It is, furthermore, desirable to avoid the use of a phrase which, at least in its general meaning, is descriptive of the position of the cause in time or space. What is needed is a term which suggests a catalyst or trigger setting off the legal reaction. The phrase "responsible cause" is appropriate for this purpose. There is, of course, a suggestion of human volition in the word "responsible" which arguably should not be applied to events, but the idea of an event as responsible for subsequent happenings is so firmly imbedded in the language that the usage seems justified.

A "concurrent cause," then, is a substantial cause which combines with another substantial cause to effect the loss, neither being sufficient to do so alone.<sup>12</sup> The term is also used occasionally to mean independent substantial causes which join to cause an indivisible loss but which individually would have been sufficient to cause the loss alone.<sup>13</sup> Less frequently, one finds the phrase "consecutive cause" used to mean one of two or more concurrent causes which are causally related to each other. For simplicity's sake, one may refer to all problems of selection in which there are two or more substantial causes as problems of concurrent causation.

### III. THE PHILOSOPHER'S CAUSATION

In the analysis of concurrent causation problems which is to be found in the decided cases, one is at once made aware of the

used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." In the context of insurance cases, the idea of responsibility is absent, and selection of possible substantial causes becomes a question of remoteness. An example of the difference between actual cause and substantial cause occurs in those cases in which recovery is denied under a fire insurance policy when a "friendly" fire such as a match flame ignites explosive vapors. The flame is, of course, an actual cause, but not a substantial cause. See, *e.g.*, *Mitchell v. Potomac Ins. Co.*, 183 U.S. 42 (1901).

<sup>12</sup> See generally Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934). The *Restatement* requires that, to be concurrent, the forces "be in active and substantially simultaneous operation." RESTATEMENT, TORTS § 441(d) (1934).

<sup>13</sup> *E.g.*, Carpenter, *Proximate Cause*, 15 SO. CAL. L. REV. 427, 446 (1942).

formidable conceptual difficulties inherent in the nature of causation itself. It is helpful to review the basic dilemma which it presents to the philosopher, so that we may know the inevitable limits of any doctrine of law which relies on identification and description of specific causative factors.

Mankind itself has, for the most part, got along well with causation. While it is a complicated concept, and one inadequately expressed by language, it is nonetheless a companion of our daily life and so understood by juries, businessmen, and private persons. It is this body of common understanding, rather than development of theory, which has permitted causation to be a useful instrument for the draftsmen.

Commonly it is said that one event leads to another. It is apparent that the idea of a series of events, each one the cause of the next, has an element of truth; but a closer analysis brings to light the fact that causal relationships are woven into a much more complicated fabric than such an analogy would suggest.

"Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but — if this metaphysical topic has to be referred to — it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely."<sup>14</sup>

Just as a net is more suggestive of the truth than a chain, the net must, upon further thought, give way to some further analogy with multiple dimensions. Every identifiable event might be imagined to be at the center of a sphere. From this center radiate an infinite number of causative factors, each expanding outward to an infinite distance, and each in turn endowed with its own infinite periphery of consequences. "Hence we have to regard each cause we see in operation as resulting from an integration of causes, or rather of forces, conditions, antecedents, becoming more complex with each step of retrogression, carrying us back to an infinite complexity."<sup>15</sup> A member of the Canadian bar, in an instructive and amusing essay on the subject, has termed this the problem of "infinite regress."<sup>16</sup>

<sup>14</sup> *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc'y*, 32 T.L.R. 569 (1916). *aff'd*, [1917] 1 K.B. 873 (C.A.), *aff'd*, [1918] A.C. 350, 369 (concurring opinion of Lord Shaw of Dunfermline).

<sup>15</sup> SPENCER, *FACTS AND COMMENTS* 215 (1902).

<sup>16</sup> Patterson, *Cause in Law & Metaphysics*, 10 CAN. B. REV. 645 (1932).

By virtue of its nature, any element or event in a sequence of causation can be repeatedly subdivided into other elements in time and space. Fortunately for the conduct of affairs, however, the human mind has become skilled in grouping certain elements of experience into rough units which can be dealt with by the ordinary resources of language, and in our particular case, by the language of the insurance draftsman. These consist for the most part of events which have traditionally impressed themselves on the memory and experience of mankind, either because of force and violence associated with them, or the catastrophes which followed, or because of their unusual and striking nature.

Fires caused by spontaneous combustion will illustrate this point. It is relatively infrequent in man's experience that oily rags will be in proximity to each other, and within such a confined space, that the temperature of combustion will be attained. As a result this factor in the causation network is roughly distinguishable and can be used as a labeling device. So also can the fire which follows, if a less specific label is desired. However, to choose one among many, the presence of oxygen in atmospheric proportions at the time when combustion occurred is also, in a true sense of the word, a cause of the resulting financial loss. The presence of oxygen, however, unlike the presence of spontaneous combustion, is a common condition in the affairs of mankind and so useless for our purposes, even though a true part of the causation network and an actual cause of the fire.

This everyday usage of causation was ignored by the many philosophers who wrote on the subject prior to the middle of the nineteenth century. Early philosophical inquiries into causation were extensively concerned with the forces which lay behind and animated physical phenomena. The turning point came with John Stuart Mill, who formulated what is essentially the modern view in *A System of Logic*, the first edition of which appeared in 1843. Mill's thinking and writing have a rational flavor which appeal to the lawyer; many of his remarks on causation can be read with profit today. To the insurance lawyer, they have the additional merit of avoiding the deep involvement with torts which characterizes most recent discussions of the subject.

To Mill, causation is "but the familiar truth, that invariability of succession is found by observation to obtain between every fact in nature and some other fact which has preceded it."<sup>17</sup> This in

<sup>17</sup> MILL, *A SYSTEM OF LOGIC*, Vol. 1, Bk. III, c. V, p. 364 (5th ed. 1862).



itself represented nothing original: Mill's break with tradition came in his refusal to consider the "supposed necessity of ascending higher, into the essences and inherent constitution of things"<sup>18</sup> to find the metaphysical force behind causation. His conclusions anticipated later scholars who, although writing in the idiom of science, find uses for causation which are entirely consistent with doubt concerning its true nature.

Mill is also quite aware of the multifold character of causation. He decries the arbitrary selection of a single cause from the infinity of conditions: "However numerous the conditions may be, there is hardly any of them which may not, according to the purpose of our immediate discourse, obtain that nominal pre-eminence."<sup>19</sup> For any scientific purpose, he states, the true cause must be expressed as the total of all the conditions necessary for the effect. But then he goes on to say that one may properly, for use in common parlance, select a single cause, which is usually that one "whose share in the matter is superficially the most conspicuous, or whose requisiteness to the production of the effect we happen to be insisting upon at the moment."<sup>20</sup> It is upon this plain man's concept that the usage of causation in the insurance contract is founded.

Later thought about the subject has qualified Mill's idea of invariable and unconditional sequence, and has suggested that causal relationships between human beings, so important in tort law, are inadequately explained by his theory.<sup>21</sup> But his awareness of the futility of investigating the "essences" remains a cornerstone of causal thinking today.

Though capable of being turned to practical use, the true nature of causation remains uncertain. Any extended analysis of causation leads eventually to an awareness of the limitations of the human mind in comprehending the universe around us. As Mill foresaw, philosophical attempts to define the nature of causation, or causality as it is more commonly spoken of by philosophers, have been uniformly unsuccessful, and by now have been either abandoned as fruitless or by-passed upon the assumption that time and space have no real existence.

Causality, if it exists at all, is now thought of as a sequence or relationship of events following one another in time. Upon mak-

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at 367.

<sup>20</sup> *Id.* at 368.

<sup>21</sup> HART & HONORÉ, *op. cit. supra* note 10, at 20-23.

ing the attempt to prove that such a sequence does in fact exist, great difficulties arise. In the first place, it is impossible to define "event" in terms which are completely satisfactory, or to reproduce it experimentally with absolute precision. Refinements can of course be made, and under laboratory conditions may succeed in reducing extraneous factors to a minimum, but in the last analysis no two events can be created which are exactly alike, and therefore no causal sequence can be exactly duplicated.

Even if the problems of definition of events and reproduction are overcome, a second and equally insurmountable obstacle is met. No physical relationship can be observed or measured without producing, as a consequence, some indefinite change in the relationship itself as a result of the application of the measuring instrument. In the macroscopic sphere this is negligible and may be safely ignored; in microscopic investigation it can ordinarily be taken into account; but in the investigation of molecular, atomic, and sub-atomic particles, where any investigation of fundamental laws must today be accomplished, the problem is more serious. It is apparent here that the instruments used to measure the frequency, course, and velocity of such particles depend for their function upon the interaction of the quantum to be measured with energy in one form or another produced by the measuring instrument, which itself produces a significant and unmeasurable deflection of the result.<sup>22</sup> Any attempt to measure the extent of this deflection encounters a similar and more difficult problem. In the area where a hypothetical law of causality must be proved or disproved, then, no final proof is possible.

<sup>22</sup> The following colloquy on this subject is to be found in a recent interview with Louis de Broglie, French physicist and Nobel Prize winner:

— Continuerons-nous à voir de plus en plus petit indéfiniment?

— Je ne le crois pas. A mon avis, l'homme ne pourra jamais aller beaucoup plus loin dans l'exploration visuelle de l'infiniment petit. Car, au-delà du seuil désormais atteint, on ne peut plus distinguer les dimensions extérieures, on arrive aux dimensions internes de l'atome.

— Et de ce fait?

— Photographier au microscope électronique correspond à bombarder la cible avec des électrons. Ces électrons ont leur mécanique propre. J'ai établi que cette mécanique était ondulatoire, exactement comme celle de la lumière. Pour être en mesure de discerner les détails de la structure interne de l'atome, il faudrait arriver à réduire considérablement la longueur d'onde des corpuscules frappeurs. Dans ce cas, dès les premiers chocs, ceux-ci bouleverseront de fond en comble la structure interne de l'atome, en lui enlevant des électrons. Chargés de photographier, ils ne pourront pas accomplir leur mission en raison de l'anéantissement de son objet même.

— Cela signifie qu'au niveau de l'atome on ne peut plus voir sans, en même temps, détruire?

— D'après moi, certainement. Le sujet transforme l'objet au moment même où il a prise sur lui.

As a result, scientists who concern themselves with such matters have developed the concept of a relationship between hypothetical events of an ideal nature which can be defined with precision only by the use of differential equations. In effect, the scientist states that it is immaterial to his work whether or not a basically predictable relationship exists between the real events with which he is dealing, since the vast majority of real events can be successfully dealt with as analogous to ideal events whose conduct and relationship can be strictly defined. Max Planck, the distinguished scientist and philosopher who developed quantum theory, termed this hypothetical view a "world-picture," and conceived all causation problems as consisting of a series of imaginary events with defined characteristics.<sup>23</sup> Laws based on the relationship of such events were useful, even if not absolute in nature.

It is of course clear that causality, despite its conceptual failings, remains indispensable to mankind. Bertrand Russell distinguished the application of causality as an everyday working tool from true causality and called it "the law of probable sequence," admitting it to be helpful in ordinary affairs and "in the infancy of a science."<sup>24</sup> Planck felt that any working scientist would profit from a belief in causality, it being a signpost amid the confusion of events to show us the direction we must advance to attain fruitful results;<sup>25</sup> the absolute law must, however, be applicable only in the case of the ideal mind, which, knowing all, could predict all.

A draftsman who has a touch of metaphysics is a better draftsman, for he approaches his task with humility; his "world-picture" may not coincide with reality. By a wise selection of causative elements, he must describe the vision of an insured event. Greater precision can be gained by a multiplication and refinement of the elements chosen, as in the laboratory, but greater precision is often the enemy of clarity, and certainly of brevity. Wisdom comes to the draftsman when he realizes that his selection must fall somewhere along the infinite progression toward absolute predictability.

Interview with Louis de Broglie, *Réalités*, March 1961, p. 91, 94. The same point was made on the philosophical level by the biologist Alexis Carrel: "Les savants font souvent l'étrange erreur d'observer les phénomènes naturels comme si eux-mêmes se trouvaient hors de la nature. En réalité, ils sont partie d'un système matériel composé de l'observateur et de l'objet de son observation." CARREL, *RÉFLEXIONS SUR LA CONDUITE DE LA VIE* 35 (1951).

<sup>23</sup> PLANCK, *SCIENCE TODAY* 345, 351 (Thomson ed. 1934).

<sup>24</sup> RUSSELL, *MYSTICISM & LOGIC* 188 (1918).

<sup>25</sup> PLANCK, *op. cit. supra* note 23, at 352, 365.

## IV. PROXIMATE CAUSATION IN TORTS

*In jure non remota causa, sed proxima spectatur.* (In law, the proximate and not the remote cause is to be looked to.)<sup>26</sup> So reads the first and most famous of Bacon's maxims. In comment Lord Bacon states: "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree."<sup>27</sup>

It has been suggested<sup>28</sup> that Bacon was not so much interested in defining a metaphysical concept as in showing his annoyance with the scholastic tendency to seek obscure and elaborate reasons for simple acts. The maxim does not appear to have been widely quoted in legal commentaries until the middle of the nineteenth century. The first usage of the word "proximate" in the cases was found by Professor Beale<sup>29</sup> in 1830. Shortly thereafter the maxim was included in and may have been given currency by the first (1845) of the numerous editions of Broom's *Maxims*. Broom states that the maxim was "almost exclusively applied" in marine insurance cases,<sup>30</sup> and an examination of the cases suggests that this was true throughout the nineteenth century.

During our own century, however, the problem of proximate causation has not suffered from lack of attention. Starting with Professor Smith in 1911,<sup>31</sup> the problem has attracted numerous scholars,<sup>32</sup> no doubt because of the challenging metaphysical and conceptual difficulties it presents. Professor Beale, whose article<sup>33</sup> is a landmark in the field, reviewed the history and developed certain rules for determining proximate causation in tort cases. These rules were in turn perfected and added to by Professor McLaughlin.<sup>34</sup> Professor Edgerton<sup>35</sup> and Dean Green<sup>36</sup> argued with con-

<sup>26</sup> Bacon, *Maxims*, Regula I, in 7 SPEDDING, ELLIS & HEATH, THE WORKS OF FRANCIS BACON 327 (1870).

<sup>27</sup> *Ibid.*

<sup>28</sup> Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870).

<sup>29</sup> Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 635 (1920), citing *Ward v. Weeks*, 7 Bing. 211, 212 (1830).

<sup>30</sup> BROOM, MAXIMS 167 (3d Am. ed. 1852).

<sup>31</sup> Smith, *Legal Cause in Actions of Tort* (pts. 1-3), 25 HARV. L. REV. 103, 223, 303 (1911-1912).

<sup>32</sup> Professor Carpenter lists 37 signed law review articles, without counting numerous unsigned notes and comments. Carpenter, *Proximate Cause*, 14 SO. CAL. L. REV. 1 (1940). Since his article appeared the *Index to Legal Periodicals* shows 99 entries under the heading "Proximate Cause," the great majority being concerned with the law of torts.

<sup>33</sup> Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920).

<sup>34</sup> McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925).

<sup>35</sup> Edgerton, *Legal Cause* (pts. 1-2), 72 U. PA. L. REV. 211, 343 (1924).

siderable force that proximate cause should be abandoned altogether, and other tests substituted. Professor Carpenter,<sup>37</sup> in an encyclopedic series of articles, states that sound rules of proximate causation can be applied by any intelligent court, and after distinguishing cases based on unsound rules or perhaps lack of intelligence, proceeds to set forth a body of rules of his own. Professors Hart and Honoré have recently made an exhaustive and thoughtful study of the subject from the English point of view in their book *Causation in the Law*.<sup>38</sup> There are many others who have written on the subject; those mentioned are illustrative only.

In addition to commentary, thousands of decided cases have quoted and used the concept of proximate cause, in most cases adding some dictum or definition to the body of learning on the subject. It is apparent that a causation problem inspires generalization, usually of a rhetorical or philosophical nature, in the most conservative of courts. By and large, the analysis has been shallow, the general rule that a single proximate cause may be found in all cases by the application of the proper test or definition being widely quoted, with little evidence that the scholarly investigations of the subject have been considered. Most references to the rule today are to be found in cases involving negligence, simply because there are now many more negligence cases relative to other types of litigation.

A sampling of this considerable literature and of the reported cases is of great assistance in overcoming the conceptual difficulties which surround causation problems, providing as it does hundreds of disputed fact situations, and many helpful insights of a general nature. So far as the development of specific rules of law for insurance cases is concerned, however, it is of less value, since most of the work that has been done is concerned with tort law alone. Those comments which are concerned with questions of remoteness, and some of those with respect to multiple causes, do provide analogies which are helpful.

Under the general rubric of causation, there are three separate kinds of inquiry which are found in a tort case, and a distinction must be made for the purpose of analysis even if it is not always made in practice. These might be put as follows:

<sup>36</sup> Green, *Are There Dependable Rules of Causation?* 77 U. PA. L. REV. 601 (1929). See generally MCCORMICK, DAMAGES 260-69 (1935).

<sup>37</sup> Carpenter, *Proximate Cause* (pts. 1-8), 14 So. CAL. L. REV. 1, 115, 416; 15 So. CAL. L. REV. 187, 304, 427; 16 So. CAL. L. REV. 1, 61, 275 (1940-1943).

<sup>38</sup> HART & HONORÉ, *op. cit. supra* note 10.

(1) *What were the actual events leading up to the damages suffered by plaintiff?* This inquiry is explanatory in nature. It is analogous to the question asked by a scientist who seeks to explain an observed phenomenon, and for its answer, a similar investigation of fact must be made and interpreted as a logical sequence of physical occurrences. This is preeminently the function of the jury. A determination of what has in fact taken place is quite clearly distinguishable from a characterization of such findings in terms of legal responsibility.

(2) *Was defendant negligent?* It is generally accepted that the question of whether a defendant was negligent is distinct from the question of liability for negligence. To the first of these inquiries we apply tests which in the main revolve about foreseeability, which is to say the foresight of a reasonable man in the circumstances of the defendant rather than the defendant himself. Principles of causation are customarily applied to the task of determining whether harm can reasonably be anticipated from given conduct. It should be noted that the particular harm which leads the conduct of defendant to be characterized as negligent may or may not be the actual harm suffered by plaintiff or, if it is the same, it may be caused by unforeseen means.

This question is of course unique to tort law. Insurance litigation requires no equivalent step. The problem of defining negligence does entail an analysis of risk and thus of remoteness, with occasional attention to the problem of intervenors, but on the whole it does not furnish analogies which are helpful in the solution of concurrent causation problems.

(3) *Is defendant liable for the injuries suffered by the plaintiff?* This is the final and most difficult problem, and although more complicated in the field of torts, it is similar in principle to the difficulties found in insurance. At the outset there are in each case two known events: in tort, the negligent act and the damages, and in insurance, the insured event and the loss. The question is very simply whether, for the purposes of the case, the one can be said to be the responsible cause of the other. It is not of particular importance that in some cases the problem is spoken of prospectively, as one might do in attempting to predict a result from known circumstances, and in other cases retrospectively, in the manner of an explanatory inquiry. Beneath each question lies the same issue.

In their broadest outline, the steps which must be taken to resolve this issue are common to tort and insurance. Is the event in question an actual cause? If so, does it constitute a substantial cause, or is it too remote? If there is more than one substantial cause, to which shall legal consequences be attached?

It is generally agreed, in tort cases as in insurance cases, that the threshold question in causation matters should be whether the disputed event was an actual cause of the damage.<sup>39</sup> The best way to identify an actual cause is to ask whether the damage would not have happened "but for" the event. If the answer is affirmative, then the event, be it ever so insignificant or remote, is an actual cause of the loss.

But, as we have seen, there is an infinite number of actual causes of every result. The problem is to reduce this multitude of actual causes to a single cause or a few causes which are outside the ordinary expectation of mankind and which are not too remote from the damage; which are, in other words, substantial causes.

It cannot be disputed that, in the selection of substantial causes from actual causes, the general pragmatic and historical experience of mankind plays a larger part than philosophical or legal elaborations of the subject, at least in the common law jurisdictions. To the ordinary man (ordinary only in the sense that he is not steeped in the refinements of causation), a cause is always a substantial cause, and it is customarily an event which stands out as unusual or unexpected in the circumstances in which it exists, or in the light of the question asked. Though he would rarely reach the question, he would, if pressed, provide rough generalizations of causal sequence to justify his choice, generalizations lacking the specific detail necessary for scientific predictions, but quite adequate for use in the ordinary affairs of mankind. These folk generalizations form the indispensable basis of common-law causation.

<sup>39</sup> RESTATEMENT, TORTS § 432(1) (1934). For a dissenting view, see Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956). Professor Malone points out that the captain who failed to turn back his ship might not have saved the drowning seaman, or that the lady who slipped on the unlighted stairs might have slipped with the best of illumination, so that the negligent conduct was not necessarily an actual cause. But is not the problem really one of proof? The determination of the responsible cause, whether the case be in tort or contract, involves a determination of the twin facts that it was an actual cause, and also a substantial factor in the result. It is perfectly true that standards of proof may vary in tort cases, with less proof of the relationship being required where the conduct is more reprehensible [*Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 130 Atl. 145 (1925)], but this should not lead to the abandonment of the "but for" test, giving as it does a sound result in almost every case, and being one of the few rules in this area capable of compre-

Admittedly the process by which a court actually decides the question of whether a given negligent act is or is not a responsible cause of the damages suffered by plaintiff may be far removed from the simple generalizations of daily life. Even at what might be called the pre-legal stage of causal thinking, however, considerations of policy are present and begin to take on a character which is distinctive to each field of the law, and which can be interchanged only to their detriment. At this point the law of tort and insurance may be said to part company.

It is widely thought, for example, that moral and punitive elements affect everyday judgments of responsibility for negligent acts, regardless of legal doctrine. Common wisdom may of itself suggest that the use of a pistol will become the responsible cause of consequences which would be remote if the negligent act had been the use of an automobile. These judgments may find their way directly or by analogy into legal doctrine.<sup>40</sup>

Of a similar nature, but more complex, are the considerations of policy which have an ascertainable legal source, either drawn from the decided cases, or as a response to those needs of society which are expressed in statutory or administrative law. Here public policy, as it appears in the determination of whether a given cause is or is not remote, is derivative in nature, tending to reflect original value judgments made in other areas of society. Thus, violation of a statute requiring the licensing of drivers might create a causal relationship between the act of driving and the ultimate injury which would not exist if the requirement of licensing were not in large part directed toward the avoidance of highway accidents.

There are factors other than public policy which tend to set apart the tests of remoteness in the tort field from those in insurance. The form of the proceeding itself has an effect. In tort the action is most frequently against a party for damages resulting from his own act, in contrast with the insurance cases where the suit is against a third party who has no connection with the operative facts. Even more important, the tort action is based on the voluntary act or omission of an individual. "The starting-point of any investigation of legal liability is some act or non-action of a

hension by a jury. See generally McCORMICK, DAMAGES 261 (1935); PROSSER, TORTS 221 (2d ed. 1955).

<sup>40</sup> Their arrival does not meet with universal approval. For citations and critical comment, see generally HART & HONORÉ, *op. cit. supra* note 10, at 272-73.



human being."<sup>41</sup> In property insurance matters the opposite is generally true. While a fire, for example, may be caused by human error, it is the fire rather than the error which is the responsible cause under the contract. Both of these factors in tort cases tend to focus attention on the act of the defendant, with its moral and punitive overtones, and, by thus diminishing other causes in relative importance, to encourage analysis of the causation problem in terms of proximity rather than concurrency.

One of the most troublesome causation problems in the tort field is that of intervention. It takes many forms; it may appear in connection with the definition of legal duty, or as the problem of whether the defendant's negligent act has become too remote from the damage because of the intervening voluntary action of another. Typically, defendant in some manner motivates or provides the opportunity for the later action. In defining duty, the discussion may be in terms of probability of intervention. In damage problems the analysis is usually in terms of remoteness, or of "cutting off" the chain of causation, rather than in terms of concurrency.<sup>42</sup> This is logical if moral values are regarded as influential in determining the remoteness of a voluntary act.

An example of the effect of intervention on the standard of duty can be simply stated. A storekeeper leaves an ice pick on the counter where it can be reached by children in his store. A child in fact plays with the ice pick and injures the plaintiff. For insurance purposes such a situation might be examined in terms of concurrent causes, but for the purpose of defining negligence, the question is whether he fell short of his duty by not anticipating that a child might use the pick as a toy and injure another.

Out of the problem of intervention comes the major difference of opinion with respect to the extent of responsibility for damages in tort. This is the question of whether a negligent defendant shall be chargeable for all of the damages of which his conduct is an actual cause and which is of the type whose likelihood of occurrence caused his action to be classified as negligent; or whether his responsibility shall be limited to damages substantially caused by his conduct. *Alexander v. Town of New Castle*<sup>43</sup> will illustrate the difference. Here defendant left an open pit in a highway, an action properly regarded as negligent because of the hazard that

<sup>41</sup> Beale, *supra* note 33, at 637.

<sup>42</sup> See generally HART & HONORÉ, *op. cit. supra* note 10, at 38-41.

<sup>43</sup> 115 Ind. 51, 17 N.E. 200 (1888).

travelers would inadvertently fall in. Plaintiff, a sheriff, became involved in an altercation with one of his prisoners, and was thrown in. Under the "risk" theory, plaintiff might recover, his injuries being of the expected type even though the mechanism, or causal connection, could not be foreseen. Under the traditional causation theory, the voluntary act of the third person intervened and caused the damage to be too remote to permit recovery.

A relatively few tort cases present the question of true concurrency without subsequent intervention. Here the discussion, while not directly applicable to the insurance cases, is of value. These cases fall into two distinct categories. While hunting, *A* and *B* fire at a moving object without taking due care to ascertain its identity. They find *C*, another hunter, wounded upon the ground. A bullet has passed through his neck. There is no way of knowing who fired the wrongful shot, although it is clear that either *A* or *B* could have done so.<sup>44</sup> A variant on this theme is the case where each contributes to an indivisible injury. Thus *A* and *B* negligently ride their motorcycles past *C*, causing *C*'s horse to run away and *C* to be injured.<sup>45</sup>

In these cases the courts have had no trouble finding that the conduct of either *A* or *B* alone is sufficient cause of the injury to impose liability, even though, in the first case, it is impossible to tell which action was the actual cause; and even though, in the second case, the precise contribution of each act cannot be established. The basis of decision in these cases should not be regarded as an abandonment of actual cause, but rather, as Professor Carpenter suggests,<sup>46</sup> a relaxation of the rules of proof in a situation where, in the absence of such relaxation, the courts would be incapable of dealing with a situation which clearly calls for relief. As will be seen, there is a parallel situation in certain insurance cases where a separate insurance contract attaches to each of two

<sup>44</sup> *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1926). For similar criminal cases, cf. *State v. Newberg*, 129 Ore. 564, 278 Pac. 568 (1929); *Queen v. Salmon*, 6 Q.B.D. 79 (1880).

<sup>45</sup> *Corey v. Havener*, 182 Mass. 250, 65 N.E. 69 (1902). In criminal cases, the action of each must materially contribute to the injury. *Wilson v. State*, 24 S.W. 409 (Tex. Crim. App. 1893).

<sup>46</sup> Carpenter, *Proximate Cause*, 14 So. CAL. L. REV. 115, 134 (1941). This explanation is consistent with the variations in proof of actual cause which are required in other tort cases; thus, the burden of showing causal connection between the alleged act and the injury is greater in a malpractice case than in a gun-handling case, presumably because of the community interests at stake in each. Note also that considerable variation exists in the standards applied to remoteness of actual causes; in civil cases the cause must be "closer" to the loss or damage than in criminal cases or tort cases having a criminal flavor.

substantial causes of loss; but the outcome is usually a division of responsibility because of the contribution clauses of the two contracts. Something similar to this could have developed in tort law, as it has in admiralty. That it has not is probably a reflection of the punitive element which is present to a greater or lesser extent in all tort cases.

There are other cases where the negligent persons are separate in time or space and are unaware of each other,<sup>47</sup> or where the act of the negligent person is joined by an innocent act or a natural force to cause an indivisible injury.<sup>48</sup> Without undertaking extended analysis, it is sufficient to say that most courts today find each negligent party to be liable for the entire injury, even though his act alone would not have caused the injury. Here again punishment seems to play a part.

Despite common-sense analogies and common-law precedents, the task of segregating substantial causes from the infinity of actual causes, and of choosing a responsible cause if there is more than one substantial cause, remains a difficult one in tort law as elsewhere. In one sense, the choice is subject to rules of causation which must be expressed. In another sense, these rules are themselves so deeply affected by the needs of society and by special doctrines of law applicable to the particular case that one is tempted, like Dean Green,<sup>49</sup> to abandon causation altogether in dealing with questions of remoteness. It seems better, however, to recognize that causal notions are too deeply rooted in our thinking to be given up, even though their character varies substantially with the situation in which they are applied.

## V. USE OF CAUSATION IN INSURANCE CONTRACTS

Causation is the principal device used by the insurance draftsman to bring the risk assumed by the insurer within proportions which can be measured by the use of statistics and given a value in dollars.

<sup>47</sup> *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (1929); *Orton v. Virginia Carolina Chemical Co.*, 142 La. 790, 77 So. 632 (1918); *Northup v. Eakes*, 72 Okla. 66, 178 Pac. 266 (1918).

<sup>48</sup> *Anderson v. Minneapolis, St. Paul & Sault Sainte Marie Ry.*, 146 Minn. 430, 179 N.W. 45 (1920). *Contra*, *Cook v. Minneapolis, St. Paul and Sault Sainte Marie Ry.*, 98 Wis. 624, 74 N.W. 561 (1898). The principal difference of opinion in this area concerns the cases in which a tortious act joins with an innocent act to cause the harm. Majority opinion today favors liability in this situation. *RESTATEMENT, TORTS* § 439 (1934). See, *contra*, *Peaslee*, *supra* note 12.

<sup>49</sup> *Green, Are There Dependable Rules of Causation?* 77 U. PA. L. REV. 601 (1929).

Risk, of course, is a slippery thing by nature. Despite constant efforts, it continues to slither out of policy language which is intended to contain it within profitable limits. From time to time the equilibrium of the insurance business is upset by a court which discovers that a loss of a novel type, or of a type which the insurer has hitherto regarded as uninsured, falls within the policy language. If the loss is of a type which is likely to re-occur, and the court of sufficient dignity to suggest that its remarks might be taken seriously by other tribunals, the draftsman must set to work to plug the gap.<sup>50</sup>

Though naturally of importance to the company, the predictability of consequences under insurance policies has general implications as well: the solvency of the company and the protection of other policyholders may be threatened by the exposure of the company to risks for which no premium has been received. Legislative policy has concerned itself in recent years with the same problem, it being a requirement in all states that an adequate premium be charged for fire and casualty risks assumed.<sup>51</sup>

The role which causation plays in this battle to keep insurance risks within measurable bounds is an ancient one. In the marine insurance form, first used by Lloyd's in 1779 and virtually unchanged today, coverage is provided for loss caused by perils of the sea.<sup>52</sup> When fire insurance first became available, as a result of the

<sup>50</sup> E.g., *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. 356 (Mass. 1852) (explosion of gunpowder a "fire," resulting in exclusion of explosion); *Bower v. Aetna Ins. Co.*, 54 F. Supp. 897 (N.D. Tex. 1944) (freezing an explosion under extended coverage, resulting in exclusion of freezing); *Commercial Union Fire Ins. Co. v. Bank of Georgia*, 197 F.2d 455 (5th Cir. 1952) (water hammer an explosion under extended coverage, resulting in exclusion of water hammer). Or the draftsman may foresee the possibility of adverse litigation and act accordingly. Thus, the exclusion from the fire policy of loss caused by nuclear energy in its various manifestations was motivated by the fear that an atomic reaction might be considered a fire. See generally Kelly, *Fire Insurance Problems in the Atomic Age*, 1955 Proceedings, Section of Insurance Law, American Bar Association, p. 209.

<sup>51</sup> In New York, for example, the Superintendent may order rate filings to be withdrawn if he finds them "inadequate, excessive, unfairly discriminatory or otherwise unreasonable." N.Y. INS. LAW § 184(6). This phrase is taken from the uniform rating laws drafted by the All-Industry Committee appointed by the National Association of Insurance Commissioners in 1944, and recommended by the Association to the various states. Model Rate Regulatory Bill § 4(A)3, contained in *Report of Committee on Rates and Rating Organizations*, NAT'L ASS'N INS. COMM'RS PROC. 77th Ann. Sess., 391-421 (1946). These laws have been adopted with minor changes by all of the states. They were a direct response to the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), holding insurance to be interstate commerce; and to the ensuing legislation, which granted to the states the continued responsibility for regulation of insurance, and provided that the federal antitrust laws would not apply "to the extent that" the states occupied the field. 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-15 (1958).

<sup>52</sup> "Touching the adventures and perils which the said Company is content to bear and take upon itself, they are of the Seas, Fires, Collisions, Pirates, Thieves, Barratry of

London conflagration of 1666, the policy insured loss by fire, as it does today.<sup>53</sup> In each case the causal limitation circumscribed the risk, and formed the basis on which the premium could be computed and statistics assembled.

In addition to playing a part in the description of the risk, causal descriptions are invariably found in the various exclusions or exceptions to coverage contained in every policy. These, it has been succinctly stated, "make clear what is insured against by reciting what is not insured against."<sup>54</sup> It is the interplay between the insuring agreement, containing the description of the risk assumed, and the exclusions or exceptions, which defines the insurance coverage.

Not every risk can be insured, of course. To be insurable, it must meet two requirements which arise out of the basically financial nature of the transaction:

1. The risk itself must be capable of reduction to or measurement by a dollar premium. Here exclusions are of paramount importance, being used to eliminate those portions of the risk which cannot be satisfactorily rated in money terms because of infrequency, unusual frequency, excessive exposure to a single loss, or other reasons.

2. The loss which may result from the risk must also be capable of translation into dollars with reasonable accuracy. This requires the draftsman to exclude damages from loss of contract, delay in deliveries, competitive disadvantage, obsolescence of machinery, and many other indefinite or incalculable injuries which are often substantial in amount. The obligation of the insurer is always to pay a sum of money (the insured loss) though the insurance be conditioned upon the burning of a house or the sinking of a ship. "These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only."<sup>55</sup>

These necessities are well known to the insurance underwriter or draftsman. His task is to design policy language which meets these requirements by designation of the appropriate insured event

the Master and Mariners, and all other like perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel or any part thereof."

<sup>53</sup> The New York Standard Fire Insurance Policy, which has been adopted as a standard form by legislative or administrative action in many states, speaks of insurance "against all direct loss by fire. . . ." It is not felt that the omission of the word "caused" changes the meaning or intent. N.Y. INS. LAW § 168 (6).

<sup>54</sup> *Newark Trust Co. v. Agricultural Ins. Co.*, 237 Fed. 788 (3d Cir. 1916).

<sup>55</sup> *Rayner v. Preston*, 18 Ch. D. 1, 9 (1881).

and exclusions therefrom. In the language of causation, he must choose the responsible cause of financial loss which he is willing to insure in all circumstances except upon occurrence of certain other substantial causes.

So described, the process of agreement and exclusion has a misleading atmosphere of precision about it. Any financial loss of a type which can be insured has a number of substantial causes. In the case of a boiler explosion, for example, the sequence of events may start with the carelessness of the operating fireman, which leads to low water in the boiler, which leads to excessive steam pressure, which in turn leads to a sudden and accidental tearing asunder of the boiler, and which in turn leads to the true object of the insurance: the financial loss. Loss caused by any of these factors would be insurable. Any one could be chosen as the responsible cause, and yet a choice of one, such as tearing asunder, may result in a coverage significantly different from the choice of another, such as the negligence of firemen.

There is no uniformity among the various forms of insurance with respect to the position in time of the responsible cause. History in this area is more important than logic. The "distance" of the insured cause from the financial loss may vary from the perils of the sea (so distant that a number of intervening events are necessary) through fire (closer, but fire must cause property damage before the loss occurs) to tearing asunder (this is the damage itself). It might be said that the farther the responsible cause from the financial loss, the broader the coverage, but even this generalization may not be true where there are unexpected substantial causes which themselves cause the insured event.

The place of exclusions in this descriptive process is worth special comment, since an exclusion often presupposes the existence of concurrent causation, and since there has been some confusion about the proper use of exclusions in the decided cases.<sup>56</sup> Part of the difficulty arises from the fact that underwriters employ exclusions for a variety of purposes. Their most common employment is to protect the insurer against the payment of indemnity in the event of the occurrence of certain causes of loss in conjunction with the insured cause. Thus, as will be seen below, it will usually

<sup>56</sup> For a flagrant example of the failure to understand the function of exclusions, see *World Fire & Marine Ins. Co. v. Carolina Mills Distr. Co.*, 169 F.2d 826 (8th Cir. 1948). An interesting and perceptive discussion of exclusions may be found in *United Life, Fire & Marine Ins. Co. v. Foote*, 22 Ohio St. 340 (1872).

be desired in a fire insurance policy to exclude payment for fires caused by war. In addition, exclusions are commonly used to avoid certain consequences of an insured loss. In fire contracts, for example, it may be necessary to avoid payment for the extra expense caused by the requirements of a building code. Finally, exclusions are found to be used for a mixed bag of purposes which could better be accomplished elsewhere in the contract, such as the elimination of coverage on a portion of the insured property. The economic factors behind the use of exclusions are equally varied: the excluded hazard may be considered uninsurable, or it may be desired to leave it out of this particular contract, or it may be covered under a different form of insurance.

There is some initial question whether the words "exclusion" and "exception" are, or ought to be, synonymous. In most fire and casualty policies "exclusion" is used to designate the section containing certain causes, conditions, or results which the underwriter for one reason or another does not intend to cover, while an "exception" is usually found in the text of the policy in the form of a dependent clause beginning with the word "excepting" and used to limit a specific grant of coverage. It is the opinion of the writer that no difference is intended.

A more sophisticated approach to these two words has been taken by Professor Patterson.<sup>57</sup> He distinguishes between "excepted causes," which are causes of the insured event, and "excluded events," which are the results of the insured event, and which constitute a part of the loss which the insurer does not wish to cover. The presence of an "excepted cause" is fatal to coverage only if it precedes and causes the insured event; if it is caused by the insured event, or appears in any other position, it is without consequence.

An example will clarify the distinction. Suppose collision to be an excepted cause in a policy insuring an automobile against fire. In that event, following Patterson's rule, no coverage would exist for damage resulting from a fire caused by collision. But in the event that the fire took place while the vehicle was operating and caused the collision, the entire damage would be covered. Suppose, in the alternative, that collision is an "excluded event" under the same policy. In that event, damage resulting from a

<sup>57</sup> PATTERSON, *ESSENTIALS OF INSURANCE LAW* 249 (2d ed. 1957). For an interesting commentary on the terminology, see Keeton, *Book Review of Patterson, supra*, 36 *TEX. L. REV.* 545 (1958).

fire caused by collision would be covered, although it is well to keep in mind that the value destroyed by fire is the value of the car following the collision. But if the fire caused the collision, recovery would be limited to the fire damage itself and would not include the damage caused by the collision.

So brief a description must of necessity deal unfairly with this system of terminology. It is founded on the unquestioned fact, mentioned above, that exclusions are in practice used to eliminate causes as well as consequences. Patterson has devised terms which aptly describe this contrast. No student of this field can have anything but sympathy for an attempt to make the vocabulary of the insurance contract more concise and accurate.

To the writer, however, Patterson's terminology is not an entirely satisfactory answer. The distinction between "exception" and "exclusion" is foreign to the actual use of those words in contracts of insurance, where they appear to have a roughly equivalent meaning. This is unfortunate, since one is necessarily tempted to use Patterson's rule as a guide to interpretation in hard cases; it is of course nothing of the kind, being simply a classification which, like the classification of causes in this article, is useful for discussion and analysis. The insight into the dual nature of exclusions, however, is important, and Patterson has performed a service in emphasizing it; whether the terminology adds anything is open to greater question.

There is a certain surface inconsistency about the whole concept of exclusions. One may state, at the risk of redundancy, that an underwriter excludes acts of war from a fire policy because he does not wish to pay for loss caused by risks of war. In simplified form, the policy states: "This policy covers loss caused by fire. It does not cover loss caused by act of war." There is of course a literal contradiction in this statement if one adheres to the theory that a single proximate cause exists which can be selected by known rules. Under this theory, it is apparent that coverage exists only if fire is the proximate cause; if the proximate cause should prove to be an act of war, no coverage exists, and the exclusion is superfluous.

But common sense tells us the matter is not quite so simple. What the underwriter fears is a situation in which fire is indeed a substantial cause of loss, but in which an act of war is a concurrent cause, preceding and probably causing the fire, and creating a financial loss which is outside the scope of the rate. A more precise



way to state the same agreement and exclusion would be: "This policy covers loss caused by fire. It does not cover loss caused by fire in the event that an act of war is a concurrent cause." What the exclusion says is that an act of war, if one is present as a substantial cause, shall always be deemed the responsible cause.

Sometimes the need for exclusions is debatable. In answering the question, it is of some assistance to ask whether a problem in concurrent causation is likely to occur. In other words, is the objectionable event likely to appear as a substantial cause of the loss together with the insured event, or is the chance so remote that the interests of brevity and clarity of policy language should prevail? To take the extreme case, one need not exclude the perils of the sea in a policy insuring growing crops against damage by hail. But there are more equivocal cases. The question of whether flood should be excluded is currently under discussion by insurers of power plant equipment. Flood waters can, under certain physical conditions, cause the breaking or bursting or burning out of equipment which is insured under the policy. Yet the rate contemplates only insurance against normal operating hazards, not against the results of great natural catastrophes.

An excluded cause may appear in an unusual or unexpected position in the sequence of events. Upon these occasions, the considerations motivating the underwriter to exclude a certain cause which customarily appears in one relationship to the insured cause might have less force when it appears in another. To take the extreme case again for clarity, the exclusion of flood preceding a fire is entirely comprehensible, in view of the impairment of fire protection and other factors, but the exclusion of flood following or caused by fire, a rare occurrence at best, would have little to support it. In this type of case the exclusion should leave no doubt as to the sequence of causation which is intended.

There may, of course, be events which require exclusion if they are a substantial cause of loss in any temporal or physical sequence whatsoever. An excellent example of this occurs in the boiler and machinery policy, where it is desirable for historical reasons to exclude all loss caused by fire, whether coming before or after an insured accident. A double exclusion is used, as follows:

- (a) Fire concomitant with or following an accident or from the use of water or other means to extinguish fire.
- (b) An accident caused directly or indirectly by fire or from the use of water or other means to extinguish fire.

What, then, can be hoped or expected from the insurance draftsman with respect to exclusions? A recognition of the fact that an exclusion always deals with a problem of concurrent causation, which is to say with events which are associated in some way or other with the insured event in the production of loss, would seem to be a reasonable expectation. We may perhaps also expect some expert knowledge of which events, falling in this category, make the contract of insurance unsatisfactory, either in principle, or at the existing rate, or for some other reason. We may hope for some professional skill in separating events of this sort which are reasonably likely and thus worthy of mention from those which are improbable and whose presence merely clutters the contract. In short, we may hope for written recognition of most of those causes which, when associated with the insured event, make the insurance contract impossible on a continuing basis.

#### VI. PUBLIC POLICY IN THE SELECTION OF CAUSES: TORT VS. INSURANCE

From the very beginning legal scholars have been aware that the rule of proximate cause applied to negligence cases was not the same rule as that to be applied in insurance cases, or damages, or determination of criminal acts. This appears to have been Bacon's view. He perceived that the nature of the action was an important element in judging the proximity of the cause; it was to be narrowly construed in civil matters, while "this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion."<sup>58</sup>

In the various editions of Broom's commentaries on the maxims covering the period 1845 to 1939, some reflection of this can be found,<sup>59</sup> but little emphasis is given to the point because of the dominance of marine insurance cases among those cited for application of the rule under English law. Theophilus Parsons, a contemporary of Dr. Broom's in our own country, gives passing recognition to policy considerations in his treatise on contracts by stating that it is applied with greater strictness in insurance cases than

<sup>58</sup> Bacon, *op. cit. supra* note 26, at 329.

<sup>59</sup> BROOM, MAXIMS 148 (10th ed. 1939).

in computing damages for breach of conduct, adding wistfully "but the difficulty and uncertainty of its application are equally great in both cases."<sup>60</sup> It remained for Professor Nicholas St. John Green, in an article on the First Maxim written for the *American Law Review*, to state the general effect of the question upon the cause in such graphic terms that one wonders that it could ever be doubted again:

"For each different purpose with which we investigate we shall find a different circumstance, which we shall then intelligibly and properly call the cause. The man may have committed suicide; we say he himself was the cause of his death. He may have been pushed into the water by another; we say that other person was the cause. The drowned man may have been blind, and have fallen in while his attendant was wrongfully absent: we say the negligence of his attendant was the cause. Suppose him to have been drowned at a ford which was unexpectedly swollen by rain: we may properly say that the height of the water was the cause of his death. A medical man may say that the cause of his death was suffocation by water entering the lungs. A comparative anatomist may say that the cause of his death was the fact that he had lungs instead of gills like a fish. The illustration might be carried to an indefinite extent. From every point of view from which we look at the facts, a new cause appears."<sup>61</sup>

In more recent years the attention of courts and writers has turned largely to proximate causation in tort cases, and once again the dominance of one type of case has tended to obscure the effect of the case upon the rule. But the point has not gone unnoticed. Judge Cardozo observed that there is a tendency in tort law to go "farther back" than in insurance law.<sup>62</sup> Reference is made by Professors McLaughlin<sup>63</sup> and Carpenter<sup>64</sup> to the difference in the application of rules of proximate cause to contract and tort cases, the former being primarily a question of the intent of the parties; but the contract question referred to is apparently that of determining the consequences of a breach rather than the application of an insurance contract.

<sup>60</sup> 2 PARSONS, CONTRACTS 451, n. (p) (3d ed. 1857).

<sup>61</sup> Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 212 (1870).

<sup>62</sup> Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918).

<sup>63</sup> McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 151 (1925).

<sup>64</sup> Carpenter, *Workable Rules for Determining Proximate Cause*, 20 CAL. L. REV. 229, 258 (1932).

Dean Leon Green was acutely aware of the problem and analyzed the difference between causation in torts and in criminal matters at length. His conclusion was that no dependable rules of causation existed, but that liability rested on fact patterns which developed more or less independently in each area of the law.<sup>65</sup>

In a recent article on the concept of cause-in-fact, or actual cause,<sup>66</sup> Professor Malone recognizes that the result of any inquiry into causation is profoundly affected by the purpose of the inquiry, citing the different conclusions which might be reached by a doctor and a judge concerning the cause of a heart attack. In Professor Malone's eyes, causation is one vehicle by which public policy is brought to bear on the decision of cases. This is useful insight and a good way of stating the situation.

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 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<sup>67</sup> as in negligence cases; a few cases qualify this by saying that foreseeability is not required in insurance matters;<sup>68</sup> often the question is not even raised.

Yet an examination of what courts have actually done in these cases, as distinguished from what they have said, leads inevitably to the conclusion that there is no single proximate cause for all purposes. Any one of the many events in the causal network may be significant in given circumstances. To ask the question: "Which is the responsible cause?" is always to ask: "Who is liable under this contract? Did the defendant commit a breach of his duty to the plaintiff? What is the measure of damages? Is the insurer obligated to pay under this policy? Is the defendant guilty of this crime?" or other particular questions. The rules and precedents for answering these particular questions have grown separately and distinctly from the requirements of each particular factual pattern. Variations in the rules reflect variations in the social requirements of the pattern to which they apply. It is in the historical development of these rules that an opportunity

<sup>65</sup> Green, *Are There Dependable Rules of Causation?* 77 U. PA. L. REV. 601 (1929).

<sup>66</sup> Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

<sup>67</sup> *Lynn Gas and Elec. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N.E. 690 (1893).

<sup>68</sup> *E.g.*, *Federal Life Ins. Co. v. Raley*, 109 S.W. 2d 972 (Tex. Com. App. 1937).

exists for considerations of social policy to influence the selection of responsible cause, and it is clear that the rules which have been developed do reflect such considerations in almost every field in which causation problems occur.

Once our attention is directed to this problem, numerous examples of actual litigation can be discovered where the responsible cause would be or actually has been<sup>69</sup> different depending on the issue in litigation. One graphic illustration of this point is *Metallic Compression Casting Co. v. Fitchburg R.R.*<sup>70</sup> Here plaintiff's mill was adjacent to defendant's track. Fire broke out, and when firemen rushed to the scene, they found it necessary to lay a hose line across defendant's track from the water supply to the burning building. Their efforts to contain the fire would have been successful had not a train crew of defendant knowingly run a train across the hose line, thus cutting the water supply. Plaintiff is permitted to recover in tort on the ground that defendant's action was the responsible cause of the loss. No one would seriously question, however, that in an action on a fire policy the fire would be the responsible cause of the loss.

Another way to illustrate this is to look at different examples of litigation on similar facts. It is well established, for example, that loss resulting from an explosion caused by a "friendly fire" does not fall within the coverage of a fire insurance policy excluding explosions since the explosion is regarded as a responsible cause of the loss.<sup>71</sup> On the other hand, in a suit by a landlord against a tenant for negligence resulting in an explosion of the same nature, where the lease provided that the tenant would not be liable for damage caused by fire, it has been held that the friendly fire was the responsible cause and the tenant not liable.<sup>72</sup> Each result is justifiable in its own context.

Modern examples of this point are frequently seen when a fire insurer pays a loss on the ground that fire was the responsible cause, perhaps after litigation of this point, and then by way of subrogation brings an action against a third party seeking re-

<sup>69</sup> For an example of a case in which the court recognizes the policy distinctions applicable to the interpretation of identical words ("perils of the sea") and the differing consequences flowing therefrom in a bill of lading and a marine insurance policy, see *The G. R. Booth*, 171 U.S. 450 (1898).

<sup>70</sup> 109 Mass. 277 (1872).

<sup>71</sup> *Briggs v. North Am. & Mercantile Ins. Co.*, 53 N.Y. 446 (1873); *Mitchell v. Potomac Ins. Co.*, 183 U.S. 42 (1901). The term "friendly fire" is generally used to designate a fire which is in its intended place, such as a candle flame or furnace fire.

<sup>72</sup> *Commercial Standard Ins. Co. v. Feaster*, 259 F.2d 210 (10th Cir. 1958).

coupment on the ground that the loss was caused by the defendant's negligence.

In *General Mills, Inc. v. Goldman*,<sup>73</sup> a case which had a considerable impact both on the insurance industry and on the drafting of commercial leases,<sup>74</sup> a factory building owned by plaintiff was destroyed by fire as the result of the negligence of one of defendant's employees. Plaintiff recovered the sound value of the building under his insurance policy, and then was successful in the United States District Court in making a further recovery against the defendant tenant which was sufficient in amount to reimburse the insurer by way of subrogation and leave a comfortable margin for the plaintiff himself. The fire insurer paid the loss on the ground that it was caused by fire, while the lower court found for plaintiff on the ground that the identical loss was occasioned by the negligence of defendant's servant. Ultimately the case was reversed on grounds not associated with causation, but it remains an excellent example of how, without even thinking of the question, the rules of causation are applied by courts in different ways in different cases.

Variations between the applicable rules of causation occur not only between fields of law but within the field of tort law itself. A negligence case ostensibly seeks to answer a simple question: Was the defendant's act or omission the responsible cause of plaintiff's injury? The difficulty, as modern commentators have pointed out,<sup>75</sup> lies in the use of the question to cover up a miscellaneous lot of moral, social, and practical considerations which had better be stated directly. For example: An act which is offensive to society or criminal in nature will be considered as the efficient cause of injury in cases where a merely negligent act would be too remote, for reasons which are clearly punitive. Or an act occurring during the manufacturing of a product, though remote in time and space, may be considered as the cause of ultimate injury because the manufacturer is in the best position to spread the cost of inevitable injury over the entire use of the product. Such considerations as these are entirely proper and relevant to the question of tort liability; trouble arises only when general causation language is permitted to obscure the true nature of the inquiry.

<sup>73</sup> 184 F.2d 359 (8th Cir. 1950).

<sup>74</sup> See generally Brewer, *An Inductive Approach to the Liability of the Tenant for Negligence*, 31 B.U.L. REV. 47 (1951).

<sup>75</sup> E.g., PROSSER, TORTS 218-19 (2d ed. 1955); Carpenter, *Proximate Cause*, 15 SO. CAL. L. REV. 187, 193 (1942).

Whether expressed or not, it is these moral, social, and practical criteria which control the development of negligence law, and in particular the selection of the responsible cause. Permitting a "classic" definition of proximate cause to flow from the large body of negligence law to the smaller body of insurance law tends to carry over these policy objectives into insurance, where they are usually inapplicable and unwelcome. If responsible cause is only that cause which we may choose to designate in the light of other criteria, we have a right to expect that a major change in the criteria will bring a change in the doctrine.

Development of suitable criteria for the selection of causes is actually not so difficult a matter in the smaller and more homogeneous field of insurance law as it is in tort law. A great variety of sociological, economic, and political factors touch upon the question of redress for legal injuries. The insurance relationship has its complications, to be sure, but it at least has a single objective: the provision of a suitable legal framework for the sharing of financial hazards.<sup>76</sup> In this context any rule of interpretation, and especially a rule dealing with the quicksands of causation, should be as simple and predictable as the subject will permit.

Whether a suggested rule is suitable or not must be judged both from the standpoint of the public and the insurance companies. With respect to the public interest, one may ask whether the rule will contribute to the understanding of insurance contracts, and whether it is consistent with the general expectations of the insurance buyer. The interest of the companies lies in establishing a rule which will encourage accurate draftsmanship and permit a reasonable predictability of consequences, although, since these matters directly concern the solvency of the insurer, they have a public aspect as well.

There are, in broad terms, two ways of approaching the problem of choosing between concurrent causes. One way, which is an extension of the rule of interpretation of ambiguous contractual provisions under general contract law, is to require that the selec-

<sup>76</sup> Lack of such definite policy considerations in certain other areas where causation is a problem makes the selection of the responsible cause more difficult, and the contrast is illuminating. In such cases "common sense is . . . the only test that can be applied to the choice between several causes, all of which are sufficient in law." *Royal Greek Government v. Minister of Transport*, 66 T.L.R. 504, 514 (1949) (interpretation of charter party). The temptation to bring rules of decision based on irrelevant social policies into such "neutral" cases is almost overwhelming, but can and should be resisted. See, e.g., *The G. R. Booth*, 171 U.S. 450 (1898) (insurance rules distinguished from rules applicable to bill of lading).

tion be made on a basis consistent with the expectation of the reasonable buyer. This is often preceded by a finding that the policy contract is ambiguous by reason of the existence of concurrent causes, followed by the customary ruling that ambiguities are to be construed in favor of the insured, which in turn is usually in accordance with his reasonable expectations. The alternative rule, here advocated, and supported, perhaps unwittingly, by the majority of cases, is that the selection be dependent upon whether or not a concurrent cause of loss is specifically excluded, with recovery being denied only in cases where such a specific exclusion exists.

Assuming that such a rule meets general community standards of fairness, it is suggested that the most important single factor to be used in appraising it should be the nature of the public requirements for insurance protection. Today this means increasingly elaborate contracts offering a variety of coverages within the same instrument. The trend is relevant to the selection of causation rules because of the difficulties of understanding which it places in the way of the purchaser and the technical difficulties it presents to the draftsman. As will be seen below, it is the opinion of the author that this trend points clearly toward the use of rules of law which have the greatest degree of clarity and predictability, even though some initial sophistication may be needed for their application.

A brief consideration of the technical difficulties is a good place to start since it helps to illuminate the fundamental problem. Drafting the modern insurance contract is a task to be approached with humility. In the past, changes in such contracts took place slowly, as by evolution; the draftsman was rarely called upon to venture far from the well-litigated clauses and concepts with which he was familiar. But it is not an exaggeration to say that the insurance business today is in process of revolution. New contracts, for the most part of the multiple peril or all-risk type, are appearing on the market in such large numbers that even careful students of the business have difficulty in keeping abreast of them. It is doubtful if the business will ever return to the stability of previous days when such contracts as the New York standard fire insurance policy, on which practically all the fire insurance in the country was written, were interpreted by the courts in minute detail over a period of many years. The standard policy is still an important factor but the direction is clear. New lan-



guage and new coverages, untested by the courts and unfamiliar to the buyer, are the order of the day.

In this confused situation, simple contract forms, using language of known consequences, are less and less to be found. In actual practice, the words which are being created by draftsmen today are perforce intended for the eye of the professional, not for the ordinary buyer. They are intended for agents, brokers, insurance advisers, corporate insurance buyers, company personnel, and all the others who might generally be classified as professionals, including that most important person, the judge who may ultimately preside over the litigation of the contract. Today the ordinary buyer, even one who might be considered a skilled amateur of the art, receives his information about the content of an insurance policy from promotional material, independent services, oral statements, and other sources than the contract itself. His information is, in brief, second-hand.

It is very doubtful that the future will bring any improvement in this respect. While the rhetoric employed by representatives of insurance companies often lacks the grace and precision which one might hope for it, its standards are nonetheless as high as those of the business community generally. Perhaps it is going too far to say that the contracts which are in growing use today cannot under any circumstances be drafted in language which can be read with understanding by the unsophisticated, but in the opinion of the author they are unlikely to be. Even a passing glance at one of the popular homeowners' policies<sup>77</sup> will suggest the difficulties involved.

If this is the case, then the non-professional buyer cannot be expected to know the details of what he is buying without competent advice. Regrettable though it is, the situation is not unique. To take one of many examples, the purchaser of goods, knowing only the broad terms of the transaction, may sign an installment contract whose provisions represent even more of a legal thicket than the insurance policy, aware as he does so that his ignorance would not generally be considered a defense to its enforcement. His conduct is not as unreasonable as it would seem. The public benefits of credit, and of insurance as well, outweigh the occa-

<sup>77</sup> This phrase is used generally in the insurance industry to describe a policy containing several types of coverage formerly purchased in separate policies by homeowners. There are numerous forms available today, but in all cases the principal hazards insured are fire, windstorm, theft, and public liability.

sional embarrassment to the individual arising from the application of unforeseen contractual provisions.

These facts suggest that some revision may be needed in the traditional attitude of the courts that a policy is either, on the one hand, intelligible reading for the man in the street, or, on the other hand, ambiguous. A more reasonable approach today would be to require that the policy language be meaningful to the type of professional, such as an agent, who is readily available to the public for advice on such matters, as well as to the court itself. Such a standard would seem to offer as great a degree of information to the buyer through the policy language as can be permitted in view of the sophistication of today's drafting requirements. Judged by this standard, the rule of concurrency that recovery is allowed except in the presence of an excluded cause seems to be sufficiently clear and predictable, having in mind the inherent difficulties of causation itself. While the alternative rule based on reasonable expectations has a surface clarity, it is likely in practice to be more capricious and therefore less comprehensible in depth than the suggested doctrine.

It is perfectly true that no rule of law, however appealing in theory, can survive unless it produces a result which is somewhere close to the expectation of the average buyer, albeit on an *ex post facto* basis. It is doubtful, however, if the possibility of concurrent causes is ever actually considered in advance. If it should be, about all that can be said is that the normal buyer would expect to be paid if an insured event occurred unless forewarned to the contrary. This test is met quite nicely by the suggested rule. Selection of causes is an intellectual exercise at best, and there is not much to be found in the periphery of an ordinary insurance transaction to evidence intention concerning what is at best an unlikely eventuality.

It is sometimes suggested that the premium charged should be taken into account in determining the expectation of the buyer with respect to the choice between concurrent causes. Thus if a certain cause of loss was included in the experience on which the premium was based, coverage should be provided regardless of the policy language. This argument, while of course based on hypothetical expectation rather than actual, the ordinary buyer having no actual knowledge of how premiums are computed, has the initial appeal of fairness and impartiality. In point of fact,

however, it offers very little assistance in specific cases because of the way in which premiums are determined.

In brief, most insurance premiums today are computed by the companies as a group acting through rating bureaus and based upon pooled experience. It is important to note the significance of the word "experience." It means the dollar amount paid by the companies with respect to certain hazards under contracts then in use. Perhaps more important, it does not mean the actual incidence of such hazards or their cost. This is an important distinction, since it means that the rating bureaus have no opportunity to reflect their desires with respect, for example, to the settlement of claims involving concurrent causes in the formulation of rates, but are bound merely to use the accumulated judgment of companies and courts in such matters in the form of experience. To this factor, also called the "pure" loss expense, is added an increment for expenses and profit in order to determine the premium. It is impossible to find in this figure any guidance with respect to concurrent causation problems in specific cases, since there is no available evidence of the average settlement practices on which it is based. As a result it is an unsatisfactory element to introduce into the applicable rule of law.

It would appear, therefore, that from the point of view of both public understanding and expectation, the suggested doctrine is an acceptable one.

From the standpoint of the insurer, any convention which makes the policy language more precise and its financial consequences more predictable is to be welcomed. There is, as mentioned above, an area in which the risk of concurrent causation is deliberately run for the sake of brevity, or perhaps as a talking point in the competitive struggle. But when the decision is made to exclude a given hazard it is of the greatest importance to find language which will actually accomplish the task.

One of the minor but legitimate objectives of a rule of law in this area is the encouragement of good drafting by rewarding clarity when it appears and penalizing deficiencies in their turn. Some thinking of this sort no doubt lies behind the well-known rule that ambiguities are to be construed against the insurer. But if such a rule is to be applied the draftsman must have a fair chance. In the case of concurrent causes, the draftsman is entitled to know that a properly drafted exclusion will stick, but that a missing or inaccurate exclusion will result in coverage.

## VII. THE CLASSIFICATION OF SUBSTANTIAL CAUSES

A desire to classify and systematize is a characteristic of those who attempt to deal with causation. Like the desire for a private vocabulary, it is an indication of the philosophical overtones of the subject. For those who would look further into the classification of causes in tort cases and the rules for selection of the responsible cause, Professor Carpenter's series of articles<sup>78</sup> is recommended both as a summary of past thinking and original contribution to the subject.

There is indeed much to recommend the use of a classification of some sort in dealing with difficult conceptual problems of this kind. Causation itself is as elusive as a drop of mercury. Causation concepts are hard to grasp and hard to describe in simple language. Not everything can be considered at once; compartments must be provided to hold surplus questions while each in turn is placed before us. Thus relieved of clutter, the mind can give its attention to the narrow point, and develop rules which are of some help in the particular rather than the general case.

It is intended to deal here with insurance cases in which two or more substantial causes exist from which one responsible cause must be chosen. These concurrent causation problems fall, as we have seen, into two broad categories. In the first category, one of the substantial causes is always the subject of a specific policy exclusion or exception. In the second, one of the substantial causes falls outside the coverage set forth in the contract, but no specific exclusion is applicable. This basic division is of the greatest importance, and is the proper starting point for any analysis of a concurrent causation problem.

In addition, each of these two categories may be broken down into three further classifications, reflecting the temporal sequence and causal relationship of the events which constitute substantial causes. Other classifications could be suggested, but these seem sufficient for practical use. There is no magic in classification. It is merely an aid to clear thought, and a check-list by which one can test proposed rules of substance.

The three classifications proposed reflect three common fact situations. In the first, the insured event precedes and causes the event which is outside the coverage. In the second, this se-

<sup>78</sup> Note 37 *supra*.

quence is reversed, and the event outside the coverage precedes and causes the insured event. In the third case, two independent events join in causing the insured loss, neither being sufficient to produce it alone; here the time sequence does not have particular significance. Note that in all three the event which is outside the coverage may be outside because of an exclusion or because it is simply not covered.

To illustrate, assume that *A* is the substantial cause or event which is within the coverage, and that *B* is the event which is outside.

*First,* *A* and *B*, which are independent of each other, join to cause the loss.

*Example:* Under a marine insurance policy, the insured vessel is damaged by enemy action (*B*). Later the vessel is sunk by storm (*A*), but would not have sunk had it not been first damaged by the enemy.

*Second,* *A* may precede and cause *B*, and *B* causes the loss.

*Example:* Under a fire insurance policy, a fire occurs (*A*), eventually causing an explosion (*B*) which destroys the building.

*Third,* *B* may precede and cause *A*, and *A* causes the loss.

*Example:* Under a fire insurance policy, an explosion occurs (*B*), causing a fire (*A*) which destroys the building.

In considering a case involving concurrent causation, it is worth the effort to place the factual situation in one of these three classes. While it is suggested that the presence or absence of an excluded event is in the long run the determining factor, there are noticeable differences in the treatment given by courts to the three proposed classes of facts, and it is important to consider whether these differences are justified.

## VIII. THE LAW TODAY

Measured by frequency, the problem of concurrent causation in insurance is not of great importance. Its interest comes from the fact that it forces the court to face up to the selection of a responsible cause, state the "nicest discriminations"<sup>79</sup> on which it

<sup>79</sup> ". . . [W]e would regard it as unprofitable labor to seek through the cases for a satisfactory expression of the rule, since no general rule will be found suited to all

is to be done, and thus illuminate the rationale of decision in other more numerous and less difficult cases.

In one recent case decided by the New York Supreme Court, Appellate Division,<sup>80</sup> the problem is illustrated with great clarity, although the decision is difficult to justify. Lekas Company is the lessee of a loft building containing a freight elevator. It received from Travelers a standard form of liability insurance policy covering its operations on the premises but excluding elevators, which term is defined as including the elevator shaft. An employee of a tenant brings the action against Lekas alleging that he fell into an unguarded elevator shaft as the result of the failure of Lekas to maintain a proper light in the corridor.

Travelers refused to assume the defense of the resulting action. In due course a verdict is rendered against Lekas, which Travelers refused to pay. The present action was brought to recover the amount of the judgment plus attorneys' fees and costs. Both parties moved for summary judgment, and both motions were denied. The precise question considered on appeal was whether Travelers was entitled to summary judgment on the ground that the accident was caused by an elevator as a matter of law, or whether the trial court was correct in ordering the issues to be tried on the ground that the choice between the absence of light and the elevator as causative factors was for the finder of fact.

In considering this question the court apparently assumed from the record of the negligence action that absence of light in the hall, a factor which would fall within the policy if found to be the responsible cause, was a substantial cause of the accident. Without actually deciding the issue, a majority of the court held that the question of causation was a trial issue. While this bare holding has importance, the interest of the case lies in its gratuitous analysis of concurrent causation.

As a starting point for the solution of the problem, the court quotes the rule concerning ambiguous draftsmanship:

"It will be seen at once that in arguable areas of coverage where there has been conjunctive causation of the casualty, one element of cause within, and one without the policy, the

conditions, and each case, as it arises, must, after all, be decided upon the special facts belonging to it, and often upon the very nicest discriminations." *The German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 584, 45 N.E. 1097, 1099 (1897).

<sup>80</sup> *Lekas Corp. v. Travelers Ins. Co.*, 147 N.Y.S.2d 60 (App. Div. 1955).

ruling has frequently gone against the carrier; and this upon the common principle of construction favoring the assured in reading an instrument prepared by the insurer."<sup>81</sup>

For this rule five cases are cited and described, of which two are illustrations of concurrent causation, and three are really concerned with the meaning of policy terms. In the first category is a holding by the New York Court of Appeals that an automobile fire insurance policy which excludes loss caused by collision provides coverage where the driver was blinded by smoke from the burning car and as a result thereof suffered a collision.<sup>82</sup> Also pertinent is a case which refuses to apply the exclusion of death resulting directly from flight in an aircraft to an insured who was killed by enemy fire while in a military aircraft.<sup>83</sup> Illustrative of the other category is a holding that the work of putting a new roof on a house, replacing old siding shingles, and removing a porch were not "structural alterations" within the policy exclusion.<sup>84</sup>

Attention is then turned to the important case of *Marcus v. United States Cas. Co.*,<sup>85</sup> which was decided for the insurer by the authoritative tribunal in New York upon very similar facts involving a fall into an elevator shaft, and might have been expected to conclude the *Lekas* case. The court deals with this case, however, by pointing out first that the fall in *Marcus* was caused by the mistaken belief that the elevator shaft was a toilet, instead of by the absence of light. This observation does not completely dispose of the *Marcus* case, however; in addition to the actual holding, there is a dictum which is almost prophetically relevant to *Lekas*:

"We cannot imagine that the parties in using these words understood that if a person fell down the shaft because the hallway was dark, the bodily injuries would be sustained by reason of the darkness, not because of the elevator shaft."<sup>86</sup>

This dictum is answered in *Lekas* by the statement that there was no "element of darkness" in the *Marcus* case, and that it is merely "comment." Furthermore, "the cases on conjunctive causation in touching on exclusion clauses seem to point uniformly in quite

<sup>81</sup> *Id.* at 63-64.

<sup>82</sup> *Tonkin v. California Ins. Co.*, 294 N.Y. 326 (1945).

<sup>83</sup> *Riche v. Metropolitan Life Ins. Co.*, 193 Misc. 557 (Sup. Ct. 1948).

<sup>84</sup> *Hawkeye Cas. Co. v. Frazier*, 183 F.2d 465 (10th Cir. 1950).

<sup>85</sup> 249 N.Y. 21 (1928).

<sup>86</sup> *Id.* at 25.

a different direction." The implication is clear that coverage exists where one of the two substantial causes is excluded.

One may doubt that the rule of ambiguity in insurance policies is of any real assistance in choosing one of two concurrent causes, or that the *Marcus* case may be so readily distinguished. But the case is useful because its facts are typical of modern cases on concurrent causation, and because the majority opinion illustrates the difficulty which many courts have in coming to grips with the issues involved.

These issues, and, in the author's view, their proper answer, might be stated as follows:

*Issue:* Is there more than one substantial cause involved?

*Answer:* Yes, both the absence of light and the existence of the elevator shaft are substantial causes of the injury.

*Issue:* Is one substantial cause excluded under the insurance contract?

*Answer:* Injury caused by falling into elevator shafts is excluded.

*Issue:* In such event, shall the selection of the responsible cause be for the jury or for the court?

*Answer:* All the facts have been determined. The interpretation of the exclusion and the selection of the responsible cause is for the court.

*Issue:* Which is the responsible cause in this case?

*Answer:* Injury caused by elevators being specifically excluded, the elevator shall be regarded as the responsible cause, and no coverage exists.

A similar position was taken by a strong dissenting opinion in *Lekas* arguing that the existence of an excluded cause was sufficient to place the action outside the policy coverage and to grant summary judgment.

The widely-quoted case of *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc'y*,<sup>87</sup> one of the many arising out of the marine insurance policy, enunciates the correct rule, but in the traditional language of proximate causation. It may be noted that in this

<sup>87</sup> 32 T.L.R. 569 (1916), *aff'd*, [1917] 1 K.B. 873 (C.A.), *aff'd*, [1918] A.C. 350. *Accord*, *Aetna Ins. Co. v. Boon*, 95 U.S. 117 (1877).



case the excluded cause joins with the insured cause to cause the loss.

In *Leyland*, the plaintiff's vessel was torpedoed in the North Sea during the first World War and made the port of Le Havre with her forward hatch flooded. She was at first berthed snugly at a quay, where she would have been safe, but a gale arose and the harbormaster was forced to move her to a more exposed anchorage. Being well below her marks due to the weight of water in her hold, she was unable to find sufficient depth, and struck bottom repeatedly in the trough of the seas. Eventually her back was broken, and she was declared a total loss. The question was whether her sinking was caused by hostilities, specifically excluded under the policy, or by the normal perils of the sea.

In discussing the theoretical question, Lord Atkinson says:

"The rule that in marine insurance policies the proximate, not the remote, causes are to be regarded is supposed to be based upon the intention of the contracting parties, to be gathered from the language of the contract itself, taken in connection with the surrounding circumstances; but there is such a tendency in argument to treat concurrent causes as preceding and succeeding causes, the latter proximate, the former remote, and to split up complex causes into their components and establish a sequence between them, that it is well always to bear in mind the warning given by Lindley L.J. in *Reischer v. Borwich*, that this rule of maritime insurance must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties."<sup>88</sup>

The court then concluded that good sense clearly pointed to the torpedoing as the proximate cause of the sinking, despite the possibility of "prolonged and ingenious argument" on the subject, with the result that the insurer was not liable for the loss.

The *Leyland* is typical of many cases in which the excluded event joins an insured event to cause the loss, neither being sufficient to do so alone. In a more recent case of this type,<sup>89</sup> plaintiff insured his house under what was then known as a standard tornado policy, covering loss by windstorm but excluding loss caused directly or indirectly by high water. Flood waters collected around the insured house to a height of three feet. After several days, the waters were blown against the house by high

<sup>88</sup> [1918] A.C. at 365.

<sup>89</sup> *National Fire Ins. Co. v. Crutchfield*, 160 Ky. 802, 803 (1914).

winds, and the combined effect of these waters and the wind itself caused the loss of the house. It was held that since "the two concurring causes brought about the damage which neither by itself alone would have produced," the loss must have been caused at least indirectly by high water, and there was no coverage.

Less commonly, a case has appeared where the insured event precedes and causes the excluded event, which in turn causes the loss. In *German Fire Ins. Co. v. Roost*,<sup>90</sup> for example, coverage against the hazard of lightning was added by endorsement to a policy which contained an exclusion of damage caused by explosion unless fire ensued. Lightning struck a nearby house used to store powder, causing an explosion which destroyed plaintiff's property. After considering a "formidable array of decisions" on proximate cause, the court found them to be of little help, and found for the defendant on the basis of the clear intention of the policy.

There has been a tendency, however, to find for the plaintiff in these cases where the insured event is first in time. Often proximate cause language is invoked with the insured event being designated as efficient and predominating, or as the continuing cause. The outstanding example of this exception is the rule, now firmly established in the law, that an explosion which is caused by a hostile fire on the premises of the insured is covered under the standard fire insurance policy excluding loss caused by explosion. This represented the law prior to the adoption of the exclusion; apparently there was little desire on the part of the industry to avoid such losses, since the adoption of the exclusion was intended to avoid losses caused by the "combustion" of gunpowder and flammable vapors.<sup>91</sup> There was equally little desire to avoid losses caused by fire resulting from explosion, and when it was held<sup>92</sup> that the exclusion had such an effect, the exclusion was modified by inserting the phrase "unless fire ensue."

In a recent Canadian case<sup>93</sup> where an appeal was carried to the Privy Council, the policy covered pressure vessel explosions but excluded loss by fire. The insured operated a turpentine

<sup>90</sup> 55 Ohio St. 581, 45 N.E. 1097 (1897).

<sup>91</sup> *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. 356 (Mass. 1852).

<sup>92</sup> *Insurance Co. v. Tweed*, 74 U.S. (7 Wall.) 44 (1868). A good account of these developments appears in Rosenberg, *Explosions and the Fire Insurance Policy*, J. Am. Ins., Feb. 1943, p. 5.

<sup>93</sup> *Boiler Inspection and Ins. Co. of Canada v. Sherwin-Williams of Canada, Ltd.*, [1951] A.C. 319.

plant in which wood chips were distilled under pressure. Following the explosion of the vessel containing the chips, the turpentine vapors filled the room, and were shortly ignited by some undetermined source, causing a visible flame in the air and an ensuing rapid combustion or explosion of the vapor which destroyed the building. It was found that coverage existed. Possibly the court was influenced in this case by the question of whether the visible flame was actually a fire in the traditional sense, or merely evidence of a combustion explosion in the atmosphere.

This tendency to find for the plaintiff where the insured cause precedes and causes the excluded cause has led to some precautionary activity among draftsmen.<sup>94</sup>

The last type of case involving specific exclusions is that in which the excluded event causes the insured event. A recent case,<sup>95</sup> correctly decided and with an element of humor, illustrates the recommended approach. Here a manufacturer of sausages had insured himself against water damage under a policy which excluded explosion. A pressure vessel containing a large amount of sausage meat exploded, scattering the potential sausages and breaking a sprinkler pipe, thus flooding the premises with a foot or two of water. Defendant was granted a directed verdict in the trial court. This was upheld by the appellate court on the simple ground that the explosion was the proximate cause of loss. It is implicit in the opinion that, once the facts have been determined, it is the function of the court to apply and interpret the insurance contract. Here the contract made it clear that explosion was not among the risks insured. One can speculate as to whether the outcome would have been different if the suit had been brought by a boiler and machinery insured who, having paid the loss, was seeking contribution by way of subrogation.

While most courts have found for the defendant where the excluded event comes first,<sup>96</sup> there have been numerous excep-

<sup>94</sup> Newark Trust Co. v. Agricultural Ins. Co., 237 Fed. 788 (3d Cir. 1916).

<sup>95</sup> Royal Sausage & Meat Co. v. Aetna Cas. & Sur. Co., 99 Ohio App. 77, 117 N.E.2d 207 (1954).

<sup>96</sup> *E.g.*, St. John v. American Mut. Fire & Marine Ins. Co., 11 N.Y. 516 (1854); compare Insurance Co. v. Tweed, 74 U.S. (7 Wall.) 44 (1868) (remoteness of excluded cause also an issue).

tions, and occasional changes in policy language have been necessary in areas where coverage was not intended.<sup>97</sup>

The application of these principles to a more complicated fact situation can be seen in the famous case of *Ionides v. Universal Marine Ins. Co.*,<sup>98</sup> which combines the romance of the sea with an episode in the Civil War. Here insurance was written on a cargo of coffee to be carried by a New York vessel from Rio de Janeiro to New York "warranted free from all consequences of hostilities." During a period when the Cape Hatteras lighthouse had been extinguished by Confederate soldiers, the ship carrying the coffee went aground on the treacherous sands of the Cape. Part of the cargo was saved with the assistance of Federal troops who had returned to the scene, and more would have been salvaged had not the Confederates then returned to the area and driven off the Federal soldiers, with the result that the balance of the cargo was lost in the sea.

There are two separate problems involved here. First, was the extinguishment of the light an excluded event which caused the insured event, the shipwreck? If so, it would appear that the *Royal Sausage* rule should apply. But instead the court held that the darkening of the light was too remote to be a substantial cause at all. "Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too distantly connected with each other to stand in the relation of cause and effect."<sup>99</sup>

Second, did the shipwreck and the raid of Confederate soldiers constitute two independent causes joining together to produce the loss of part of the cargo? If so, then the *Leyland* rule would appear to be applicable. The court did take this position by holding that the intervention by Confederate soldiers was within the warranty and the insurer was not liable. Recovery was therefore permitted for the value of the vessel but not for the lost cargo.

In certain cases involving exclusions, the issue has reached the appellate court without a proper resolution of the facts by the trial

<sup>97</sup> See generally *Carva Food Corp. v. Equitable Fire & Marine Ins. Co.*, 261 F.2d 254, 257 (4th Cir. 1958) (discussion of coverage of sprinkler leakage caused by windstorm).

<sup>98</sup> 14 C.B.N.S. 259, 143 Eng. Rep. 445 (1863).

<sup>99</sup> *Id.* at 285, 143 Eng. Rep. at 456.

court, so that a question exists as to whether the excluded cause was a substantial cause of the loss at all. This situation is not always recognized for what it is. As a result, though the disposition of the case may be sound, we are left with statements of unsound law which cause difficulty in future cases. Thus, in a case<sup>100</sup> where the extent to which rain had contributed to a windstorm loss was clearly in doubt, the court states: "However, the policy expressly insured against 'all direct loss and damage by windstorm' and we are of the opinion that this coverage extends to losses where windstorm is a contributing cause."

Bad draftsmanship has also played its part in this area. While it is the point of view of the writer that the draftsman is entitled to be read with some understanding of the problems of the business, it is reasonable, in view of the greater capacity of the insurer to absorb and spread the results of such errors, that true ambiguities created by defective drafting should be interpreted in favor of the policyholder, and this is the general rule. If, for example, one exclusion is qualified by the words "directly or indirectly," while another is not, a court is justified in limiting the application of the latter to a narrow compass.<sup>101</sup> But it is important to understand that the existence of concurrent causes does not create an ambiguity in an otherwise unobjectionable contract.

There are two types of problems involving exclusions which have each generated a large number of cases in different courts over a period of years, and which, if a detailed study were desired, would provide excellent examples of different judicial approaches to the same subject. One of these is the fire-explosion series, involving cases where fire caused explosion or explosion causes fire under a fire policy excluding explosion.<sup>102</sup> The second is the windstorm-water damage series, where wind and water react with each other in various ways under windstorm policies excluding water damage and water damage policies excluding windstorm.<sup>103</sup>

The other great line of cases dealing with complex causation includes those in which the choice of causes lies between an event which falls within the insuring agreement and one which, while

<sup>100</sup> *Pearl Assur. Co. v. Stacey Bros. Gas Constr. Co.*, 114 F.2d 702, 706 (6th Cir. 1940). *Accord*, *Fireman's Fund Ins. Co. v. Hanley*, 252 F.2d 780 (6th Cir. 1958).

<sup>101</sup> *Williamsburgh City Fire Ins. Co. v. Willard*, 164 F. 404 (9th Cir. 1908). For an early case in which bad draftsmanship resulted in a finding for the defendant, see *Evans v. Columbian Ins. Co.*, 44 N.Y. 146 (1870).

<sup>102</sup> See 6 COUCH, *INSURANCE* § 1279 (1930), for citations of representative cases.

<sup>103</sup> For an illustrative case containing a discussion of the history of the problem, see *Carva Food Corp. v. Equitable Fire and Marine Ins. Co.*, 261 F.2d 254 (4th Cir. 1958).

not specifically excluded, falls clearly outside it. We have seen that where one of the events was specifically excluded from the contract, there are considerations which suggest that the excluded event be considered as the responsible cause and no coverage afforded. But where neither is excluded, these considerations are absent, and both public policy and the cases suggest that the insured event be regarded as the responsible cause. The only exception to this statement lies in the fraud cases where the insured event is caused by the willful act of the insured, and public policy clearly requires that coverage be denied. An examination of the cases shows that decisions have, in general, followed this pattern, although, as in the exclusion cases, the policy reasons are not always well understood.

No cases have been found dealing directly with the factual situation in which two unrelated events each contribute to the loss, one being insured and the other uninsured but not specifically excluded. No doubt problems of this type have arisen, but the relatively strong equities in favor of the insured may have contributed to the lack of litigation. An example might be in order. Suppose a commercial building to be partly destroyed by fire, leaving a wall standing. Shortly thereafter an unusual windstorm blows the wall down on an adjacent building.<sup>104</sup> May the owner of the adjacent building recover under his fire insurance policy? It would appear that he should. Windstorms are known to increase the hazard of fire or, as in this case, to augment the damage caused by fire. If it is desired to exclude loss in which windstorm is a factor, a specific exclusion is in order.

Questions of complex causation of this type should be distinguished from questions of valuation. Using an example similar to that above, suppose a building which has been partially destroyed by a windstorm, and is shortly thereafter destroyed by fire. May the owner of the building recover for the full value thereof under his fire insurance policy? Here, unlike the above case, the loss to the insured caused by each event is readily distinguishable. He may recover only the value of the structure at the time of the fire, or in other words as it existed following the windstorm.

A common type of case, and one which has presented little

<sup>104</sup> *Russell v. German Fire Ins. Co.*, 100 Minn. 528, 111 N.W. 400 (1907), is identical with the assumed case except that the wind was of ordinary force. The case held for the plaintiff on the ground that, in essence, the wind was not a substantial cause. "The wind was not the cause, if it was an intervening agency which could reasonably have been foreseen."

difficulty to the courts, is one in which the first of the consecutive causes is the insured event, with the second and resulting event outside the contract but not specifically excluded. A typical example is *Norwich Union Fire Ins. Soc'y v. Port of New Orleans*.<sup>105</sup> A fire in a grain elevator resulted in damage to the machinery used to aerate the grain. Consulting the rule of proximate cause, the court found it to be of no consequence that the inherent properties of the grain caused the loss, and held that the damage was covered under a fire policy. This holding is straight-forward and clearly correct.

In this situation, the insured event may come first and cause an intervening uninsured event, which itself is at some distance in time and space from the loss. If the discussion is in terms of proximate causation, the question of whether the insured cause is too remote to be a substantial cause of the loss may be mingled indistinguishably with the question of the choice between losses. Perhaps the greatest American case on this point, or at least the most unforgettable opinion, is *Bird v. St. Paul Fire & Marine Ins. Co.*<sup>106</sup> Here Judge Cardozo, then on the New York Court of Appeals, decided that a barge owner could not collect from his fire insurer for concussion damage from the distant Black Tom explosion, which itself had originated in a fire. He recognized that the problem of remoteness could be answered only by the context in which it had arisen, here an insurance contract. "In 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>107</sup> To put the matter briefly, no one could expect to be paid for a fire that far off.

Some complications appear when the event intervening between the insured cause and the loss is the voluntary or involuntary action of an individual. If confusion is present, it is likely that it arises from an erroneous comparison with tort cases in which there is an independent intervening force which may or may not be foreseen by the original actor. Thus, in an insurance case, if a fireman drops a jewel while attempting to rescue it from a fire,<sup>108</sup>

<sup>105</sup> 141 F.2d 600 (5th Cir. 1944).

<sup>106</sup> 224 N.Y. 47, 120 N.E. 86 (1918).

<sup>107</sup> *Id.* at 54.

<sup>108</sup> *Mercury Ins. Co. v. Griffith*, 178 Va. 9 (1941).

or a thief plunders a burning building,<sup>109</sup> there is no reason to deny coverage.

*Princess Garment Co. v. Fireman's Fund Ins. Co.*<sup>110</sup> presents an unusual example of that category of cases in which the uninsured event precedes and causes the insured event. Here the policy insured against fire, including the damage caused by the orders of military or civil authority to prevent the spread of fire. Plaintiff's factory was first inundated by flood waters. A nearby gasoline tank then burst, the contents ignited, and the flames, burning fiercely on the surface of the water, approached plaintiff's building. Upon order of the authorities, plaintiff's employees left the building for a place of safety. They were thus forced to abandon their work of carrying plaintiff's goods from the lower floors to the upper floors to keep them above the rising waters. As it turned out, the flames never reached the building, but a quantity of goods was damaged by water. It was held that the damage was covered under the fire policy. The result seems justified. It might be commented that flood frequently increases the hazard of fire by depriving the insured premises of normal fire protection or by causing the abandonment of electrical apparatus while connected to a source of power, and a flood exclusion might reasonably be expected in a fire insurance policy if coverage is not intended where flood is a contributing factor.

Another type of situation in which the uninsured event causes the insured event is where the loss has its origin in negligence. It is now the rule, and has been since a very early date, that negligence which causes the insured event does not void the coverage. A brief statement of the history of this point as it bears on fire insurance together with a collection of the early cases, is set forth by Mr. Justice Story in *Waters v. Merchants' Louisville Ins. Co.*<sup>111</sup> He points out that "the practical inconvenience of carving out such an implied exception from the general peril in the policy, furnishes a strong ground against it; and it is to be remembered, that the exception is to be created by construction of the court, and is not found in the terms of the policy." As every underwriter knows, practically all fires are caused by negligence.

<sup>109</sup> *Denham v. LaSalle-Madison Hotel Co.*, 168 F.2d 576 (7th Cir.), *cert. denied*, 335 U.S. 871 (1948).

<sup>110</sup> 115 F.2d 380 (6th Cir. 1940).

<sup>111</sup> 36 U.S. (11 Pet.) 213, 221 (1837). For a similar case involving marine insurance, see *Clarke & Co. v. Mannheim Ins. Co.*, 210 S.W. 528 (Tex. Com. App. 1919).



An occasional verdict for the defendant can be found in this type of case where the initial uninsured event is clearly beyond the intention of the insurance. *Chute v. North River Ins. Co.*<sup>112</sup> is an example. Plaintiff had insured an opal ring under an all-risk type of policy. Due to what was admittedly a slow and gradual disintegration of the stone, in a manner not uncommon to opals, the stone eventually cracked apart and became worthless. While cracking would normally be insured, the court held that, since natural change was not mentioned in the insuring agreement, cracking caused by such change was not covered. No doubt the defendant regarded this holding with relief but without confidence as to the future, since most policies of this type now contain an exclusion of natural deterioration.

In the course of this discussion we have assumed for the purpose of clarity that a problem of concurrent causation involves two substantial causes or events. This is of course not always true; there may be three or more events which would be regarded as substantial causes of the loss, particularly if we change the question which is asked. Perhaps the most graphic illustration of this for our purposes is to be found in cases where two or more forms of insurance are applicable. Many examples could be given, but *New York and Boston Despatch Express Co. v. Traders' and Mechanics' Ins. Co.*<sup>113</sup> will suffice. Here the steamer *Narragansett*, running up Long Island Sound in the fog on a June night in 1880, was struck on the starboard side forward by the steamer *Stonington*. Plaintiff's goods, insured by defendant against the risk of fire, were in crates on the upper deck of the *Narragansett* and were undamaged by the collision. The *Stonington* backed off and stood by to help the *Narragansett*. A raging fire had broken out in the boiler room of the *Narragansett*, apparently as a result of the stem of the *Stonington* penetrating the starboard bunkers and the fire box. As a result of the fire, the chief engineer was forced to shut off steam from the main engine, thus rendering the ship's pumps inoperative, pumps which would, if functioning, have been entirely capable of freeing the ship of water entering through the hole in the starboard planking. The *Narragansett* was partly consumed by fire and sank in nine fathoms of water. Plaintiff's property, being on an upper deck, was not touched by fire. It was later recovered in a water-damaged condition.

<sup>112</sup> 172 Minn. 13, 214 N.W. 473 (1927).

<sup>113</sup> 132 Mass. 377 (1882).

In the lower court the defendant secured a directed verdict. This judgment was reversed on appeal, the court stating that it was for the jury to determine whether the fire was the proximate cause of the loss. In its opinion the court takes pains to point out that the policy contains no exclusion of fire caused by collision.

In itself the result of the case is of less interest today than the comments which may fairly be made upon its facts. It is not unreasonable to guess that a jury eventually found the fire to be the proximate cause of the loss, or more likely, that defendant settled the case in anticipation of such an outcome. What of the damage to the *Narragansett* herself? Almost certainly the ship was insured under a policy of marine insurance which undertook to indemnify the owners against loss caused by the perils of the sea. It may also be safely assumed that a claim was made under such policy for the value of the sunken vessel, and that such claim was paid. Having in mind the habits of steamship captains on a close schedule, one can also guess that, if the Coast Guard made an investigation of the collision, it would report that the collision had been caused by excessive speed under conditions of limited visibility. If given a chance to speak, the captain himself might point out that he would certainly have been discharged by the owners if he had made a practice of slowing down for every patch of fog and thus falling behind his schedule, and that it was this "hard driving" attitude which was the real cause of the accident. We can close the catalog of suggested causes by pointing out that the bow lookout on the *Stonington* might well have been asleep. There is little point in going farther; the lesson is easily understood.

#### IX. SUMMARY

A cause, like a unit of measurement, can be infinitely subdivided. Except by applying arbitrary limits to the process of subdivision, no accurate description of a cause can be given and no proof of the inevitable relationship between cause and effect can be made. A working concept of causation is of course essential to our daily affairs, and, in the words of Bertrand Russell, "in the infancy of a science." But the inevitable relationship between cause and effect remains unproved and apparently unprovable.

Despite this philosophical weakness, by judicious use of events which are extraordinary to the experience of the community, insurance draftsmen have been able to avoid most of the problems which the theoretical nature of causation might seem to raise. Suc-

cess has not been universal, however. From time to time there is a clash of giants, catastrophe joins with catastrophe, and the question of choosing between two or more substantial causes under an insurance contract is placed before the courts.

Traditionally this problem has been solved by selecting a classic definition of proximate cause and applying it to the facts. Actually, the results have varied with the considerations of public policy applicable to the particular contract or to the social or economic problem involved. Upon the same set of facts, a different proximate cause would be found in a negligence case than in a contract case. It is more honest and accurate to recognize in advance that the selection of a responsible cause depends on the question asked.

Concurrent cause situations in the insurance cases can readily be divided into those in which an excluded cause plays a part, and those in which it does not. With numerous aberrations, the present decision law holds that the defendant insurer is not liable in the first type of case, while it is liable on the second. This is a reasonable and justifiable result. One is entitled to assume that the draftsman understands those types of events which are inconsistent with insurance principles, and has the opportunity to exclude them as causes of loss. Other unexpected events may properly fall on the insurer, not because of ambiguity, but because provision for insurable contingencies can be made in the premium.

Unlike tort cases, no moral or punitive factors are involved in questions of insurance. The only proper long-term objective in developing new law, aside from the common need of predictability, is the creation of rules which encourage the economical and efficient distribution of risks by means of insurance principles. Risk-bearing by private as well as government insurers has become indispensable to decent human life. When a court must break new ground, as it often must in concurrent causation cases, a public policy of this stature should be an important ingredient in its decision.