its amendment the only aim of the Widow Remarrying Statute has been to protect the children of the former marriage, and its effectiveness in this capacity can be seriously questioned. The Act seems to overlook altogether the possibility—and a fairly strong one if the cases are a criterion—that a widow might ally herself with an improvident spouse. And, if her children are minors, she has no recourse to the property from her first marriage, a potentially valuable asset, to make provision for them. Added to this is the prospect that in such an eventuality either she or the guardian might be compelled to dispose of the children's two thirds share of their father's property for their provision simply to preserve for them the uncertain right of descent in their mother's one third.

To argue that the children should not be afforded further benefit from the restraint provision is not necessarily to propose that their right of descent under the old statute is, or ought to be, similarly ended. It will be seen, however, that what is left is insubstantial at best and susceptible of being handily defeated by any inter vivos conveyance.

THE EFFECT OF THE PALSGRAF DOCTRINE IN INDIANA

The development of negligence as a basis for tort liability epitomizes the growth of socio-economic policies. Originally, the common law action of trespass to the person imposed absolute liability for all damage directly caused by a defendant's behavior.[1] Everyone owed an absolute duty not to harm the person or property of another. If an injury occurred, there was a breach of duty, and liability was imposed. However, judges realized that to promote private enterprise liability then imposed for pure accident would have to be tempered.[2] Accordingly, courts began to require some fault on a defendant's part before holding him liable for a plaintiff's

1. ". . . [I]t should be noted that this ancient concept of trespass had reference to any contact achieved as the consequence of one's conduct against the interest of another, no matter under what circumstances it occurred, as long as the defendant's causative conduct was his voluntary act." Gregory, *Trespass To Negligence To Absolute Liability*, 37 VA. L. REV. 359, 362 (1951). Professor Gregory indicates that there was no right of action for nontrespassory acts; *e.g.*, when one left a timber on the highway which caused a traveler to trip and be injured, no cause of action accrued. Then, trespass on the case was developed to provide a remedy for such injuries. Although this gave a remedy where there previously was none, plaintiffs had to show some fault on the defendant's part to recover; they had merely to show injury to prevail in a trespass action.

2. ". . . [M]any of our judges believed that the development of this young country under a system of private enterprise would be hindered and delayed as long as the element of chance exposed enterprisers to liability for the consequences of pure accident, without fault of some sort. And this point of view became manifest in several state court decisions a little more than a century ago." *Id.* at 365.

injuries.[3] Thus, the fault principle, known today as negligence, gave rise to the complex tort for unintended harm.

It developed that to recover damages for a negligently inflicted injury, five elements must be proved: damage, actual causation, duty, breach of duty, and proximate cause.[4] The first two elements would also have been required under the old common law action for trespass. Responsibility, however, was limited, from an absolute duty not to injure another's person or property, to a duty to refrain from committing those acts that may unreasonably threaten the safety of others.[5] Though thus restricted, the duty is still owed to the world at large.[6]

However, even when one breaches this broad duty, it is generally agreed that he should not be liable for all harms that result.[7] *Causa proxima, non remota, spectatur* was early adopted by courts as a limitation on liability. Through use of this notion, sometimes termed legal cause, courts fulfill the need for restricting liability of negligent defendants in order to foster industry and safeguard the individual. Judge Andrews frankly defined proximate cause when he said: ". . . [B]ecause of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. It is not logic. It is practical politics."[8] In the application of this principle, courts and jurors are guided by experience gleaned from their environment; thus, a just outcome determined by community standards is sought.

Unfortunately, difficulties in application arose when the proximate cause principle was utilized, for courts began to incorporate the other four elements of a negligence case in their charges on proximate cause.[9] Duty

3. Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

4. For a detailed study of these elements under proximate cause and the risk theory, see Foster, *The Risk Theory and Proximate Cause—A Comparative Study*, 32 NEB. L. REV. 72 (1952).

5. Judge Andrews has stated the traditional proximate cause approach in the clearest terms possible. Consequently, his dissenting opinion in Palsgraf v. Long Island R. R., 248 N.Y. 339, 350, 162 N.E. 99, 103 (1928), will be used as an example of the analysis and treatment given to a negligence case under the traditional approach.

6. *Ibid.*

7. "There is still the problem of an end to liability, of a place to stop. It is still unthinkable that anyone shall be liable to the end of time for all the results that follow in endless sequence from his single act." Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1953). See also Fleming and Perry, *Legal Cause*, 60 YALE L.J. 761, 784 (1951).

8. Palsgraf v. Long Island R. R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (dissent).

9. ". . . '[P]roxima causa' captured the imagination of the courts, and by its promise of easy decision has led them upon evil days. . . . Having no integrated meaning of its own, its chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . The inability to identify its meaning for sure renders it immune to effectual argument." Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471 (1950). See also PROSSER, TORTS 186 (1941).

was so broadly defined that it was often assumed, and judges sent cases to the jury on the proximate cause issue with instructions which required them to draw an "uncertain and wavering line" some place in the series of events.[10] In effect, such a charge is an invitation to the jury to give free rein to their dictates of conscience and emotion.[11] Consequently, cases decided on the theory of proximate cause became a confusing mixture of the several elements of negligence plus numerous and complex public policy considerations. To locate the decisive factor upon which liability was predicated in such circumstances is extremely difficult, for such a witches' brew of variables impedes analysis.

Attempts have been made to clarify the meaning of proximate cause by using other equally vague phrases, such as "efficient cause,"[12] "natural and probable,"[13] "natural and proximate,"[14] and "efficient and predominating."[15] However, the criterion most frequently employed is foreseeability; *i.e.*, liability will not attach if a reasonable man could not have foreseen *some* harm to *some* person.[16] Unfortunately, this requirement is so vague that it does not materially aid clarification of the phrase, proximate cause. Further, consideration of foreseeability under the proximate cause element of a negligence action results in a duplication of effort, for the determinations to be made here are identical with those made under the duty element where it must have been ascertained whether or not the alleged misconduct unreasonably threatened the safety of others.

While most courts were becoming more deeply mired in the confusion of proximate cause, Judge Cardozo developed a new approach to the problem of limiting liability. In the famous *Palsgraf* case he enunciated the risk theory in its matured form.[17] Cardozo redefined the essential elements of a tort action so that: A defendant is negligent when a reasonable man could have perceived that the proposed conduct would

10. Palsgraf v. Long Island R. R., 248 N.Y. 339, 354, 162 N.E. 99, 104 (1928) (dissent); Tabor v. Continental Baking Co., 110 Ind. App. 633, 643, 38 N.E.2d 257, 261 (1941).

11. See SEAVEY, COGITATIONS ON TORTS 33 (1954).

12. Sarber v. Indianapolis, 72 Ind. App. 594, 610, 126 N.E. 330, 334 (1920).

13. Lake Erie & W. R.R. v. Charmin, 161 Ind. 95, 104, 67 N.E. 923, 927 (1903).

14. Lake Erie & W. R.R. v. Lowder, 7 Ind. App. 537, 546, 34 N.E. 447, 450 (1893).

15. Terre Haute & I. R.R. v. Buck, 96 Ind. 346, 353 (1884). Difficulty with this type of test was early bemoaned in Indiana. Binford v. Johnston, 83 Ind. 426, 428 (1882).

16. Knouff v. Logansport, 26 Ind. App. 202, 206, 59 N.E. 347, 349 (1901); Indiana Natural & Illuminating Gas Co. v. McMath, 26 Ind. App. 154, 157, 57 N.E. 593 (1900); Ohio & M. Ry. v. Trowbridge, 126 Ind. 391, 395, 26 N.E. 64, 65 (1890).

17. "The risk reasonably to be perceived defines the *duty* to be obeyed, and risk imports relation. . . ." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (emphasis added). Cardozo's redefinition of the duty had the effect of limiting a defendant's liability much as had the earlier redefinition of the absolute duty owed under trespass.

create an unreasonable risk of a certain type of harm[18] to a specific class of persons[19] (duty) and the defendant so conducted himself (breach of duty) causing (actual causation) injury of the type and to a person of the class that was endangered (damage).[20] Proximate cause is foreign to this theory,[21] for the furthest limit of liability is set by the risk reasonably to be perceived.[22] Once the duty is defined, so is the extent of liability.

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18. The harm risked when A gives B, an infant, a stick of dynamite is that of explosion and resulting injury. If B strikes a playmate with the dynamite and causes injury, A should not be liable. He did not create an *unreasonable* risk of the type of harm that occurred any more than if he had given B a toy of the same size. The unreasonable risk which was created did not mature, and the resulting harm was outside that risk. Not only must the risk be unreasonable, but it must be such as to a certain type of harm.

Also, the type of harm is pertinent in determining whether or not contributory negligence is present. For example, if X's employer tells him not to go on a loading platform because he may slip on the ice covering it, and X goes onto the platform and is injured when a wall falls on him, X is not contributorily negligent. That is, he contributed only to the foreseeable risk of slipping on the ice and not to the risk that the wall would fall. This is a type of harm outside the risk. Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924 (1890). See Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468, 469 (1932).

19. The duty owed is considered to be relational to a certain class of persons. This obviates any duty to the world at large and narrows the duty to those persons foreseeably endangered. For example, if A gives a gun to B, an infant, and B later presents it to C, his thirty year old brother, who carelessly fires it and is injured, A should not be liable for C's injury. While A created a risk to B and those B may injure, A did not create a risk that C would negligently shoot himself; he is a person outside the risk created. While A did create an unreasonable risk, it terminated when the gun was delivered to a responsible person.

"A duty to use care extends only to those who may be harmed; a breach of duty to one person is not of itself the basis for liability to another person. There is liability only to those within the circle of risk." Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 92 (1942). See Foster, *supra* note 4, at 92; PROSSER, TORTS 182-188 (1941).

20. HARPER, TORTS §73 (1933); PROSSER, TORTS §31 (1941).

21. "Thus, in most cases we should be able to avoid the esoteric meaning contained in the phrases 'proximate cause' or 'legal cause' and ask simply whether or not the plaintiff was one of those endangered by defendant's act, and if so whether the harmful event was one which was at least not unexpectable. In other words, in most cases the reason for making a person liable for negligence gives the limits of liability." SEAVEY, *op. cit. supra* note 11, at 32.

22. If A unreasonably creates a risk of harm to B, but no reasonable man could foresee any harm to X, yet X is injured as a result of A's act, there would be no liability under the risk theory because A did not breach any duty owed to X. A was not negligent as to X. Under the traditional approach the duty is broader. Since A acted unreasonably as to B, A breached his duty to the world and was negligent. It seems unrealistic to consider an act negligent unless it is relative to certain protected interests. Cardozo referred to the traditional proposition as "negligence in the air." Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99 (1928). However, though A is considered negligent, he may be exonerated because his act was not the proximate cause of X's injury. Conversely, if B had been injured as a result of the unreasonable risk created by A, A would be liable under the risk concept. While A would be considered negligent under the traditional approach, he could escape liability if the court held his act was not the proximate cause of the harm. Because of the inexact nature of the proximate cause element and the latitude it allows a jury, it is difficult to predict what will happen when a case must be decided on this issue.

The risk theory restricts the duty owed to the world at large by requiring that an act must not create an unreasonable risk of a certain type of harm to a specific class of individuals. To determine when a risk is unreasonable, the social utility of permitting a particular activity must be balanced against the social detriment it may entail.[23] The likelihood of injury and the ease of abating the risk also weigh in a determination of reasonableness.

The necessity for careful analysis of the defendant's duty is chief among the advantages of the risk theory. Breakdown of the duty as to reasonableness of risk and person and harm within it permits the critical issue to be spot-lighted. Therefore, as precedent, the case is more meaningful because it can be interpreted in relation to one of these factors. In deciding the reasonableness of the risk, the significant public policy considerations should be forthrightly expressed and not obscured in equivocal terminology. Instruction to the jury in terms of risk is easier and more understandable than those of proximate cause for the former, more familiar, term conveys some meaning to the jury.[24] The jurors by necessity draw on experience to reach a decision, as they do under proximate cause, but the issues are the defined factors of the risk theory; thus, their verdict is more significant than when a result of the impenetrable morass of proximate cause.[25] Consequently, results are more predictable than

23. "The existence of negligence can be found by evaluating the interests of the parties in the light of the welfare of the entire community. On the one side is the value to the community of what the defendant is doing; on the other, the interest which it has in not having harm occur. When the first is great, permissible conduct includes great risks." SEAVEY, *op. cit. supra* note 11, at 27.

What is unreasonable today may not be so in fifty years, and what is unreasonable in New York may not be in Utah. "When the first railroad was sued for damages in Bavaria, the court decided for the plaintiff because 'The operation of a railroad necessarily presupposes a negligent act.' And when the first 'wealthy hoodlum' set his automobile on an American road, the law all but came to hold him liable for his 'devil wagon' as for a ferocious animal." Ehrenzweig, *A Psychoanalysis of Negligence,* 47 NORTHWESTERN L. REV. 855, 863 (1953). However, as civilization advanced, though the dangers coincident with the use of the automobile weighed heavily, it was of such great utility that society condoned automotive travel despite the constant risk of danger.

Cardozo told how a judge weighs interests when he said: ". . . [H]e must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).

24. Seavey, *Mr. Justice Cardozo and the Law of Torts,* 52 HARV. L. REV. 372, 389 (1939). Foster, *supra* note 4, at 85.

25. "May it not be that whereas the long sought 'system' of tort law, not discovered in the artificialities of procedure and forms of action, nor yet in the logical organization of doctrinal generalizations, may yet be found in a few comparatively simple formulations of social policy which seem consciously and unconsciously, to have pushed the judges in the right direction for these many centuries. If such a formulation of somewhat general notions of social policy can be made, it seems pretty clear that the general concept of the foreseeability of harm, the idea of a general threat to a general class of persons, will occupy a conspicuous place in the rational organization of tort law." Harper, *supra* note 18, at 482.

under the traditional approach.[26]

The appropriate and logical place for a consideration of public policy in a negligence case is in relation to the duty owed certain plaintiffs. Under the traditional approach it is a manifest contradiction to hold that a duty to the world has been breached, yet exonerate the defendant because of public policy. In effect, the court determines that, although there is a breach of duty, the defendant has committed no actionable wrong. It is far more logical to include consideration of public policy with the determination of the defendant's duty. If for public policy reasons liability must be restricted, then his conduct in the light of all circumstances is not unreasonable to any plaintiff.[27] As life in modern

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"But the fact that as a mere matter of straight thinking analysis it is more helpful to think about the foreseeable range and source of danger as limits upon duty rather than limits upon causal connection in no way shows that these questions therefore become more difficult or less appropriate for the jury." Fleming, *Scope of Duty in Negligence Cases,* 47 NORTHWESTERN L. REV. 778, 814 (1953).

26. "The result sought by Cardozo, Andrews, and all the others is a formula which with a fair degree of definiteness will mark the boundary between liability and non-liability in negligence cases." Seavey, *supra* note 24, at 382.

"The risk theory is easier of application and more readily understood. In most cases it is not difficult to determine the kind of harm which was foreseeable and the persons who were within the danger zone. To be sure, the risk theory is not a panacea, and in some cases there will be doubt as to the area of risk, but in most cases there will be general agreement, as distinguished from the certain uncertainty of proximate cause." Foster, *supra* note 4, at 101. But see Prosser, *Palsgraf Revisited,* 52 MICH. L. REV. 1, 19 (1953).

"It is quite true that even this does not always give a definite result; there are still many doubtful cases. . . . In any event, this method of appraisal appears to be an advance over the older phrases which seem to be completely meaningless." SEAVEY, *op. cit. supra* note 11, at 34.

27. Under the risk theory, liability should extend to the limit of the unreasonable, foreseeable risk and no further. Public policy by necessity determines what is reasonable and unreasonable. It is claimed that in certain cases liability is cut short of the foreseeable risk. In water utility cases, for instance, where fire causes damage that could have been avoided had adequate water pressure been furnished, some courts are unwilling to impose liability on the water company. Fitch v. Seymour Water Co., 139 Ind. 214, 37 N.E. 982 (1894); Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928), *accord,* Larimore v. Indianapolis Water Co., 197 Ind. 457, 151 N.E. 333 (1926). However, it seems plainly foreseeable that if pressure is inadequate, such a harm could occur. Apparently, the reluctance of the courts to so extend liability is due to a fear of imposing staggering burdens on public utilities. On the other hand, nonliability in this type of case may make water companies lax in maintaining their facilities. For instance, in April, 1954, the first check in nineteen years was made on the maximum fire-fighting capabilities of the Indianapolis water supply. Indianapolis Star, April 21, 1954, §1, p. 11, col. 2. It is significant that in those jurisdictions where liability is imposed, water companies still exist. Nevertheless, in some cases an overpowering public policy reason restricts liability short of the foreseeable risk. In this situation the court is holding that society does not consider the defandant's acts unreasonable, though the harm may be foreseeable.

A similar situation occurs in cases concerning a negligent act which causes mental anguish. Unless there is a concurrent physical injury, courts generally deny recovery. Boden v. Del-Mar Garage, Inc., 205 Ind. 59, 185 N.E. 860 (1933); Vandalia Coal Co. v. Yemm, 175 Ind. 524, 92 N.E. 49 (1910); Cleveland C. C. & St. L. Ry. v. Stewart, 24 Ind.

society grows more complex and knowledge increases, the concepts of unreasonable and foreseeable risk must also progress,[28] and contemporary judges and jurors are the means by which it should expand and grow.[29]

Under the risk theory, foreseeability is employed to ascertain the type of harm and class of persons within the risk created by the defendant's act. This is commendable,[30] for he should be liable only to the extent a reasonable man could perceive a risk of harm to the plaintiff. Such reasoning is seemingly in accord with the underlying theory of negligence since one should act at his peril only with regard to what is foreseeable. Any damage incurred beyond that is merely accidental.

Thus, the traditional proximate cause approach and the risk theory can be distinguished in the abstract. While the former may limit liability by exonerating a negligent defendant because he did not proximately cause the harm, the latter narrowly defines duty, rendering the defendant liable only for injuries to individuals within its scope. However, in

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App. 374, 56 N.E. 917 (1900). This can be explained on grounds that mental anguish is not regarded as a type of damage compensable at law. However, Indiana courts do allow recovery solely for mental anguish when it is caused by a wilful act. Kline v. Kline, 158 Ind. 602, 64 N.E. 9 (1902); Aetna Life Insurance Co. v. Burton, 104 Ind. App. 576, 12 N.E.2d 360 (1938). The difficulty of proof and uncertainty of damages are practical reasons for refusing relief. Where mental anguish caused by a negligent act results in a physical manifestation of injury, this difficulty does not exist, and there seems to be no valid reason for denying recovery. When one enters a course of conduct that creates a risk of harm to a person, he should foresee that mental as well as physical injury may be inflicted. To limit recovery to physical injuries, and thereby deny compensation for mental anguish resulting in physical injury, is to restrict liability short of the foreseeable risk. Here again, however, when a court determines that public policy will not permit recovery for this damage, it is consistent with the risk theory to hold that the defendant's activity did not create an unreasonable risk of that type of harm.

These are two areas where courts generally have found it advisable to restrict liability because of public policy reasons. In both cases a foreseeable risk of harm was created, but it may appear that it was not an unreasonable risk in the light of public policy. When this is the decisive factor, the courts should clearly state it.

28. "The fact is that a century or more ago, the failure to guard against dangers that ought to be foreseen was treated in the same spirit as now; what has changed in the accelerated pace and the enhanced mechanism utilized by society is merely the range and scope of the danger to be guarded against. The law of tort is more 'liberal' precisely because experience shows more predictable casualties." McPartland v. State, 277 App. Div. 103, 98 N.Y.S.2d 665, 668 (1950).

29. An example of a commendable expansion in this area has occurred in situations involving railroad engine collisions with objects at crossings which result in debris being thrown against a nearby plaintiff. In 1900, the appellate court held that an injury occurring in such a manner could not be anticipated. Evansville & T. H. Ry. v. Welch, 25 Ind. App. 308, 58 N.E. 88 (1900). In 1929, the court held to the contrary and allowed the plaintiff to recover. Robinson v. Standard Oil Co., 89 Ind. App. 167, 166 N.E. 160 (1929). In a similar situation, where the engine was exceeding the speed limit, the court reversed a directed verdict for the railroad holding that it could reasonably have anticipated such an injury. McIntosh v. Pennsylvania R.R., 111 Ind. App. 550, 38 N.E.2d 263 (1941).

30. "Prima facie at least, the reasons for creating liability should limit it." Seavey, *supra* note 24, at 386.

practice, courts have seemed to combine these two rationales, though ostensibly most judicial decisions are reasoned in terms of proximate cause.[31] Through foreseeability, as employed under the proximate cause concept, courts tend to analyze negligence cases by considering elements peculiar to the risk theory and in this manner have effected a combination of the two principles.[32]

Indiana has frequently stated its negligence theory in definite causation terms. *Swanson v. Slagel*[33] set down a dual standard for determining liability by requiring the defendant's act to be a substantial factor in producing the injury and by applying the test of foreseeability. Apparently, when a court imposes the first of these requisites, it determines whether or not the act is the actual cause of the harms;[34] foreseeability is used to ascertain the proximate cause.[35] Thus, foreseeability is not merely one means of determining proximate cause; it has become an essential test in Indiana.[36]

In the *Swanson* case, instead of merely requiring the usual foreseeability of some injury to some person, the court required a determination of whether the plaintiff's interest was protected against the particular hazard encountered.[37] In terms of the risk theory, this requires that both the person and the harm be within the scope of the risk created. By utilizing portions of the risk doctrine in their application of the proximate

31. ". . . [I]n judicial decisions the result is often reached through reasoning in terms of proximate cause. Indeed, a professional generation ago the 'cause' reasoning was used almost exclusively. But the problem is not one of cause in any meaningful sense and the scope of risk analysis has been gaining favor in recent years with both courts and commentators. It is doubtful whether this trend has made any material change in substantive results, but it has made a tremendous contribution in promoting clarity of thought." Fleming, *supra* note 25, at 784. See Fleming and Perry, *supra* note 7.

32. "An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more." CARDOZO, THE GROWTH OF THE LAW 5 (1924).

33. 212 Ind. 394, 8 N.E.2d 993 (1937).

34. "'Substantial' presumably means much the same thing as 'material,' also an approved word in Indiana. It apparently has a double significance: 1. that the defendant's negligence contributed *in fact* to the injury, that is, was at least an important *actual* cause, and 2. that there was no unforesecable intervening force which makes the defendant's negligence *unsubstantial* or relatively unimportant. If the defendant's negligence is a 'substantial factor' in this sense, it is immaterial that the extent of the injury or the manner of its occurrence is wholly unforeseeable." Harper, *Development in the Law of Torts in Indiana 1940-45*, 21 IND. L.J. 447, 453 (1946).

35. "The result of the holding in the foregoing cases is that if the wrongful act of the defendant is a substantial factor in producing the injury complained of, and if the particular injury suffered by the plaintiff is one of a class which was reasonably foreseeable at the time of the defendant's misconduct, then there is a casual relation in fact as well as a legal cause." Swanson v. Slagel, 212 Ind. 394, 413, 8 N.E.2d 993, 1001 (1937).

36. Dalton Foundaries, Inc. v. Jefferies, 114 Ind. App. 271, 51 N.E.2d 13 (1943); Buddenberg v. Morgan, 110 Ind. App. 609, 38 N.E.2d 287 (1941).

37. Swanson v. Slagel, 212 Ind. 394, 414, 8 N.E.2d 993, 1001 (1937).

cause concept, Indiana courts are combining the two liability-limiting theories.[38]

Further illustration of this combination is found in *Button v. Pennsylvania R.R.*[39] The complaint alleged that the defendant unnecessarily fired large amounts of coal into its engine causing black smoke to cover the highway paralleling the railroad. Because of the smoke, the car in which the plaintiff was riding ran off the road, and struck a utility pole causing injury to the plaintiff. The court indicated that for the same consequences resulting from an act necessary to the operation of the engine there would be no liability. In other words, that was a reasonable risk that the public had to bear because of the social utility of the railroad's operation. However, the complaint alleged an unnecessary firing of the engine which, the tribunal concluded, would subject travelers on the highway to unreasonable risks. The court's discussion of proximate cause involved a determination of whether the harm was one included in the foreseeable risk.[40] Thus, once again elements of the risk theory were employed under the proximate cause label.

Other Indiana cases have reached desirable results by considering the bounds of the circle of risk under the veil of proximate cause. A condition negligently created by the defendant which enables the unintentional misconduct of a third person to cause injury is often within the risk thus rendering the defendant liable for the total damage.[41] In such a case, he is held to foresee the negligent acts of third persons. However, when the risk of injury to the plaintiff is very slight and the negligence of a third

38. Button v. Pennsylvania R.R., 115 Ind. App. 210, 57 N.E.2d 444 (1944); Dalton Foundaries, Inc. v. Jefferies, 114 Ind. App. 271, 51 N.E.2d 13 (1943). In Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (1941), the court stated: "There was a duty upon the appellants to refrain from the creation or maintenance of any condition upon their right of way which subjected the traveling public, using public highways in the vicinity of such right of way [persons within the risk], to unreasonable risks or conditions that were unnecessarily dangerous. A violation of this duty would constitute negligence." *Id.* at 701, 34 N.E.2d at 946. In a consideration of proximate cause the court looked to the factual cause question. *Id.* at 702, 34 N.E.2d at 948. The case is commented on by Harper, *supra* note 34, at 455.

Though the *Palsgraf* case has never been cited in Indiana, Tabor v. Continental Baking Co., 110 Ind. App. 633, 38 N.E.2d 257 (1941), cited a later New York case which expressly applied the risk theory. O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930). Other cases utilizing elements of the risk approach are: McIntosh v. Pennsylvania R.R., 111 Ind. App. 550, 38 N.E. 2d 263 (1941); Buddenberg v. Morgan, 110 Ind. App. 609, 38 N.E.2d 287 (1941); Daughterty v. Hunt, 110 Ind. App. 264, 38 N.E.2d 250 (1941).

39. 115 Ind. App. 210, 57 N.E.2d 444 (1944).

40. The court classified the harm as a traffic accident which was, therefore, one that was reasonably foreseeable. *Id.* at 218, 57 N.E.2d at 447.

41. Indianapolis v. Willis, 208 Ind. 607, 194 N.E. 343 (1935); McIntosh v. Pennsylvania R.R., 111 Ind. App. 550, 38 N.E.2d 263 (1941); Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d, 943 (1941).

person highly improbable, the harm occurring to the plaintiff caused by an intervening negligent act may be outside the original risk.[42] Similarly, no liability attaches when the original act did not produce a risk of the occurrence of a wilful or criminal act.[43] Finally, although an unreasonable risk is created, it may be terminated if a third party could reasonably be expected to correct the situation.[44]

Whether proximate cause or the risk theory is applied to a particular set of facts oftentimes occasions little difference in result. However, there are cases where, like *Palsgraf,* use of the risk theory would effect a different outcome than that arrived at through proximate cause. In *Watts v. Evansville, Mt. Carmel, and Northern Railway*[45] two persons were injured as a consequence of the defendant's actions. The trial court allowed damages to one plaintiff for his injury because it was foreseeable but denied recovery to the other, because his was not. In permitting recovery to both, the appellate court reasoned that if the defendant had acted so as to avoid the foreseeable injury, the unforeseeable harm would not have occurred. Such a rationale is founded upon the principle that everyone owes a duty to the world at large. Thus, if a defendant breaches this duty as to one person, he is then negligent as to all. On the other hand, the trial court, by limiting the duty to the foreseeable risk of harm created by the defendant's act, reached a result in conformity with the risk theory.

Another situation that invites resolution by utilization of the risk theory was presented in the *Prickett* case.[46] Company X negligently cut a decayed telephone pole; later, company Y further weakened it. Although the telephone company for some time had actual knowledge of the dangerous condition of the pole, they instructed an employee to climb it. He was seriously injured when the pole fell. The court held all three jointly liable. Yet, it hardly seems possible that Companies X and Y could foresee any risk of danger to this plaintiff. To do so, they would have had to anticipate that the telephone company, fully aware of the danger, would allow the pole to remain in a dangerous condition and, then, send an employee up the pole. Unquestionably, Companies X and Y created unreasonable risks to certain protected interests. Should they have so weakened the pole that it would fall and injure a passer-by or damage nearby property, the result would be within the risk created. Also, there might be liability if the lineman climbed the pole before the telephone

42. Pennsylvania R.R. v. Martin, 122 Ind. App. 28, 102 N.E.2d 394 (1951).
43. Riesbeck Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E.2d 776 (1942). This case is noted by Harper, *supra* note 34, at 454.
44. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S.W. 647 (1908).
45. 191 Ind. 27, 129 N.E. 315 (1921).
46. Citizens Telephone Co. v. Prickett, 189 Ind. 141, 125 N.E. 193 (1919).

company had sufficient time to correct the situation or to inform its employees. However, this plaintiff seems to have been a person outside the risk created by companies X and Y; they could foresee no danger to him. At some point the risk created by them must terminate, and this point was reached in the *Prickett* case.[47]

A more recent Indiana case may be criticized in that the court required too much detail to be foreseen by the defendant, a utility company which allowed a decayed and unsupported utility pole to remain in use.[48] The defective pole was connected by utility wires to a second pole 150 feet away. An automobile was negligently driven against the second pole causing the decayed one to fall on the plaintiff. The court in considering the defendant's duty to the plaintiff stated that the "inquiry in the instant case [is] whether [the defendant] should have anticipated that the driver of an automobile would negligently drive his car off the traveled portion of the highway over the curb and into one of its poles with sufficient force to affect a connecting pole 150 feet away."[49] Realistically, however, a broader question should have been considered, *i.e.,* the risks created by not replacing a pole in such a decayed condition. It seems obvious that one possibility of harm implicit in this situation is that the pole may fall of its own weight and injure a passer-by. With the number of automobiles in use today, it is reasonable to foresee that a car may collide with a utility pole. Thus, there is a substantial risk that negligence of a third party may combine with the dangerous condition and result in injury to nearby persons. In the instant case, both the person and the harm were within the risk. Admittedly, the manner in which the harm occurred was improbable, but the result was not. Since the risk could have been easily abated by supporting or replacing the pole, suffering its continuance would seem unreasonable.[50] Because the utility's negligence was the

47. This case should be compared with Sinram v. Pennsylvania R.R., 61 F.2d 767 (2d Cir. 1932). There the railroad's tugboat negligently damaged a barge. The barge was towed into the dock safely, but because the sides were then covered with ice, the bargee did not inspect it to determine the extent of the damage. The barge was loaded with plaintiff's coal and capsized due to its damaged condition. The railroad was not held liable for the sinking of the barge or the loss of the coal. Learned Hand stated in the opinion: ". . . [T]he breach of a railroad's duty to one class of persons creates no liability in favor of another." *Id.* at 770. ". . . [T]he usual test is said to be whether the damage could be foreseen by the actor when he acted; not indeed the precise train of events, but similar damage to the same class of persons." *Id.* at 771. When the railroad tug damaged the barge, it could not be foreseen that the barge would be towed to shore and loaded without inspection as to the damage. As to the bargee's neglect, Judge Hand said: "As a wrong it is irrelevant; as an *unlikely event* it may be critical." *Ibid.* (emphasis added).

48. Indiana Service Corp. v. Johnston, 109 Ind. App. 204, 34 N.E.2d 157 (1941).

49. *Id.* at 206, 34 N.E.2d at 158.

50. Two other Indiana cases appear to have unduly restricted what was reasonably foreseeable. Gary v. Struble, 106 Ind. App. 518, 18 N.E.2d 465 (1936); Wilcox v.

actual cause of the injury, liability would attach under the risk theory;[51] however, under the proximate cause concept, the court held that no reasonable man could have anticipated this result.

The courts' tendency to combine the two liability-limiting principles is especially apparent in certain types of cases. Indiana statutory negligence decisions are pervaded with proximate cause language,[52] but clearly the reasoning of the risk theory is being followed.[53] This rationale has also been adopted in cases concerning manufacturers' liability to third

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Urschel, 101 Ind. App. 627, 200 N.E. 465 (1936). These cases were distinguished in Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (1941), and have been criticized in 14 IND. L.J. 379 (1939).

51. Though the utility company is liable, it may be indemnified by the driver who negligently drove against the utility pole.

52. The real issue considered under the causation veil is and should be whether the act was the factual cause of the injury. Because of the ambiguity of the term "proximate cause" it is necessary to look behind the words to the actual consideration that was made. See Hayes Freight Lines, Inc. v. Wilson, 226 Ind. 1, 77 N.E.2d 580 (1948); Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914); King v. Inland Steel Co., 177 Ind. 201, 96 N.E. 337 (1911); Jones v. Furlong, 121 Ind. App. 279, 97 N.E.2d 369 (1951).

When a violation of the statute causes harm to the interests and class of persons protected, liability is incurred. Northern Indiana Transit, Inc. v. Burk, 228 Ind. 162, 89 N.E.2d 905 (1950); Winder & Son v. Blaine, 218 Ind. 68, 29 N.E.2d 987 (1940).

Where the violation does not injure a protected interest there is no liability. Nickey v. Steuder, 164 Ind. 189, 73 N.E. 117 (1905); Greencastle v. Martin, 74 Ind. 449 (1881).

In the *Steuder* case, the defendant violated a statute prohibiting employment of any child under fourteen years of age. The child was injured by the negligent act of a customer. The court held the negligence of the employer was not the proximate cause of the injury for a reasonable man could not have foreseen the child would be injured by the act of an independent, responsible human agency. This seems to be a narrow interpretation of the interests protected by the statute. The purpose of such a statute is to protect children from the dangers of such employment. Negligence of third parties on the employer's premises is one of those dangers. Violation of the statutory duty was the factual cause of the injury because, but for the illegal employment of the child, the injury would not have occurred.

53. When there is an injury resulting from an omission of a statutory duty, courts hold such a violation to be negligence *per se* only as to those interests protected by the statute. "It must be regarded as well settled doctrine, (1) that if one upon whom the statute imposes a duty, violates that duty, *and the violation results in injury,* he is liable, irrespective of all questions of care and prudence. . . ." Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 600, 106 N.E. 365, 368 (1914). The negligence *per se* doctrine is limited in Indiana to violations of statutes that require certain safety equipment. Northern Indiana Transit, Inc. v. Burk, 228 Ind. 162, 172, 89 N.E.2d 905, 909 (1950).

"This is nothing more than the application of the risk theory to a special type of negligence case." Foster, *supra* note 4, at 83. See Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E.2d 896 (1951); Gerlot v. Swartz, 212 Ind. 292, 7 N.E.2d 960 (1937); Opple v. Ray, 208 Ind. 450, 195 N.E. 81 (1935).

Some difficulty is experienced in determining what interests the legislature sought to protect by the statute. Kiste v. Red Cab, 122 Ind. App. 587, 106 N.E.2d 395 (1952); Evansville Hoop and Stave Co. v. Bailey, 43 Ind. App. 153, 84 N.E. 549 (1908). This last case virtually overruled an earlier interpretation of the same statute, though it said the case was distinguishable on the facts. The earlier case, P.H. & F.M. Roots Co. v. Meeker, 165 Ind. 132, 73 N.E. 253 (1905), restricted so narrowly the interest protected by the statute as to render it ineffective.

persons.[54] The most recent statement of the Indiana law on this point was made by a federal district court in Illinois.[55] The judge reviewed the Indiana holdings and concluded that liability should be based on the creation of a substantial risk of harm rather than the kind of commodity that was put into circulation. This rationale extends responsibility to the limits of foreseeable risk—a highly desirable result.[56]

Adoption of the risk theory in the fields of statutory negligence and manufacturers' liability is an indication that the principle is susceptible of application to Indiana negligence law. Furthermore, there are early Indiana cases which clearly apply an embryonic risk analysis. In the first and clearest of these,[57] a tall brakeman was standing on an oversize boxcar in a train passing beneath a sagging telegraph wire maintained by the railroad. The brakeman struck the wire causing it to break and wrap around a brake handle so that the loose end was swinging free. The plaintiff's decedent was loading a flat car on a siding twenty-five feet from the passing freight. The loose end of the wire swung out, caught the decedent, and dragged him 125 feet causing injuries which resulted in his death. At the outset, the opinion declared that the railroad owed no duty to the world at large but rather considered the duty to be a relational matter between the parties.[58] That is, the duty of the railroad was not to harm a person within the risk created. Also, the injury was not within the risk, for "[m]ischief, which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong."[59] As to the foreseeability of the instant occurrence, the court held that though there was a risk created, it was so slight as to seem impossible—it was not an unreasonable risk of harm.[60] Significantly, the opinion did not indulge in the vagaries of proximate cause, though such a fact situation presented a tempting opportunity. Rather, a clear definition of the defendant's duty in relation to the plaintiff's decedent was formulated and applied.[61]

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54. Development in this field began in New York when a manufacturer was held liable for failure to inspect an automobile wheel which was defective and later caused injury to a third party. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

55. McCloud v. Leavitt Corp., 79 F.Supp. 286 (E.D. Ill. 1948). The *Buick* case was specifically followed. *Id.* at 291.

56. See the discussion of the *Buick* case in Seavey, *supra* note 24, at 376-381.

57. Wabash, St.L. & P. Ry. v. Locke, 112 Ind. 404, 14 N.E. 391 (1887).

58. *Id.* at 410, 14 N.E. at 394.

59. *Id.* at 413, 14 N.E. at 395.

60. *Id.* at 418, 14 N.E. at 398.

61. Louisville, N.A. & C. Ry. v. Lucas, 119 Ind. 583, 21 N.E. 968 (1889), also gives careful attention to the duty owed by the defendant and the risk to be perceived. The court then held that the negligence of the defendant would be deemed the proximate cause

The risk theory requires a careful analysis of the duty, provides for the application of significant public policy considerations, and affords a convenient means for a clear, understandable instruction to the jury. These advantages make Cardozo's approach not only desirable but necessary to an intelligible explanation of the basis of determination in negligence actions. Courts have employed the risk theory in decisions concerning manufacturers' liability, statutorily imposed fault, and even in some early common negligence cases. Judges have been applying the risk analysis of duty under the foreseeability test of causation making them a part of Indiana law; proximate cause language of these opinions serves only to veil and confuse the critical issues. Since proper use of the risk theory leaves nothing to be considered under the element of proximate cause, the judiciary should abandon the language of the causation concept and clearly adopt Judge Cardozo's rationale.

PROBLEMS CREATED BY THE PURCHASERS' INABILITY TO BARGAIN OVER LIFE INSURANCE

Recent criticism of the insurance industry has not been aimed at either the financial practices or management of the companies but rather at the product sold, the insurance policy.[1] Basically this is due to a prevailing dissatisfaction with certain results accruing when contract law is applied to the policy.[2] The field of life insurance contains many examples of these unsatisfactory results. Although each instance is a complete problem in itself, they are, when viewed together, illustrative of the larger issue.

The law of misrepresentation has an important position in present day life insurance litigation. It owes its prominence, in a large sense, to judicial and legislative dissatisfaction with the results obtained when the strict common law doctrine of warranties was applied to life insurance contracts.[3] Today, the statutes of most states provide that all statements

since the consequences were not unnatural. By the definition of the risks to be perceived, the court answered the issue of proximate cause.

1. "Generally, the criticism which is aimed at insurance is not criticism with respect to financial matters or management. It is criticism of the product which insurance companies sell. . . . This condition of affairs has been developing for two hundred years or more. It grows worse instead of better. . . ." Shaver, *Pitfalls in Insurance Policies*, [1950] INS. L.J. 801, 802.

2. The policy of insurance is a contract between the parties and is governed by the principles of contract law. 1 FREEDMAN, RICHARDS ON THE LAW OF INSURANCE §1 (5th ed. 1952).

3. The application by the early courts of the strict doctrine of warranties to the life insurance policy resulted in widespread hardships for the insured. VANCE, HANDBOOK ON