Proximate Cause Should Be Barred from Wandering Outside Negligence Law

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I. THE CASE AGAINST CAUSE

In tort law's darkest corner lurks the concept of proximate cause. Causation's mystifying riddles constitute the last refuge of muddy thinkers. Proximate cause, with its two utterly different meanings, spills too much ink and distorts legal debate over the scope of tort liability. When lawyers and judges toss causation rhetoric into briefs and opinions, the resulting babel smothers common sense and further corrupts legal English. The fog of proximate causation seeps in because courts inanely mix value-neutral cause in fact (who-did-it) with the policy matter of allocating accident costs (who-should-pay). This article suggests that, at least with respect to strict liability torts, the proximate cause concept should be outlawed.

The distinction between concrete cause in fact and blameworthy ("it was her fault") cause is easy to blur. Lay and legal people alike do it, but only lawyers make a fetish of confusion. In fairness to those who speak the legal tongue, the current bar inherited the confusing doctrines of causation. Yet clear analysis of scope-of-liability problems demands that the legal process accommodate itself to the very different intellectual tasks involved in discovering who-did-it and judging who-should-pay. The lawyer-judge, who is both historian and policymaker, needs a clearer language for talking about past events and current values. Proximate cause lore won't do.

In the trial of tort cases, the two faces of causation unduly complicate keeping separate the is and the ought. For example, it's one kind of job to trace empirically the history of this planet's pollution (cause in fact) back to the ape who crawled down a tree, urinated in a stream, and first began upsetting nature's balance. It's

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quite another job to select, among a jungle of contributing factors, which polluting apes deserve fine or jail for contaminating Mother Earth. *Who-did-it* is history; *who-should-pay* is practical politics (in its larger sense). Confusing history with politics, as is the legal custom in proximate cause cases, makes for weak history and poor politics.

The pity is that legal folk make so little effort to clean up causation pollution. Of course killing off proximate cause may be akin to hindering the setting of the sun. Legal reforms come and go, but proximate cause hangs on like death and taxes. Perhaps West Publishing Company, had it long ago undertaken to clean up legal language, might have put a quota on “goobledegook” and retracted proximate cause’s key number. Or perhaps the Bar Committee on Unauthorized Legalisms should have locked tortious causation away for good along with the rack, the fellow servant rule, and other legal monsters.

But proximate cause is so unruly and so devious that it’s difficult to close in for the kill. Proximate cause, in sum, is a common law leviathan, a Moby Dick that surfaces at awkward moments from the murky deep to do evil. This white whale with the legalistic eye hypnotizes judges and juries into playing a shell game in which the players ostensibly search for concrete facts while, under the table, political choices are made.

For decades, a handful of legal realists, eager to free the law of shell games, have made like Captain Ahab and given dogged chase to Moby Dick. But for too long the bastard offspring of cause-and-effect and cause-and-blame has eluded the harpoon. The legal community, alas, may never talk common sense about allocating accident costs, and judges may never draft risk-spreading rationales in language closer to the Queen’s. But what the hell—here’s one more try at bringing in the proximate beast, belly up.

To start with, nobody’s proud enough of proximate cause to step forward and confess founding fathership. Even apologists for legal formalism are embarrassed by the false front created by proximate cause’s muddled mixture of ideas about factual connection and scope of liability. Only true believers in the pure milk of the hornbook look at causation’s two faces and see a single true rule. First-year law students, for goodness sake, catch on by Christmas to the subterfuge going on when courts purport to fish, from an ocean of shadowy causes, for a big one named “proximate.”

In tort cases, cause in fact is rarely in issue. Therefore, proximate (or legal) cause comes out being little more than a courtroom
procedure for allowing judge and jury to decide, mostly on intuition, *who-should-pay*. Causation equations are shockingly shy of substantive meaning. In fact, most negligence law boils down to mere procedure because abstractions such as foreseeability and legal causation beg the liability question. Empty words are dead until judge and jury make the choices that give life to the law.

Theories of recovery in negligence cases, and in most strict liability cases, are couched in terms so general that judge and jury must regularly define limits to tort protection. Such liability-limiting discretion involves choosing among political and social values. Vague definitions of causation, no matter how often repeated, give little aid in making such judgments. The traditional claims of legal science to the contrary are false.

Proximate cause is, however, a handy device for judges who, where the law is embarrassingly silent, cannot escape making political, albeit masked, liability choices. Pointing toward causation’s dark corner is deemed better, apparently, than an outright lie, or sitting mute. Thus proximate cause, with its pinch of concreteness to a ton of fog, keeps the judge “above the fray” by tying the decision to the rule-of-law’s brooding omnipresences.

Judges keen on passing the political buck need only find a precedent by crouching in the nearest causation graveyard; there, like ancient tribal medicine persons, robed leaders rattle dry bones until the proximate finger of phantom fact points to the limit of the law’s detached protection. So traditional and so seductive is this causation concept that, rather than eradicate the concept in its ancestral home in negligence law, it may be easier to replace negligence law.

But outside negligence law, there’s a chance that common sense and plain English can overcome the ills of leaning too heavily on the frail causation reed. In developing areas of strict tort liability, there is no proximate cause tradition, and therefore, no justification for rattling causation bones to make rain. In damage suits involving defective products or no-fault automobile insurance, setting liability limits cries out for judicial candor and leadership. To be avoided is passing the proximate buck to juries along with misty generalities about misty causes.

II. Dog Shane Did It

The Florida Supreme Court, however, in its most recent pronouncement on proximate cause, *Jones v. Utica Mutual Insurance*
Co.,¹ chose once again to do the Devil’s work. That court turned proximate cause loose to swim free in a no-fault dispute involving a little boy and his dog Shane. Jones is a good case to show how the law can be lured into sleeping with nonsense.

Dog Shane allowed her young master and two other boys to loop a rope through her collar and harness her to a little red wagon. But Shane proved too weak to pull a wagon full of beefy wagoners. Soon the three boys gave up that sport but left Shane in harness. Shane then gave chase to a dog belonging to twelve-year-old wagoner Donnie Jones. During that chase, the wagon, which Shane still towed, struck and injured Donnie Jones’ leg.² Young Jones sued Shane’s owner under a century-old Florida Statute³ making dog owners strictly liable for their best friend’s misdeeds. Shane’s owner defended all the way to the Florida Supreme Court and lost. Five of seven justices ruled that the dog statute’s no-fault coverage, though presumably subject to some limits, extended nevertheless to Shane’s owner. The simple, maybe too simple, reason the court gave for this harsh result was that Shane, as a matter of cause in fact, caused Jones’ injury.⁴ The problem with the Jones rationale is that the real issue was who-should-pay, not who-did-it.

Jones is the latest in a series of strict liability cases⁵ in which proximate cause, despite its confusion of meanings and unmistakable aura of fault, dominates judicial review of the scope of no-fault protection in Florida and elsewhere.⁶ Strict tort liability, remem-

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1. 463 So. 2d 1153 (Fla. 1985).
2. Facts are drawn from the opinion of the district court in Utica Mut. Ins. Co. v. Jones, 408 So. 2d 769, 770 (Fla. 2d DCA 1982), rev’d, 463 So. 2d 1153 (Fla. 1985).
3. FLA. STAT. § 767.01 (1979). As originally enacted in 1881, this statute offered no protection to personal injuries: “[O]wners of dogs shall be held liable and responsible for damages to sheep or other stock killed or maimed by their dogs.” 1881 Fla. Laws 3294.
   But in the 1892 compilation, § 2341 added personal injury protection: “Owners of dogs shall be held liable for damages to persons and stock killed or injured by their dogs.” For additional legislative history, see infra note 61.
4. Jones, 463 So. 2d at 1157. The supreme court rejected the district court’s judgment that strict liability protection in § 767.01 was not designed to reach little-red-wagon incidents; instead, it affirmed the trial judge’s directed verdict of liability. Id. at 1155.
5. See infra notes 28, 70, 90, 92, 147, 158.

The tendency of courts to use causation doctrines to justify limits on strict liability (or in the case of Jones to turn proximate cause on its head to rationalize a near-absolute liability) means that judges avoid explicit clarification of no-fault goals. Such use of the slippery proximate cause device to mask ad hoc groping for policy boundaries has been questioned frequently. See, e.g., Maleson, Negligence Is Dead but Its Doctrines Rule Us from the Grave: A Proposal to Limit Defendants’ Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause, 51 Temp. L.Q. 1, 17 (1978) (urging conscious assump-
ber, is not absolute. Strict means strict only in a sense relative to liability keyed to fault. Strict liability supposedly lies between liability for fault and the near-absolute liability of an insurer. However, when strict liability moves toward the negligence end of the scale, some courts have incongruously mixed strict liability with fault doctrine by using proximate cause (in its blameworthy sense) as an excuse to bar strict liability claims. Thus do lawyers and judges overly fond of universal nineteenth-century principles, when sailing in the unchartered strict liability waters of the 1980's, cling to fault as if to a life preserver.

When judges in strict liability cases like Jones sneak in fault by measuring liability in proximate cause terms, the resulting dialogue sounds like the Brave New World of, well, 1884: Did the pertinent no-fault dog (or defective lawnmower or no-fault vehicle), as a direct consequence of a continuous sequence and without the intervention of a superseding cause, probably, foreseeably, legally, substantially, and proximately cause the plaintiff's hurts?

The foreseeability test for proximate cause is applied differently in no-fault cases. Instead of asking whether "the risk can be foreseen at the time of the negligent act," in strict liability the defendant is liable if "the risk of harm can be foreseen at the time of embarking upon the activity." Note, Strict Products Liability and the Bystander, 64 COLUM. L. REV. 916, 935 (1964).

7. Jones is the rare case of not strict, but STRICT liability.
8. See Maleson, supra note 6, at 2-3 (footnotes omitted):
   The revolution [overthrowing negligence law] may be illusory, however, as the case law of the transition period appears to be at odds with the ringing declarations ushering in this new era in products liability law. Strict products liability emerges as a doctrine in search of historical underpinnings. . . . Lacking an adequate theoretical substructure, courts have dealt with situations on an ad hoc basis and have turned to negligence terminology to justify all manner of divergent conclusions in what purport to be strict liability decisions. The most disturbing evidence of this trend is the emergence of proximate cause as a factor in limiting the scope of a defendant's liability with virtually no inquiry concerning its appropriateness in a strict liability framework.
9. See Pope v. Pinkerton-Hays Lumber Co., 120 So. 2d 227 (Fla. 1st DCA 1960), cert. denied, 127 So. 2d 441 (Fla. 1961), the state's most frequently cited opinion on proximate cause. In this negligence case, the court attempted to capture the elusive magic of causation with legalistic formulas tied to empty words such as "foreseeable" and "superseding" and "intervening." But see Probert, Causation in the Negligence Jargon: A Plea for Balanced
The Jones opinion, with its proximate cause approach, clouds the issue by transposing the problem of how far to extend the dog statute (section 767.01) into a fake question about what Shane did. The court in Jones thus bypassed the threshold question of what the legislature intended to accomplish with its dog law. Of course, looking into the well of legislative intent sometimes adds confusion. When legislative history is vague (more later on whether section 767.01’s purpose is vague), perhaps courts should move toward a forthright judicial shaping of the limits of statutory protection; it’s no surprise that courts have long been, and must continue to be, partners with legislators in shaping legal codes. In Jones, however, the court ignored the ambiguity in section 767.01, which says only that “[o]wners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons.”10 The Jones court merely closed one eye and ruled the

"Realism", 18 U. FLA. L. REV. 369, 388 (1965) (questioning whether anyone really believes that terms like foreseeable, risk, proximate, duty, or cause can possibly control a court’s decision).

The Pope court’s faulty incantations hardly fit contexts in which changing political and moral ideas are pushing fault aside to make room for tort schemes keyed to compensating large classes of victims; in effect, the circle back to the old trespass form of action with its faultless liability is being completed. Partly this is a new social justice; partly it is economic theory applied in the courtroom to reduce and more widely spread the liability costs of, for example, mass-produced defective products.

Academic lawyers work to build sophisticated models for this new social justice. One model-building article attempts to adapt causation doctrines to an “instrumentalist approach, under which the choices that can be made over the scope of liability are related directly to well-specified social goals.” Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. LEGAL STUD. 463, 502 (1980). Shavell makes use of “decision theory” and of economic analysis spelled out in equation form. For a recent attempt to capture proximate cause with economic equations, see Grady, Proximate Cause and the Law of Negligence, 69 IOWA L. REV. 363 (1984). Social goals put into economic language are perhaps the seeds of a brave new world of torts and not merely Pope v. Pinkerton-Hayes formulas put in 1980’s dress. But for now the fact is that judges and juries continue to sleep with dotty old proximate cause, and, before more rational ways of shaping strict liability goals can be developed, the ghosts of negligence must first be exorcised.

10. FLA. STAT. § 767.01 (1983) (emphasis added). Section 767.01’s “liable for any damage” language has been interpreted to mean strict liability. See Sweet v. Josephson, 173 So. 2d 444 (Fla. 1965), aff’d 173 So. 2d 463 (Fla. 3d DCA 1964); Knapp v. Ball, 175 So. 2d 808 (Fla. 3d DCA 1965). These cases also declare that § 767.01 covers damage “done by . . . dogs” other than by dog bite. The Sweet case also holds that FLA. STAT. § 767.04 (1979)—“Dog owner’s liability for damages to persons bitten”—supersedes § 767.01 only in relation to dog bite situations. See Seventh Survey of Florida Law (pt. 2), Torts, 20 U. MIAMI L. REV. 820, 835 (1966).

What if dog bites dog? Since § 767.04 protects only “persons,” the owner of a dog-bitten canine must seek compensation under § 767.01’s protection of “domestic animals.” Such a strict liability claim was recently pending in Keshan v. Martin, No. 84-6913 (Fla. 13th Cir. Ct. filed May 9, 1984). The owner of a poodle named Max alleged that defendant’s two
So, given the justices’ “traditional standards,” just how do we ascertain section 767.01’s coverage? The Jones majority reasoned that Shane was a section 767.01 beast since “the injury in this case would not have occurred ‘but for’ the animal.”12 “But for,” however, is a cause-in-fact matter of history, of physical cause-and-effect, whereas in Jones the history of Shane’s little red wagon mishap was undisputed. Reading section 767.01 exclusively in “but for” terms leads to absurdity, as the following Big Shane hypothetical shows. Big Shane is Shane’s daddy. “But for” Big Shane, Donnie Jones’ “injury would not have occurred.” So, did both Shanies do section 767.01 damage? Surely no court would follow the cause-in-fact trial so blindly.

III. WATCHDOG TO GUARD CAUSE

Why do courts persist in injecting no-fault schemes with doses of nineteenth-century fault? Why borrow from negligence law—of all things—that awkward mix of who-did-it and who-should-pay with which lawyers weaned on fault make mud pies? And why transpose broad policy issues into proximate cause issues and thus shift to so-called factfinders the power initially to set strict liability limits? This Article deals with these questions first by analyzing the proximate cause concept and its role in allocating functions between judge and jury. The Article next explains how transplanting proximate cause into strict liability contexts distorts the legal process. And finally, this Article identifies cases (under Florida’s dog statute, the state’s automobile no-fault law, the state’s workers’ com-
pensation system, and Florida's strict products liability law) that suffer from the obfuscation which accompanies causation hide-and-seek.

The underlying concern here is that posing the issue in causation terms in cases like Jones—where the factual connection between defendant and damage is obvious—means that Florida juries, charged to grope for ultimate causes, are blindly setting policy for the administration of strict liability torts. Appellate judges, moreover, in second-guessing juries about blameworthy cause, absurdly sift through empirical evidence of cause in fact when, in fact, who-did-it or what-happened is clear and only who-should-pay is in question.¹³ Such forms of Orwellian doublethink deserve rooting out.

Negligence law's proximate cause is especially unsuitable for export into compensation schemes geared to create wider loss spreading and to promote safety.¹⁴ The meanest critics of proximate

¹³. "Who done it" is Dean Pedrick's name for the cause-in-fact aspect of proximate cause. Pedrick, Causation, the "Who Done It" Issue, and Arno Becht, 1978 WASH. U.L.Q. 645. The "Who Done It" reference seems to emphasize that the cause-in-fact inquiry is not metaphysics but physics.

A more all-embracing phrase for use in focusing on cause in fact is "what happened." Of course there are some lawyers, philosophers, and bass fishermen who assert the impossibility of ever separating the notion of cause into separate matters of sensory description and evaluative judgment. My colleague, Dean Joshua Morse, lawyer, philosopher, and bass fisherman, points out that a purified cause in fact with all the judgment boiled out opens up every tort suit to an infinity of causes, including Adam and Eve. Maybe the answer is to erase c-a-u-s-e from legal language and substitute "what happened" or "who pays," inquiries that for practical purposes point to the two different intellectual tasks involved in causation debates. Of course there is no getting around the fact that all language is a trap and complete abstinence is the only sure way to avoid captivity. Charles Black illustrated this in his article, Mr. Justice Black, the Supreme Court, and the Bill of Rights, HARPER'S MAC., Feb. 1961, at 63, 67:

Dr. Johnson, who was addicted both to accuracy and to veracity, said in substance that if one stood before a great orchard and remarked, "There is no fruit in that orchard," and there came a poring man who found two apples and three pears, the first speaker would be right in dismissing the objection with laughter.

Professor Probert writes that arguments about splitting proximate cause "tend . . . to show an unjustified faith in our underdeveloped nonmathematical legal language. . . . The arguments tend too much to assume that 'facts' are outside one's skin and that 'values' are on the inside . . . ." Probert, supra note 9, at 370. Probably so. But the judge-and-jury show must go on, and as a practical matter I will go along with Dr. Johnson and say that there is no fruit in that orchard. See also infra note 15; A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961), for support of the proposition that it is almost always possible to separate the tangle of fact and policy in dealing with causation issues.

¹⁴. See Michelman, Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs (Book Review), 80 YALE L.J. 647, 649-59 (1971). For an inquiry into whether strict liability actually will produce safer products, see R. POSNER, ECONOMIC ANALYSIS OF LAW
cause would rid the legal world of proximate cause wherever that noxious concept rears its heads, including negligence cases, and limit the jury's role in all cases to determining cause in fact. The more moderate Dean Prosser, so highly skilled at imposing order on a wilderness of cases, knew he had seen the abyss when he faced the mysteries and miseries of Moby Dick:

There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach.

In 1945, Justice Traynor misspoke when he said that "[i]n all probability the general expectation is the reasonable one that in time the courts will dispel the mists that have settled on the doc-


For extensive readings on economic and other approaches to the analysis of tort law, see R. Rabin, Perspectives on Tort Law (2d ed. 1983).

15. E.g., Thode, Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury, 1977 Utah L. Rev. 1 (naming those few courts that have eliminated proximate cause and have substituted the duty-risk approach). The late Wayne Thode, as he indicated in his article, was a vigorous disciple of the late Dean Leon Green. Green in the 1920's began his fifty-year generalship in the battle against proximate cause. This Article represents my effort to be a good Green soldier. For more on Green and his noble cause, see infra notes 30, 31. Other Green-inspired warriors include Maleson, supra note 6; Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60 (1956); Pedrick, supra note 13.


Dean Prosser, in Palsgraf Revisited, 52 Mich. L. Rev. 1, 32 (1953), almost threw off the chains of tort tradition to become a Green convert to a world without proximate cause:

Direct causation, the scope of the risk, the unforeseeable plaintiff, the last human wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of 'proximate cause,' all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be. In this respect Leon Green has been for a quarter of a century a voice crying in the wilderness; and as one of the original scoffers at his doctrine, I make him belated obeisance [sic].
trine of proximate cause in the field of negligence." 17 That the mists persist in Florida law is evident in the sampling of cases analyzed in this Article. The Florida Supreme Court, like Dean Prosser, has conceded that the concept of proximate cause "can be quite difficult" and is "[m]ore easily defined than applied." 18 Another Florida court, in a fit of candor, once let the entire proximate cause cat out of the bag:

It is notorious that proximate cause is in most cases what the courts will it to be and that it is at best a theory under which the courts justify liability or shield from liability those that the courts find should not in reason and logic be responsible for a given result. 19  

Yet, despite the widespread recognition of the unnecessary confusion caused by traditional causation doctrines, proximate cause is today, like the joker in poker, wild in aces, straights, and flushes. 20 It is little wonder that critics of the fictions and subterfuges of legal orthodoxy so often hit home, 21 given such easy targets as the sham-scientific tests for proximate cause. 22 Regretta-

18. Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301 So. 2d 441, 444 (Fla. 1974).  
19. Mozer v. Semenza, 177 So. 2d 880, 883 (Fla. 3d DCA 1965). Mozer involved a hotel fire lit by an arsonist whom the defendant hotel claimed was an independent intervening cause. The Mozer court correctly identified the causation issue as a nonfactual policy matter ("who done it" was clear) of choosing between the hotel owner's liability or immunity. But the court's language in Mozer about proximate cause being a matter of the scope of the hotel owner's duty would of course be inappropriate in a case where the dispute is about "who done it," a matter that calls for drawing inferences from sensory perceptions about history. For a recent Florida case attempting to dispel some of the mists and to separate proximate cause into its two separate parts, see Stahl, 438 So. 2d at 19. The Stahl court, like the court in Mozer, recognized that the proximate cause issue, in situations where cause in fact is obvious, is a matter of drawing policy lines: "[C]ourts ... have found no proximate cause in such cases based solely on fairness and policy considerations, rather than [on] actual causation grounds." Id.; see also Note, Medical Malpractice and "Loss of a Chance" Actions—What Standard Should Florida Adopt?, 13 Stetson L. Rev. 136, 139 n.31 (1983) ("Causation in fact poses the question whether the plaintiff was injured and, if so, whether the defendant caused the injury. . . . [C]ausation in law requires the court to determine whether any legal consequences should be imposed." (footnote omitted)).  
21. See, e.g., THE POLITICS OF LAW (D. Kairys ed. 1982); G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 175-76 (1982) ("[T]oo much . . . [linguistic inaccuracy about the frequent fiction of legislative intent] by courts destroys their credibility, especially since the major effective control on courts stems precisely from their duty to explain what they are doing.").  
22. Causation scientists don smocks and go to the lab, if one believes what one reads in
bly, proximate cause has slipped not only into important areas of tort law, such as strict products liability and ultrahazardous activities, but also into constitutional law, tax law, criminal law, and securities law. The Florida Supreme Court, in Lumbermens Mutual Casualty Co. v. Castagna, even spied proximate cause lurking in so unlikely a place as the Florida Motor Vehicle No-Fault Law, a law designed to free traffic victims from common law defenses to compensation.

What all this means is that the legal system needs a trained watchdog to keep proximate cause out of compensation plans tied to policies inconsistent with negligence law goals. If law is to be the continual striving for reason it is cracked up to be, that reason must be freed of excessive entanglement with Latin maxims such as the law reports, to measure time and space; to test for efficiency and for cracks in the chain of causation; to weigh for substantiality; to examine microscopically for activeness; and from this data to form a hypothesis as to foreseeability.

23. Maleson, supra note 6; Polelle, supra note 6; Thode, supra note 15, at 11-12. But see Note, supra note 6 (foreseeability standard approved).


26. See M.C.J. v. State, 444 So. 2d 1001, 1004-05 (Fla. 1st DCA), petition for review denied, 451 So. 2d 849 (Fla. 1984); J.A.C. v. State, 374 So. 2d 606, 606-07 (Fla. 3d DCA 1979), cert. denied, 383 So. 2d 1203 (Fla. 1980).

27. See Ketchum v. Green, 557 F.2d 1022, 1028 (3d Cir.), cert. denied, 434 U.S. 940 (1977), noted in 46 Geo. Wash. L. Rev. 482 (1978), entitled For Fraud To Be “In Connection With” a Purchase or Sale of Securities Under Section 10(B), Plaintiffs Must Allege a Causal Connection and Close Degree of Proximity Between the Purchase or Sale of Securities and Defendants’ Fraudulent Scheme.

28. 368 So. 2d 348 (Fla. 1979). For a discussion as to how proximate cause became involved in the Lumbermens litigation, see infra text accompanying notes 111-24.


30. See Green, The Thrust of Tort Law Part I: The Influence of Environment, 64 W. Va. L. Rev. 1, 15 (1961) (“The environment of today struggles to break through the doctrinal overcast of yesterday.”). Green was one of the early group of legal realists who in the 1920’s showed how inadequate legal language is for describing what judges and juries actually do. If you read much of Green’s work, you soon realize that legal literature has its own Moby Dick. Dean Green’s harpoons still draw blood from his great white nemesis:

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

as proxima causa.\textsuperscript{31} As Oliver Wendell Holmes, Jr. said, "To rest upon a formula is a slumber that, prolonged, means death."\textsuperscript{32}

Whittling proximate cause down to a manageable, cause-in-fact size will never be easy, for proxima causa has "captured the imagination of the courts, and by its promise of easy decision has led them upon evil days."\textsuperscript{33} Those who seek to paper over cracks in the rule of law have been lured over the past century into the shifting sands of causes proximate, sole, active, direct, immediate, legal,\textsuperscript{34} causa causans, causa sine qua non, effective, continuing, operative, independent, concurring, intervening novus actus interveniens, efficient, controlling, producing, procuring, preponderating, responsible, just, substantial, material, appreciable, subsequent, supervening, supervening, dependent, remote, passive, indirect, consequential, sole proximate, independent intervening, intervening independent supervening, and so forth.\textsuperscript{35} For the cause in fact of this avalanche of causation adjectives, we have the English bar to thank.

In 1810,\textsuperscript{36} proxima causa slipped quietly into England's tort law

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\item \textsuperscript{31} Lord Bacon's first "Maxim of the Law" was \textit{In jure non remota causa, sed proxima, spectatur}—a caution against misty generalities and uncertain speculation. Bacon was hoping for law tied to reason, but instead he got a misty proxima causa that had grown, by the time Dean Leon Green took up arms, into a whale of a fog. For half a century, Green dissected proximate cause cases to reveal that the causation formulas of negligence law are too empty of meaning to bear the burdens that judges continue to assign. When I was one of Dean Green's students in 1957 at the University of Texas Law School, he emphasized the hollowness of proximate cause rhetoric by forbidding mention of the noxious phrase in his classroom. Students reciting cases in Green's classes referred to the unmentionable proximate cause in Greenspeak, i.e., either as a problem of "causal relation" or of "scope of duty," depending on which of proximate cause's two faces appeared that day in the casebook. Just before Green died at 90, the Texas Law Review filled its February 1978 issue with guest articles dedicated to Green's war against the demon cause. That dedication issue also lists Dean Green's published proof of Moby Dick's sins, including works such as \textit{L. Green, Rationale of Proximate Cause} (1927); \textit{L. Green, Judge and Jury} (1930); \textit{L. Green, The Litigation Process in Tort Law} (1965).
\item \textsuperscript{32} O.W. Holmes, \textit{Ideals and Doubts}, in \textit{Collected Legal Papers} 303, 306 (1920).
\item \textsuperscript{33} Green, \textit{Proximate Cause}, supra note 30, at 471. Dean Green's anti-proximate cause crusade was all the more noble since he must have known that stamping out proximate cause in toto would be akin to removing from professionally-pitched baseballs that last tell-tale trace of tobacco-brown spit.
\item \textsuperscript{34} "Legal" is the key adjective in Florida's causation jurisprudence. Florida's standard jury instructions for negligence cases substitute for proximate cause the words "legal cause," apparently on the theory that a rose by any other name hides the thorns that impale reason. \textit{Florida Standard Jury Instructions In Civil Cases} 5.1 (1967); see Note, \textit{Tests of Causation and the Florida Jury Instructions—The Current Conflict and the Need for a Change}, 32 U. Fla. L. Rev. 308 (1980).
\item \textsuperscript{35} This list of adjectives was compiled 35 years ago. Green, \textit{Proximate Cause}, supra note 30, at 472 n.2a.
\item \textsuperscript{36} In philosophy, a first-century poet traced the chain of causation to an earlier date:
\end{itemize}
in a horse-and-buggy accident case entitled *Flower v. Adam*. In *Flower*, Judge Lawrence opined that "the immediate and proximate cause [of the accident was] the unskilfulness of the [plaintiff] driver." Lawrence's words, at the simplest level, could be read as a mere description of the accident. But simple description was not Lawrence's aim. In *Flower*, the plaintiff's driving clearly was connected to the accident; Lawrence, alas, was talking about who-should-pay.

Lawrence no doubt knew his "proximate cause" had a face of fault, yet he hardly could have realized the nature of the animal he had created. Certainly there was nothing unique then or now about referring to a party at fault as the blameworthy cause of an injury. Only later did defense lawyers and easy-to-seduce judges develop proximate cause's blameworthy side into a potent defense against plaintiffs seeking broader protection under the negligence theory. The proximate cause concept in post-*Flower* America perhaps met a felt need for some means—often a judge finding insufficient evidence of proximate cause—of limiting the scope of this new nineteenth-century fault theory of liability. The negligence tort lacked the built-in liability limitations implicit in the specific elements of intentional torts. Moreover, when a defendant's conduct is merely faulty rather than malicious or intentional, pressure builds to draw a liability line commensurate with the lesser degree of sin.

But the time has come for social engineers to lay aside causation mechanics and openly shape compensation schemes according to shared notions of fairness, deterrence, economics, morality, and courthouse administration. Ridding the law of some of its proximate cause baggage might even lessen the more general legal confusion about the whole law-fact distinction and the proper role of the jury.

"Even from the first beginnings of the world descends a chain of causes." *Lucan, De Bello Civili VI*, 1.611.


IV. THE JURY AND PROXIMATE CAUSE

According to the law, proximate cause is a question of fact for the jury. To understand what this means, note that in law, "fact" isn't really fact. "Fact," in point of fact and law, is often pure non-fact. In plain English the truth is that, among lawyers, "[b]y and large the terms 'law' and 'fact' are merely short terms for the respective functions of judge and jury." Or, as a champion of common sense about the basic law-fact distinction put it, "whether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law." Thus a jury queried on the "fact" issue of legal cause may face either: (a) what-happened choices tied to conflicting sensory evidence about a slice of history; or (b) who-pay choices concerning political-ethical-sociological-economic values that bring into the courtroom everything that tugs on the human conscience, including the values of stability and predictability; or (and here comes the fog) (c) choices involving both (a) and (b).

Were lawyerly talk of esoteric causes to go out of style and references to cause be always wedded to cause in fact, the expressions "proximate" and "remote" and "efficient" could be dropped and the sun would shine. Even the Janus-headed concept of proximate cause could be tolerated (assuming we wish to acknowledge the jury's legislative role) if the bar could keep separate the is from the ought. But far too often, officers of the court speak of cause-in-fact when the issue calls for discretionary choice among competing values. Lawyer and judge often either fail to recognize the real issue or, by using causation techniques, elect to view the law through

41. L. Green, Judge and Jury 279 (1930); see K. Davis, Administrative Law Text 545-56 (3d ed. 1972).
42. Isaacs, The Law and the Facts, 22 Colum. L. Rev. 1, 11-12 (1922); see Pedrick, supra note 13, at 657.
44. That the lack of such a separation of the is and the ought in proximate cause litigation causes considerable confusion is clear. See W. Prosser & W. Keeton, The Law of Torts § 42, at 272-73 (5th ed. 1984). Florida courts likewise recognize that the causation issue has a double aspect. See, e.g., Nicholas v. Miami Burglar Alarm Co., 339 So. 2d 175, 177 (Fla. 1976); Courtney v. American Oil Co., 220 So. 2d 675 (Fla. 4th DCA 1968), cert. denied, 225 So. 2d 919 (Fla. 1969). In Courtney, the court states that "[t]he concept of proximate cause has at least two functions. One is to require a causal connection between an alleged act of negligence and [an injury]. The other is to limit the liability of the alleged wrongdoer . . . ." Id. at 677. The perennial problem, however, is keeping legal eyes trained on the proper ball at the proper time.
a glass darkly.

Even were legal eagles able simultaneously to juggle both proximate cause balls, what about juries asked to fish the murky deep for sin-laden causes? If juries are to choose, albeit intuitively, compensatory goals, why seek out learned lawyers and give them robes. On the other hand, in those few cases in which the cause-in-fact aspect of proximate cause is disputed, resolution of such what-happened disputes is proper jury work. But even in cause-in-fact disputes, the standard legal cause instruction given juries is so garbled that it fails to isolate for jurors the what-happened issue.

Take, for example, Florida's standard jury instruction on legal cause in negligence cases: "Negligence is a legal cause of [injury] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [injury], so that it can reasonably be said that, but for the negligence, the [injury] would not have occurred." Suppose a Florida trial judge believes there to be a jury issue on cause in fact (for example, and hypothetically, did Shane's wagon hit Master Jones, or did Jones break his leg breakdancing?). The judge has little choice but to instruct the jury in terms of "natural" and "directly." Yet such vague adjectives necessarily beg the political question and frustrate any effort to focus jury attention on any disputed history.

If what-happened is in question, it is nonsense to ask jurors to contemplate the mysteries of legal (who-should-pay) cause. A perceptive juror given learned advice about "natural" and "legal" cause, in a case where only what-happened is in question, must tremble at the uncommon ways of the common law. One wonders if literal-minded jurors might grapple seriously with the philosophical intricacies of whether a dog harnessed to a wagon is a "natural" dog. Was Shane in harness any less a cause in fact of Jones' injury because "natural" dogs pull no toy wagons?

45. Pedrick, supra note 13, at 646; Thode, supra note 15, at 7.
47. Florida Standard Jury Instructions in Civil Cases 5.1(a) (1967) (emphasis added).
48. See, e.g., Clooney v. Geeting, 352 So. 2d 1216, 1219 (Fla. 2d DCA 1977) (awarding new trial for failure to give standard instruction on concurring cause); Little v. Miller, 511 So. 2d 116, 118-19 (Fla. 4th DCA 1975) (error to refuse standard instruction on concurring cause); Ruiz v. Cold Storage & Insulation Contractors, Inc., 306 So. 2d 153, 154-55 (Fla. 2d DCA) (awarding new trial for failure to give standard instruction on concurring cause), cert. denied, 316 So. 2d 286 (Fla. 1975). For an excellent discussion of the competing tests for cause in fact among Florida courts and for a proposed jury instruction limited to the cause-in-fact inquiry, see generally Note, supra note 34.
“Natural,” in the context of personal injury suits, is alien to the world of physical fact; “natural” is of the world of judgment. Concepts such as “direct” and “natural” evoke the accordion-like notion of foreseeability, a triple-duty word Florida courts use to rationalize choices made about issues of proximate cause or negligence or duty.49 If, therefore, a Florida juror faced with a cause-in-fact issue were so unlucky as to remember the learned instruction on legal cause, such a juror should keep it to herself and avoid confusing the other jurors.

A second problem with Florida’s jury instruction on causation is that jurors are never told that the search for “legal” cause, in cases void of a cause-in-fact issue, is a sub rosa procedure for choosing the scope of a negligent defendant’s liability. Manipulating juries into unconsciously sharing with judges the power to set liability limits is a peculiar way to run a government.50 And then there’s the trial judge faced with a proximate cause verdict he can not live with. This judge, in order to veto the jury’s causation finding, must tell the wrongheaded jurors that “reasonable minds” could never have drawn such inferences from the evidence.

Equally peculiar is the posture appellate judges often assume when reviewing proximate cause verdicts. Most such appeals concern scope of liability, yet judges routinely test these proximate cause verdicts by pretending that cause in fact is on review and by incongruously screening testimony for substantial evidence of who did what to whom. This pretense about empirical evidence is made necessary by the underlying fiction that juries decide only what-happened. For judges explicitly to review the unspoken policy choices underlying a jury’s verdict would fly in the face of a legal theology that preaches that only judges shape law and policy.

The Florida Supreme Court, in Eli Witt Cigar & Tobacco Co. v. Matatics,51 pretended that cause in fact was the sole issue and avoided meaningful review of a scope of liability question. The Matatics opinion reveals that the plaintiff, three weeks after suffering a brain concussion in a highway collision with the defen-

49. Stevens v. Jefferson, 436 So. 2d 33, 35 (Fla. 1983) (foreseeable risk); Cone v. Inter County Tel. & Tel. Co., 40 So. 2d 148, 149 ( Fla. 1949); Sharon v. Luten, 165 So. 2d 806, 809 (Fla. 1st DCA 1964) (stating that natural and probable consequences are those which a prudent person can be expected to anticipate).
50. See Bayles, supra note 25, at 48; Wells v. City of Vancouver, 467 P.2d 292, 296 ( Wash. 1970) (Finley, J., concurring).
51. 55 So. 2d 549 (Fla. 1951).
dant, became dizzy at home and fell off a ladder. The jury gave the plaintiff damages for his postcollision ladder fall. On appeal, the defendant argued that, under the foreseeable test for proximate cause laid down in Cone v. Inter County Telephone & Telegraph Co., the plaintiff's dizzy fall, coming so long after the primary accident, was a risk, though attributable to the earlier accident, that the plaintiff should himself bear.

The supreme court's answer, however, spoke neither to foreseeability nor to scope of liability. Instead the justices pretended the dispute centered solely on whether the plaintiff's earlier concussion contributed to his dizzy fall from the ladder:

[W]e do not think [Cone] is applicable to a determination of the particular question of whether the plaintiff's dizzy spells were caused by the brain concussion . . . . We think that such evidence [of factual connection] fairly warranted an inference of proximate cause and effect between the brain concussion and the dizzy spells . . . .

The Matatics court stated correctly—albeit irrelevantly—that Cone's "foreseeability" is inapplicable to cause-in-fact disputes. But of course the defendant cited Cone to bolster an argument for restricting liability, a debate over policy that the Matatics opinion sidestepped. Today, similar evasive tactics are being played by the Florida Supreme Court in strict liability cases, and the fog thickens.

V. STATUTORY CONSTRUCTION AND COMMON LAW TINKERING

Where tort litigation involving strict liability has a statutory
base, proximate cause is not the only language problem. Another problem is the law's inadequate vocabulary for making sense out of the way courts must deal with legislative acts. Lawyers, hemmed in by the law's closed language system, can talk legally about few subjects, and as to those only in limited ways. Legal language, for example, has no way to talk about love or poetry, and that is perhaps as it should be. But in the case of statutory interpretation, the law's inability to step outside its language and examine itself critically is a weakness. A judge's job, the law says—and says little else on the subject of reading statutes—is to follow the legislature's bidding, as if it were a matter of following the Yellow Brick Road.

The rules of statutory construction, much like causation lore, serve in substantial measure merely to screen judges from accountability. If rules like "statutes in derogation of the common law should be strictly (or is it liberally?) construed" ever had teeth, they have long since been worn down. Florida's dog statute cases reflect the poverty endemic in judicial administration of statutes. Traditional talk about statutory construction is so shut off from reality that many lawyers perceive only dimly that the elaborate attention legal writers give to notions of legislative intent is Wizard of Oz stuff. Furthermore, were judicial deceit deemed a crime, combining proximate cause chants and sleight of hand about legislative intent would be compounding a felony. The Jones opinion, for instance, shows justices reading section 767.01, in causation's weak light, far too simplistically.

As Guido Calabresi argues in his newest book, A Common Law for the Age of Statutes, we need a new theory for the role of courts in interpreting legislative acts. Certainly the traditional theory of judicial obsequiousness to legislative supremacy does poor service in describing the actual relationship between judge and legislature in the daily application of legislative prescriptions. As is well known, legislative supremacy is a sometimes thing; a clean separation of power between judge and legislature takes place rarely. Judges have long shared or even dominated the legislative process (with or without the excuse of a constitutional power of judicial review). As Calabresi puts it, "the development of theories and practices of judicial interpretation of statutes . . . would make even the proverbial Jesuit blush if they were viewed as attempts to

57. G. CALABRESI, supra note 21, at 7.
discern any kind of legislative intent.”

Florida's dog statute is just the sort of law that Calabresi had in mind in proposing judicial updating of obsolete statutes. Calabresi suggests that statutes (such as section 767.01) that are out of step with the whole legal landscape be overhauled by a common law process of renovation. Such a judicial revamping would be derived from common law sources or from relevant statutory materials; in this way rusty statutory parts would be replaced by courts—where legislatures have neglected to revisit old haunts—in the heat of litigation.

During one period in the life of Florida's dog statute, something close to Calabresi's suggested common law renovation was attempted. In Smith v. Allison, the Third District Court of Appeal denied section 767.01 protection to a plaintiff motorcyclist who crashed trying to avoid a dog in the road. The court turned away from absolute dog owner liability and concluded that an anti-dog reading of section 767.01 might have fit the needs of an agrarian society but that today's needs are different.

Likewise, in a Fourth District dog bite case, the court emphasized the desirability of reading section 767.01 restrictively with regard to personal injury liability "because the legislature never specifically included damage to persons." Thus did the Fourth District rewrite section 767.01 to fit cities rather than farms. Such also was the common law approach of the district court that re-

59. G. CALABRESI, supra note 21, at 1. One such "blushworthy" practice of interpretation is the proximate cause method used in the dog cases described herein.

60. Similar to this Article's proposal that judges come out from behind proximate cause and squarely confront no-fault policy issues, Calabresi would remove the curtain of legislative intent where statutes are afflicted with "legal obsolescence" and permit judges to renovate statutes the common law way, by judicial revision.

61. It is difficult to imagine that § 767.01, as interpreted in Jones, would receive legislative endorsement today. More importantly, in terms of legal obsolescence (Calabresi's term), § 767.01 as written today is supported by no legislative enactment, either in 1881 or thereafter, providing protection for "persons." See supra note 3.

Following an earlier compilation in which the compiler added "persons" to the act's list of beneficiaries, the 1901 legislature rewrote its dog law (chapter 4979) to again protect not "persons," but "sheep or other domestic animals." And once again, in a 1906 compilation (section 3142), the dog statute's list of beneficiaries included "persons."

Under Florida's practice relating to statutory reenactments, the authenticity of the current reference to "persons" in § 767.01 cannot be attacked.

62. G. CALABRESI, supra note 21, at 2; see supra note 60.

63. 332 So. 2d 631 (Fla. 3d DCA 1976).

64. Id. at 633; see supra notes 3, 60.

65. Wendland v. Akers, 356 So. 2d 368, 369 n.5 (Fla. 4th DCA 1978), cert. denied, 378 So. 2d 342 (Fla. 1979).
viewed dog Shane's misfortune, resulting in that court's short-lived ruling that Shane's owner was outside section 767.01's strict liability reach.66

By contrast, the supreme court in Jones resisted a reading of section 767.01 to make it fit the current legal landscape. Shane done it, period. Such a mechanical reading of section 767.01 gives urgency to Calabresi's plea for a new age of judicial accommodation of outmoded statutes to contemporary life. Calabresi says "[t]he choice must be for candor"67 in revealing the partnership role judges play in making workable the necessarily tentative efforts of legislators.

In Jones, the supreme court opted for causation dogma, always a temptation in difficult cases in which no "rhyme or reason"68 springs readily to mind. Thus do judges push into the background their "creative role in statutory interpretation."69 Thus do judges punt the ball toward the jury box by creating "fact" questions such as proximate cause. And as for section 767.01, Florida law superimposes proximate cause's mockery of "rhyme or reason" on top of the statute's inherent ambiguities. The result, as the cases described below show, is, for reasons never clarified, strict-with-a-vengeance dog owner liability.

VI. PROXIMATE DOGS AND STRICT LIABILITY

Since (blameworthy) proximateness, like beauty, is in the eye of the beholder, who-should-pay can only be worked out case by case in that intuitive world below the level of language where hunches about relative truth take form. Jones is but the latest in a line of bizarre dog cases illustrating the folly of tying dog owner liability to mechanical causation formulas. Two other dog cases, both surprisingly tough on dog owners, show how, by carefully massaging the cause concept, judges can avoid saying what they are doing and why.

Brandeis v. Felcher70 is one such case, cited with approval by

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67. G. CALABRESI, supra note 21, at 177. "To deny what we are doing, to use tricks here, is to destroy by overuse a language that is easily cheapened . . . .” Id. at 180.
68. Probert, supra note 9, at 390.
69. R. KEETON, VENTURING TO DO JUSTICE 82 (1969). "[S]uch refusal freezes reform. . . . In view of the ever increasing impact of inertia in legislatures, the effect in most cases is a deep freeze.” Id.
70. 211 So. 2d 606 (Fla. 3d DCA), cert. denied, 219 So. 2d 706 (Fla. 1968).
the Florida Supreme Court in *Jones.*\(^7\) Defendant owners of mating German shepherds placed their dogs inside a backyard chain link fence. Children, passing by on the adjacent sidewalk, were frightened when the barking shepherds charged the four-foot-high fence. The children ran into the street, and the plaintiff's child was killed by a passing car. The district court noted the dogs *done* it, period, next case.\(^7\)

What the district court might have done, had it not tripped over proximate cause, was first note that although a wide range of canine-related incidents can trigger section 767.01 liability,\(^7\) the act's scope nevertheless has limits.\(^7\) (A plaintiff who trips over a sleeping dog, in violation of Dickens' command to "let sleeping dogs lie,"\(^7\) surely deserves no section 767.01 succor.) The district court next might have reflected on section 767.01's original aim of livestock protection or even considered, along Calabresi's common law lines, judicially updating the statute to meet contemporary goals. The district court then might have judged the risk of injury posed by the German shepherds too slight to deserve strict liability treatment. Such judicial shaping of section 767.01 policy would avoid ad hoc judgment by confused jurors, would put the responsibility for the decision where it belongs, and would make judges accountable for their policies.

The general problem in these dog cases is, of course, that the dog statute, in contexts like *Brandeis,* is hopelessly vague. Whether the Florida legislatures of 1881\(^7\) or 1901\(^7\) would have characterized *Brandeis'* shepherds as having *done* statutory mischief is any-
body’s guess. Despite such statutory guesswork, courts assume that behind every statute there exists a binding legislative intent, even though this notion of definitive intent is often little better than a fairy tale. Legislative codes that might sink into chaos are saved, however, because behind the metaphysical mysteries of intent courts usually “find” an intent that fits practical needs.

Under the orthodox legislative intent approach, judges dig into legislative history for clues or else fire canons of statutory construction at the statute’s looser phrases. What else is there? The legal imagination fails to provide a vocabulary for sensible talk about the way judges must put new faces on old statutes. If things get bad enough, there’s always, as in Brandeis, proximate cause to lean upon. The Brandeis court thus “uncomplicated” the statutory coverage problem by phrasing the issue in cause-in-fact terms: Did the German shepherds contribute to the child’s fatal retreat into the street? An affirmative answer may get the appeal off the docket, but it doesn’t explain why the dogs’ owners ought to pay section 767.01 damages. The cause-in-fact issue was fake.

In all fairness, however, the Brandeis court did not entirely forego an inquiry into legislative intent. The court’s opinion responded to a preliminary issue by ruling for the plaintiff that both bite and nonbite damages are “within the contemplation of the statute.” Oddly, however, it is only in this segment of the case that the court measured the reach of “done by . . . dogs” by looking to legislative intent. Inconsistently, the Brandeis court next, despite having confessed to knowing what was “within the contemplation of the statute,” refused to draw upon this knowledge in deciding whether the German shepherds’ owners fell within section 767.01’s strict, nonbite, liability reach. Instead, the “done by” Brandeis court concluded that the shepherds’ owners had to pay because section 767.01’s plain cause-in-fact meaning so dictated. Under this reading of section 767.01, had Mrs. O’Leary’s cow—the

78. Had the court in Brandeis seen its job as one of determining the reach of § 767.01’s strict liability protection, then presumably the 1881 legislature’s concern for protecting livestock and the accidental nature of the compiler’s adding of “persons” as a § 767.01 beneficiary would have pointed toward stopping liability short of the Brandeis facts.


80. 211 So. 2d at 607.

81. “Deciding cases on grounds of ‘plainness’ also means deciding them without hard thought about underlying policies, without recourse to that reasoned consideration and discussion of the substantive aspects of the problem which alone can provide a base for the law to build on soundly and which alone permit rational prediction for the future.” Kernochan, Statutory Interpretation: An Outline of Method, 3 Dalhousie L.J. 333, 344 (1976).
one that knocked over the lantern that burned Chicago—been a Miami dog, owner O'Leary would have had to buy Miami.

In the Brandeis appeal, who did what and to whom was undisputed. Brandeis' mating dogs, in the plain English sense of "fact," noisily charged the fence, conduct that clearly contributed to the child's death. The real question was just how much of Miami must a dog-burdened O'Leary buy. Yet so convoluted is causation jargon that it was easy for the Brandeis court to dress up in factual costume the scope-of-liability issue raised by Brandeis' unusual circumstances. Under the Brandeis approach, the trier of fact must search among barking dogs and speeding automobiles for some "natural" and "legal" creature that swims around the edges of section 767.01 and marks the circle of strict liability.

Florida's dog jurisprudence and other causation cases cited later pose the question of why, if we wish to draw on a jury's common sense in shaping no-fault policy, we handicap jurors with such uncommon devices as legal cause instructions. Rather, why not ask a jury candidly for its advice, say, on 767.01 policy: "Do you, members of the jury, believe that the defendant-owners of these German shepherds ought to pay damages for the child's death?" Such plain talk about who or what shapes tort law might disappoint the brooding-omnipresence crowd. But in the long run, candor should promote credibility in courtroom government.

The Brandeis opinion reveals that the district court itself, as is often the case when causation debate generates fog, was confused about what it was doing. For example, the court, in measuring section 767.01's applicability, mentioned the "but for" test. "But for," however, is out of place in Brandeis. Had the dog owners contended in Brandeis that the children were frightened by hissing snakes rather than barking dogs, then "but for" would be a logical question.

The Brandeis court also discussed the substantial factor test for cause in fact. But again, the cause-in-fact issue was a red herring. Brandeis involved the much more complex problem of choosing

82. See Note, Dog Owner's Liability in Non-Bite Situations: Duty v. Cause—Barking Up the Wrong Tree, 23 U. MIAMI L. REV. 848, 852-53 (1969): "It is this writer's opinion that the [Brandeis] court... confused proximate cause with duty... Limitations of responsibility should be based upon considerations of policy and not facts of causation."

83. 211 So. 2d at 607. For a discussion of the limited nature of the "but for" test, see Thode, supra note 15, at 13-14, 23-26, 28.

84. 211 So. 2d at 608. See Thode, supra note 15, at 25 for discussion of the limited nature of the "substantial factor" test.
who-should-pay the costs of a fatal accident.\textsuperscript{85}

Brandeis, moreover, by measuring section 767.01's coverage by a proximate cause yardstick, creates a paradox. Section 767.01 is on one hand a no-fault law. Yet when judges feed proximate cause into a statutory no-fault system, disputes about coverage tend to smack of foreseeability and remoteness and all the rest of proximate cause's negligence baggage. The effect of such fault baggage ordinarily, though not in Brandeis,\textsuperscript{86} is to take the strictness out of strict liability.

Of course, paradox and the law are longtime friends.\textsuperscript{87} And for

85. Dean Green's answer to this common confusion would be to restrict the causation issue to cause in fact, reserving for the judge the resolution of competing economic, moral, deterrent, and administrative factors which go into deciding liability issues. See supra note 31. The rub is in separating out the true cause-in-fact cases. Here the most common mistake is to analyze cases involving an actor's failure to do something as raising a cause-in-fact issue.

Consider, as an example of such judicial error, the recent Florida Supreme Court case of Stevens v. Jefferson, 436 So. 2d 33 (Fla. 1983). A widowed plaintiff sued a bar owner for the death of her husband. The plaintiff's husband had been shot and killed in the defendant's bar by a fellow patron. In Stevens, had the dispute been about which bar served the deceased his last drink, the issue would have been true cause in fact. But cause in fact was not at issue in Stevens; the problem instead involved whether legal consequences should be imposed on the bar owner for failing to keep better order.

The supreme court nevertheless concluded that the case raised a jury issue of "legal causation"—whether the killing occurred because the bar lacked adequate security safeguards. Id. at 35. Another way to pose the question as formulated by the court in Stevens is to ask, hypothetically, would the deceased have lived to take another drink had the bar owner kept better order? Such a hypothetical question, however, is essentially unanswerable because it is about what-if, not what-happened. And asking what-if, because it involves speculation of the rankest order, is at bottom necessarily to ask which actor, given the circumstances and the unknowns, should pay for the loss. See Thode, The Indefensible Use of the Hypothetical Case to Determine Cause in Fact, 46 Tex. L. Rev. 423 (1968).

86. Yet in Brandeis there is a second paradox. Although the function of proximate cause in negligence cases usually is to cap liability, in cases such as Brandeis and Jones, courts have focused solely on the cause-in-fact side of proximate cause, a one-eyed application of proximate cause which gives § 767.01 an unusually broad reach.

87. For example, consider these newly discovered writings about the law found in a rabbit hole out West:

(a) The law is a body of rules around the end of which lawyers, for money, circumnavigate;
(b) Questions of fact are also questions of law, and vice versa, except when neither is the other;
(c) Keepers of the common law are proud of their lawyerly language, which is why they have forsaken English;
(d) The law is constantly being clarified and simplified, but law students must study longer and harder;
(e) The rule of law works well except in instances where judges must clarify ambiguity, which is the case with statutes, common law, and constitutions;
(f) The common law, which is judicial rule based on precedent, has only a single flaw: The absence of a rule defining precedent;
opinion writers comfortable with causation conundrums, proximate cause is user friendly. Accordingly, the Brandeis court and the Florida Supreme Court in Jones and Matatics punched the key that momentarily erased the scope-of-liability side of proximate cause, leaving only the easy-to-please, pro-plaintiff, "done by" side. What is missing of course, in cases like Jones, is a straightforward discussion about how far to extend the statutory duty imposed on dog owners by section 767.01.

The 1968 Brandeis opinion is typical of the opinions which followed in the 1970's invoking proximate cause as a measure of the strictness of section 767.01. One of those cases, Mapoles v. Mapoles, decided by a divided district court, initiated the debate about the suitability of the Brandeis causation approach that later would divide the supreme court in its 1984 decision in Jones.

Mapoles involved a nearly two-hundred-pound Saint Bernard named Rueben who was placed in the backseat of a Volkswagen that contained a loaded shotgun. Rueben sat down on the shotgun and it discharged, severely injuring the plaintiff, who was standing

(g) Extracting legal precedent includes both expanding old cases beyond their facts to cover new claims, and contracting old cases to their facts so as to exclude new claims.
88. 463 So. 2d at 1153.
89. Eli Witt Cigar & Tobacco Co. v. Matatics, 55 So. 2d 549 (Fla. 1951).
90. See, e.g., Allstate Ins. Co. v. Greenstein, 308 So. 2d 561 (Fla. 3d DCA 1975), disapproved in Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co., 358 So. 2d 21 (Fla. 1978). Pandora, a Great Dane, escaped from his chain and ran into the street where he collided with plaintiff's car. The court directed a verdict for the plaintiff under § 767.01 on the theory that the act covered Pandora's owner because Pandora, rather than plaintiff's alleged sixty-mile-per-hour driving, caused plaintiff to bounce off Pandora and into a power pole.
91. See, e.g., Smith v. Allison, 332 So. 2d 631 (Fla. 3d DCA 1976), in which the same district court that had one year earlier ruled Pandora the proximate cause had one year later forgotten about causation theories and on similar facts (except that the dog in the street did not collide with plaintiff's motorcycle) decided that § 767.01 fell short of protecting the plaintiff.
92. E.g., Jones, 463 So. 2d at 1153; Mapoles v. Mapoles, 350 So. 2d 1137 (Fla. 1st DCA 1977), cert. denied, 364 So. 2d 888 (Fla. 1978); Allstate Ins. Co., 308 So. 2d at 561; Rutland, 277 So. 2d at 807; English v. Seachord, 243 So. 2d 193 (Fla. 4th DCA 1971), petition for cert. dismissed, 259 So. 2d 136 (Fla. 1972), disapproved in Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co., 358 So. 2d 21 (Fla. 1978).
93. 350 So. 2d 1137.
94. Id. at 1138 (Smith, J., dissenting) (proposing a legislative intent approach to putting boundaries around § 767.01).
95. 463 So. 2d at 1153. In Jones, two justices dissented. Justice Overton dissented with an opinion rejecting the majority's proximate cause emphasis.
near the car. Suit under section 767.01 ensued, and the First District Court of Appeal voted 2-1 that Rueben “done” it and his owner must pay.

The Mapoles majority saw only a cause-in-fact issue. The majority apparently assumed the policy reach of the dog statute extends to Saint Bernards passively riding shotgun in backseats. So simple was the issue for the majority, it saw no need for a jury: “If the statute means what it says, the syllogism is clear: Cam was the owner of the dog; damage was caused to a person by the dog; and thus the owner of the dog is liable for the damage done.”

In dissent, Judge Robert Smith asserted that, since Rueben’s “dogness played no more a part than if the trigger had been jolted by a cat or a falling sack of groceries,” surely the statutory purpose would be ill-served by imposing dog owner liability. Smith proposed that section 767.01 liability be imposed only if “the shotgun was fired as a result of canine characteristics for which the legislature intended to make the owner an insurer.”

Five years after Mapoles, the Second District Court of Appeal, in the initial appeal involving dog Shane and wagoner Jones, rejected the Mapoles majority’s cause-in-fact reading of section 767.01. Instead, the district court, adopting Judge Smith’s “canine characteristics” test, concluded that section 767.01 was designed for purposes other than compensating victims of dog-drawn toy wagons.

When the Florida Supreme Court in Jones rejected Smith’s “canine characteristics” test and reinstated near-absolute dog owner liability, the court apologized for its proximate cause approach but noted “the difficulty of fashioning a workable and administrable alternative.” The supreme court then approved Mapoles’ one-eyed, cause-in-fact version of section 767.01.

97. Mapoles, 350 So. 2d at 1138.
98. Id.
99. Id.
100. Id. at 1139 (Smith, J., dissenting).
101. Id. at 1138 (Smith, J., dissenting).
103. Id. at 771-72. In addition, the court reviewed legislative history indicating that the predecessors of § 767.01 were designed to protect agricultural interests. Id. at 771.
104. Jones, 463 So. 2d at 1156. The court failed to explain why it characterized as “traditional” the use of causation doctrines drawn from negligence law in alien no-fault litigation; nor is there a clue as to why the justices believed it desirable to allow the proximate cause concept, which so many find so distasteful a part of the legal process in negligence law, to escape from its ancestral home in the house of fault.
105. Id. at 1156.
Proximate cause, as usual, thus winds up in the catbird seat, and Florida justices remain “above the fray.” The “canine characteristics” test, wrote the supreme court, just won’t do: “How is one to determine whether or not an animal’s behavior is sufficiently . . . canine?” One answer of course is to acknowledge ambiguity in much of the legal world and to face up to the challenge such ambiguity poses for the legal imagination. To say, as the Jones court did, that Shane’s “affirmative” act in towing the wagon was part of the “natural and continuous sequence” which was a “but for” cause of young Jones’ injury just won’t do.

The point is that neither traditional causation law nor vague notions like dogness can be the real stuff of decision. Verbal tests for true causes or true dogness merely divert attention from the difficult policy choices which judge and jury must make. The power to decide cannot be evaded. The law needs fewer magicians, more managers.

VII. FLORIDA MOTOR VEHICLE NO-FAULT LAW

What may be needed finally is a law outlawing proximate cause. Proximate cause’s advance into the Florida Motor Vehicle No-Fault Law, in Lumbermens Mutual Casualty Co. v. Castagna, indicates, however, that it may take a constitutional amendment to pry proximate fault out of no-fault law. Meanwhile, Lumbermen’s plaintiff, Ercole Castagna, has learned that causation is a double-edged sword.

Castagna was hurt when his business van collided with a lunch truck. Just seconds before hitting Castagna, the lunch truck had bounced off a Chevrolet passenger car. Castagna’s initial problem in collecting no-fault benefits was that Florida’s no-fault law

106. Red Barber, in his radio broadcasts of major league baseball, used to say when team A was leading team B, say nine-to-nothing in the ninth inning, that team A was in the catbird seat.
107. 463 So. 2d at 1156.
108. Id. Justice Overton in dissent characterized Shane’s dogged chase as neither a “direct” nor an “affirmative” cause. Id. at 1158-59 (Overton, J., dissenting). The majority, however, was so sure of its causation adjectives that it saw no need for a jury and found proximate cause as a matter of law. Id. at 1158.
109. See G. Calabresi, supra note 21, at 178-81.
112. 368 So. 2d 348 (Fla. 1979).
113. Id. at 349.
at that time excluded coverage of commercial vehicles;\textsuperscript{114} Castagna's van and the lunch truck were excluded commercial vehicles. Since Florida's no-fault law extends benefits for injuries "caused" by a noncommercial "motor vehicle,"\textsuperscript{115} Castagna looked around for a noncommercial motor vehicle that "caused" his injuries. He spied the Chevrolet passenger car off which the lunch truck had bounced before hitting his van. So Castagna tied his no-fault claim, ingeniously, to the "ricochet Chevy" that allegedly "caused" his injuries.

The Florida Supreme Court in its \textit{Lumbermens} opinion tentatively agreed with Castagna that, if the Chevy "caused" his accident, he should collect no-fault benefits. Had the justices then read the Act's "caused" the cause-in-fact way, Castagna would have collected; clearly the Chevy was involved in Castagna's accident. "But for" the once-removed Chevy's service as a springboard to propel the lunch truck into his business van, Castagna would have escaped harm.\textsuperscript{116}

At this point, the \textit{Lumbermens} court should have shunned further dealings with causes, proximate or otherwise. "Caused" is too ambiguous to help much in deciding which far-out auto no-fault claims to give no-fault law protection. The underlying issue in \textit{Lumbermens} was, after all, whether the risk-spreading policies underlying the Florida Motor Vehicle No-Fault Law justified extending the Act to Ercole Castagna's multi-vehicle collision.

But the supreme court declined to talk about risk-spreading. Instead the court announced that, when the legislature tied no-fault liability to a "motor vehicle" that has "caused" injury, it must have intended that judges and juries measure the act's protective reach by "traditional tort concepts of causation."\textsuperscript{117}

\textsuperscript{114} The no-fault law's current definition of covered motor vehicles includes a "commercial motor vehicle." \textsc{Fla. Stat.} § 627.732(1)(b) (1983).

\textsuperscript{115} \textsc{Fla. Stat.} § 627.736(4)(d)(1) (1983) (emphasis added) reads:

\begin{itemize}
  \item (d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:
      \begin{itemize}
        \item 1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.
      \end{itemize}
\end{itemize}

\textsuperscript{116} For a Florida auto no-fault case involving a real cause-in-fact issue, see American States Ins. Co. v. Piasceki, 392 So. 2d 1369 (Fla. 4th DCA 1981) (Was Piasceki hurt in traffic accident or in battle with a gang of kids?).

\textsuperscript{117} \textit{Lumbermens}, 368 So. 2d at 350. \textit{But cf.} Arnold v. South Carolina Ins. Co., 425 So. 2d 1164 (Fla. 2d DCA) (distinguishing \textit{Lumbermens} and relieving plaintiff-pedestrian of proving that car \textit{A} was the cause of injury where car \textit{A} bounced off car \textit{B} and was out of control, and plaintiff fell down and hurt himself when a friend tried to push plaintiff out of
court then sent Castagna back to a trial court jury to learn if the once-removed Chevy "caused," in the blameworthy, metaphysical sense of that word, Castagna's collision.

On remand, Castagna's jury decided as a matter of policy—there was no other matter in dispute—that the "springboard Chevy" present at the accident scene failed to justify extending no-fault benefits to plaintiff Castagna. Or to put it in traditional terms: The jury decided that, because the "ricochet Chevy" was unforeseeable way over there behind the foreseeable lunch truck, the Chevy "caused" no injury and was disqualified as a covered "motor vehicle."

Fairness to the state's high court demands that the finger of fault for first injecting traditional causation into the Florida Motor Vehicle No-Fault Law be pointed at the Third District Court of Appeal. That district court, in 1975, four years before Lumbermens, injected proximate cause into Royal Indemnity Co. v. Government Employees Insurance Co. Royal Indemnity settled which of two insurers was to pay certain no-fault claims. The case involved a two-car accident in which car A knocked car B into the plaintiff victim, who was seated on a nearby bus bench. It was judged that car A was the more blameworthy "motor vehicle" and so for no-fault purposes "caused" the damage. What is missing, however, in Royal Indemnity is plain talk about scope of no-fault liability and the role of the jury in shaping no-fault policy.

Plain English in such contents, as earlier discussed, is rare. Nowhere in the vast reaches of the common—or uncommon—law is there a clear statement about a jury's role in allocating losses suffered by accident victims. In Lumbermens, for example, clearly

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car A's runaway path), petition for review denied, 437 So.2d 677 (Fla. 1983). Lumbermens and Arnold involved claimants injured while not occupying covered vehicles, and so the no-fault law condition that benefits be tied to a covered vehicle that "caused" injury applied. In cases involving injury to occupants of covered vehicles, FLA. STAT. § 627.736(1) (1983) requires only that the loss be one "arising out of the ownership, maintenance, or use of a motor vehicle." The Florida Supreme Court, in Government Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1119 (Fla. 1984), recognized that "'arising out of' does not mean 'proximately caused by,' but has a much broader meaning. All that is required is some nexus between the motor vehicle and the injury." The "nexus" in Novak, which the court deemed adequate to trigger no-fault benefits, was that Beverly Ann Novak was sitting in her parked car when she was shot to death by a stranger whose request for a ride she had just rejected. Id. at 1117.

119. 307 So. 2d 458 (Fla. 3d DCA 1975).
120. Id. at 460.
121. See supra notes 41-43.
the jury legislated a policy for plaintiff Castagna's no-fault law claim. Juries asked to weigh causes in multi-car collisions clearly decide much more than what-happened. The "formal law description of the judicial process," wrote Jerome Frank, "is false where juries are involved."

It may be that passive judges who transfer to juries the power to set no-fault policy may get decent verdicts. Lumbermens is a case in point. Jurors, free of the obfuscations of legal learning, may screen no-fault claims more wisely than judges bound in legalistic knots. This depends, of course, on which jury and which judge and on one's preferences about using no-fault insurance to spread (generally through plaintiff-minded juries) losses. The pity, however, is that judges can't be more direct in managing juries and administering statutes.

Despite legislative efforts to spread losses more widely through no-fault plans, Lumbermens reminds us again that the lawyerly habit of thinking in terms of fault dies slowly. Shifting accident losses by seeking out proximate sinners likely will continue long after no-fault codes replace, on paper, all negligence doctrines. How can courts live with this paradox? The Lumbermens' opinion shows how. First, the court noted that the no-fault law "was intended to make an inquiry as to fault unnecessary." Then, without blinking, the justices loaded proximate cause and its century-old accumulation of fault baggage onto the backs of future no-fault claimants with borderline claims.

The nonsense represented by a proximate cause inquiry in contexts like Lumbermens once was underscored by the Mississippi Supreme Court's effort to state in a single sentence the boundaries of liability carved out by "traditional causation":

123. Lumbermens, 368 So. 2d at 350.
124. Id.; contra Pestock v. State Farm Auto. Ins. Co., 674 P.2d 1062, 1063 (Kan. Ct. App. 1984) (auto no-fault statute covering claims "arising out of the . . . use of" automobiles "imparts a more liberal concept of causation than 'proximate cause'"); Berg v. Ohio Casualty Ins. Co., 399 A.2d 675, 677 (N.J. Super. Ct. Law Div. 1979) (court, in no-fault case involving pedestrian hit first by noncovered truck and then by covered car, rejected proximate cause: "Tort concepts are not pertinent. . . . The Legislature designed the [no-fault] statute to (1) excise the fault concept . . . [and] (2) guarantee a certain minimum amount of coverage . . . by shifting compensation from a tort insurance system . . . ."); but see Detroit Auto. Inter-Ins. Exch. v. Higginbotham, 290 N.W.2d 414, 419 (Mich. Ct. App. 1980) (husband in car rammed his wife's automobile and then shot her; court ruled that injury was not one "arising out of the use of a motor vehicle" and not "foreseeably identifiable with the normal use of a motor vehicle." (emphasis in original)).
The area within which liability is imposed is that which is within the circle of reasonable foreseeability using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameters of the circle, and those injuries which from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which, although foreseeable, were foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle,—in all of which time, place and circumstance play their respective and important parts.\textsuperscript{125}

During trials jurors must by law listen to judges go through similar law-in-discourse rituals. Afterwards, jurors can only ignore these unintelligible descriptions of legal causation.\textsuperscript{126} Such doctrinal trappings serve merely to facilitate the procedure by which judges give to and take from juries the power of choosing where to place accident losses.\textsuperscript{127}

The world of legal cause cannot escape the fact that it lacks substantive content. Foreseeability, the slender reed that supports the world of fault as a triple-duty test for duty, negligence, and causation,\textsuperscript{128} is hollow.\textsuperscript{129} Neither foreseeability nor its flip side, remoteness, no matter how intensely judge and jury strain to see into the fog, can answer scope-of-protection questions such as those posed by Lumbermens’ springboard Chevrolet. Deciding whether a vehicle located on the periphery of an accident warrants no-fault law inclusion is not a matter of looking and seeing, but of choosing values.

Another example of how Florida appellate judges get tangled up in their elaborate variations on the causation theme is the 1985 no-fault case of Hernandez v. Protective Casualty Insurance Co.\textsuperscript{130} In the district court, Jorge Hernandez lost his claim for personal injury protection benefits.\textsuperscript{131} Hernandez was injured while police were assisting him from his car after stopping him for a traffic violation. He claimed entitlement to no-fault protection since his in-

\textsuperscript{125} Mauney v. Gulf Ref. Co., 9 So. 2d 780, 781 (Miss. 1942).
\textsuperscript{126} See Frank, supra note 122, at 648-49, 652.
\textsuperscript{127} See Green, Proximate Cause, supra note 30, at 644-45.
\textsuperscript{129} See Green, Proximate Cause, supra note 30, at 772.
\textsuperscript{130} 10 Fla. L.W. 297 (Fla. May 30, 1985).
\textsuperscript{131} Protective Casualty Ins. Co. v. Hernandez, 450 So. 2d 864 (Fla. 3d DCA 1984).
jury arose “out of the ownership, maintenance, or use of a motor vehicle.” The district court, however, followed the *Lumbermens* brand of proximate cause and ruled as a matter of law that Hernandez’s police-aided injury was an unforeseeable consequence of driving a car and therefore not a statutory injury “arising out of the use . . . of a motor vehicle.” The supreme court reversed, holding that Hernandez, unlike plaintiff Castagna in *Lumbermens*, was entitled to no-fault benefits despite the lack of foreseeable proximity between Hernandez’s use of an automobile and his injury at the hands of the police.

According to the supreme court, Hernandez’s claim should have been measured by one kind of causation and Castagna’s by another. The court’s basis for this distinction is dubious. Driver Hernandez sued for no-fault coverage as an occupant of a covered motor vehicle under section 627.736(1), which protects against injury “arising out of” use of such a motor vehicle. Castagna, driving an un-covered business vehicle, keyed on the ricochet Chevrolet and sued as a nonoccupant (of the Chevrolet) under section 627.763(4)(d)(1), which protects against injury “caused by physical contact” with a motor vehicle. Normal readers of legislative prose, readers unafflicted with proximate cause myopia, would assume that the legislature intended to treat similarly occupants (“arising out of”) and nonoccupants (“caused by physical contact”). The most reasonable inference is that the legislature expressed more or less the same idea in these two contexts, using slightly different combinations of words in order to make syntactical sense. Only if one assumes that the drafters of the Florida No-Fault Law were proximate cause lawyers writing exclusively for proximate cause judges, can one concur in the supreme court’s Hernandez reading of these two no-fault sections. The supreme court concluded that the “arising out of” language requires occupant claimants to show only “some nexus” between car and injury. The “caused by physical contact” language, on the other hand, requires nonoccupant claimants to run the obstacle course of proximate cause. The court’s only explanation for treating no-fault claimants Hernandez

133. 450 So. 2d at 865-66.
135. *See supra* note 115.
136. *Hernandez*, 10 Fla. L.W. at 298. The court first articulated this distinction in *Novak*, 453 So. 2d 1116. *Novak* was decided after the district court in *Hernandez* denied no-fault coverage on a proximate cause basis.
and Castagna differently was to quote its *Lumbermens* rationale: “We think by inserting the word ‘caused’ in the statute, the legislature plainly intended [the proximate cause concept from negligence law] would be a factor to be considered.”

If, in fact, the legislature “plainly intended” to give plaintiff Hernandez the easier “some nexus” route to no-fault recovery, the court’s 4-3 split in *Hernandez* is surprising. Hernandez, after all, was literally “arising out of” his car when he was hurt. The trouble is, of course, both “arising out of” and “caused” are equally riddled with ambiguity. Thus, when questionable claims arise under the no-fault law, whether under section 627.736(1) or 627.736(4)(d)(1), that call for defining the scope of protection to be given traffic victims, all the fine-tuned appellate talk of “nexus” and “foreseeable” and “proximate” turns into static. The three dissenting justices in *Hernandez* emphasized the intervention of the police into Hernandez’s motoring trip and believed that the police’s action negated any notion that Hernandez’s injury arose “out of the ownership, maintenance or use” of his automobile.

Even the majority would have found no “nexus” if the police had dragged Hernandez from his car as a suspected embezzler. Slipping into presumably inappropriate proximate cause language, the majority stressed that the police were responding to a traffic offense, so the police officers’ action “was not such an intervening event so as to break the link between petitioner’s use of the vehicle and his resultant injury.” How much better it would be for rational, democratic government if the court had simply admitted that phrases such as “arising out of” and “caused by physical contact” do little more in these kind of cases than beg the question of the court as to the breadth of no-fault coverage. Both occupant Hernandez and nonoccupant Castagna had borderline no-fault claims. Hernandez was hurt exiting from his parked car; Castagna’s claim was tied to a stranger’s parked Chevrolet. In both cases, the parked cars clearly contributed to the injuries. The key question in each case involved the policy reach of the no-fault law. “Nexus” and “proximate” and the rest of the world of legal cause are of little help, except to thicken the fog.

137. *Hernandez*, 10 Fla. L.W. at 298.
138. *Id.* (Ehrlich, J., dissenting).
139. *Id.*
VIII. CAUSATION IN WORKERS' COMPENSATION

The language of proximate cause also appears, on rare occasions, in opinions dealing with Florida's Workers' Compensation Law. Judges (and deputy commissioners) must determine when peripheral compensation claims are beyond the pale of work-relatedness. One way to deny coverage to an injured employee is to point to an off-the-job contributing factor as the proximate cause of the injury.

Early in this century, before proximate cause got up a head of steam, spreading the risks of industrial accidents confronted legal barriers much taller than proximate cause defenses. Conservative judges listened sympathetically to constitutional attacks against the workers' compensation acts that progressive legislatures adopted in the early 1900's. For example, the New York Court of Appeals struck down the nation's first compulsory workers' compensation statute in 1911. New York's statute was adopted, like others of that period, amidst proponents' cries that the cost of the product should bear the blood of the working man. New York's highest court, however, announced forthrightly that it sat not to preside over the demise of American free enterprise, and that New York's compensation act violated the due process clause ban on leftist leveling:

If the Legislature can say to an employer, "You must compensate your employe' for an injury not caused by you or by your fault," why can it not go further and say to the man of wealth, "You have more property than you need, and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must [share]" . . .?

... In its final and simple analysis that is taking the property of A. and giving it to B., and that cannot be done under [due process].

Today, injured workers' rights to compensation are, unlike Car dozo's elusive negligence, in the air. Present legal battles involve

141. Chapter 440 provides for initial adjudication of workers' compensation claims (from within the Department of Labor and Employment Security) by deputy commissioners appointed by the governor.
143. Id. at 440.
not constitutional attacks but how broadly to read compensation acts so as to compensate for the blood of the working man. And because compensation codes today reflect a community consensus to "take the property of A and give it to B," judges are wary about limiting compensation coverage by blaming causes unrelated to the job for employee injuries. Proximate cause language, moreover, with its taint of negligence and its history of being a handmaiden to the defense bar, has been pointedly absent from drafts of compensation bills. The replacement phrase for tying compensation claims to the workplace usually is, as in Florida's act, "arising out of and in the course of employment."

The "arising out of and in the course of employment" phrase joins proximate cause in being highly ambiguous. Inserting "arising out of" into compensation laws was a form of punting the football. Drafters of compensation bills realized that injuries to workers would occur in contexts where job-relatedness is faint. In such cases, compensation decisions become less a matter of describing the job connection than of gauging the proper role of the humanitarian impulse. "Arising out of," therefore, like blameworthy proximate cause, simply poses the value question. Nevertheless, rule-of-law judges try to squeeze a rule out of "arising out of."

One possible way to handle "arising out of" issues would be to restate such questions in proximate cause form and to retrace the path of "traditional causation." But most judges have sought other verbal tests to illuminate the dark corners of "arising out of and in the course of employment." The Texas Supreme Court, for example, has suggested posing the "arising out of" issue in terms of whether the worker's job was a "producing cause" of his injury.


146. FLA. STAT. § 440.09 (1983). Former First District Judge Robert Smith, whose "dog-ness" test in his dissent in Mapoles v. Mapoles, 350 So. 2d 1137, 1138-39 (Fla. 1st DCA 1977) failed to keep two-hundred-pound Rueben out of the dog house, once explained in a student note why drafters of workers' compensation bills substituted "arising out of" for proximate cause:

To the anonymous Englishman who invented the new phrase [arising out of], and doubtless to his American counterpart, proximate cause was a concept too sophisticated to serve the utilitarian purpose of compensating injured workmen with a minimum of delay, too compartmentalized to represent the humanitarian impulse to pay a workman or his family part of the salary that he could not earn because of injury or death caused to some extent by his employment.

Note, Workmen's Compensation—Arising Out Of and In The Course Of an Enigma, 9 U. FLA. L. Rev. 311, 312 (1956).

147. Tex. Indem. Ins. Co. v. Staggs, 134 S.W.2d 1026, 1028-29 (Tex. Comm. App. 1940). The Commission of Appeals was created by the Texas legislature in 1918 to handle the
The Texas court reasoned that producing cause is broader in scope than proximate cause (only the latter requires foreseeableness) and better fits a compensation plan designed to protect injured workers regardless of fault.\textsuperscript{148} Professor Larson writes that legal cause is out of place in workers' compensation because it smacks of fault and because "foreseeability has no relevance if one is not interested in the culpability of the actor's conduct."\textsuperscript{149} Larson, therefore, would have the courts forego proximate cause tests when deciding, for example, whether a claimant's second (off-work) injury is compensable because causally related to a compensable earlier injury.\textsuperscript{150} In these second-injury cases, Larson would set up categories of "quasi [in the] course of employment"\textsuperscript{151} and non-"quasi [in the] course of."\textsuperscript{152} Under Larson's "quasi" scheme, a worker might recover if hurt traveling to her doctor's office for treatment of a prior compensable injury ("quasi . . . course of"), but be denied compensation if the subsequent injury occurs during a non-"quasi . . . course of" lark.\textsuperscript{153} Unfortunately, too much of Larson's "quasi . . . course of" could make one homesick for proximate cause, or worse, lead to the ultimate doomsday test: A quasi-proximate cause measured by the quasi-foreseeability of the quasi-reasonable woman.\textsuperscript{154}

In Florida, the observation of a court twenty-five years ago that "[o]bviously, the law of proximate causation has no place in the Workmen's Compensation Law"\textsuperscript{155} is today obviously untrue. Legal or proximate cause has taken root in the state's compensation jurisprudence, despite earlier efforts to keep proximate cause at bay that include this Industrial Commission's discussion about whether a corporate executive's fatal fall in a hotel shower during a busi-
ness convention was an injury "arising out of":

Too often, we . . . are prone to treat this phrase as though it were (1) "proximately . . ." or (2) "legally caused by the employment." . . . "Arise" does have something to do with causal connection but there are many shades of meaning to causal connection. It is our feeling that the "arising" phrase of the function of the employment is passive while "caused by" or "proximately caused" are or should be active. The employment is a condition out of which the event arises rather than the force producing the event in an affirmative fashion. Physical causation by the surroundings is not required in order to satisfy what is implied by this phrase of the Act. . . . [S]uch . . . surroundings . . . may be passive, active or inert.156

The Florida Supreme Court denied certiorari without opinion.157 Persistent proximate cause, before it eventually infiltrated Florida compensation law, changed its first name from proximate to direct. So Florida courts today on occasion measure the scope of workers’ compensation protection by talking about the “direct and natural” results of job-related activities. The Florida Supreme Court framed the modern doctrine this way:

The basic rule is that a subsequent injury, whether an aggravation of the original injury [or a new and distinct injury], is compensable if it is the direct and natural result of a compensable primary injury. But if the subsequent injury is attributable to claimant's own negligence or fault, the chain of causation is broken, even if the primary injury may have contributed in part to the occurrence of the subsequent injury.158

The same court two years later denied recovery for consequential (to a primary compensable injury) disabilities triggered by economic anxiety by declaring that “as in the doctrine of proximate cause generally,” the subsequent disabilities must be “a natural and direct” consequence of “an unbroken chain of causation” linked back to the initial injury.159 By the 1980’s, proximate or le-

gal cause was at home in Florida compensation law, with the supreme court in *D'Angelo Plastering Co. v. Isaac* denying compensation on a causation basis to an employee named Isaac who, while on crutches recuperating from earlier job-related injuries to his heel and back, was run over by a negligent driver. The court admitted that pedestrian Isaac might have stepped out of the car's path had not his earlier job-related accident handicapped him; nevertheless, the auto driver was the “intervening cause” of Isaac's second round of injuries. The court agreed that Isaac's auto collision had “some causal connection” to Isaac's employment, but because the auto accident was not a “direct and natural result of the compensable primary injuries,” the earlier compensable primary accident was not the “legal cause” of Isaac's auto-accident injuries.

Despite the *D'Angelo* case, compensation law, with its vigorous risk-spreading, pro-claimant thrust, is nevertheless infertile soil for spreading the proximate cause defense. But how about strict products liability? How hospitable to proximate cause is this more recent addition to the no-fault family?

**IX. Strict Products Liability and Proximate Fault**

Professor Maleson's 1978 article, on which this Article draws heavily, decry's resort to proximate cause to limit defendants' responsibility in strict products liability actions. Maleson traces the deplorable extent to which the use of "proximate fault" in the United States has diluted the concept of strict liability. Maleson regrets that few courts or commentators have questioned the use of proximate cause in strict liability actions. Yet Maleson's theme,
as is the case in this Article, is that “[m]ere words will not solve a problem as complex as limiting a defendant’s responsibility”167 in no-fault situations.

“Mere words,” however, sufficed for Florida’s Second District Court of Appeal in Watson v. Lucerne Machinery & Equipment, Inc.168 Charles Watson, whose representative filed the Watson (products liability) action, died at the citrus processing plant where he worked, his head crushed by the rotating arm of a large, allegedly defective machine known as the Kinsey Sampler.169 The defendant-manufacturer defeated the claim at the summary judgment stage. The district court held that the Kinsey Sampler, even if its safety features were inadequate to provide reasonable protection to nearby workers, nevertheless was not, as a matter of law, the proximate cause of Watson’s death; the proximate cause of Watson’s death was Watson’s own action in voluntarily crawling into the Kinsey Sampler during its operation.170

The Watson court, in light of the bizarre facts surrounding Watson’s death, was faced with a policy choice whether to extend the strict products liability theory to cover this particular accident. Cause in fact was not an issue. Of course, Charles Watson’s actions, as well as the Kinsey Sampler’s rotating arm, were causally connected to Watson’s death. The court’s causation reasoning is a sham, revealing again the inability of courts to analyze issues clearly and to develop policy rationally.

The notion of “proximate fault” fits Watson because Watson’s contributory negligence, if any, should not have barred a strict liability claim. Yet the Watson court, faced with a no-fault claim involving a presumably careless decedent, was uncomfortable with imposing strict liability. By using proximate cause, the court slipped fault back in to defeat the Watson plaintiff’s no-fault claim. Thus, the Kinsey Sampler may be a killer of sorts, but Charles Watson’s demise, as the district court put it, “was caused solely by his own actions and was not contributed to by any defect in the Kinsey Sampler.”171

This last quote makes no sense, except perhaps for lawyers

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167. Maleson, supra note 6, at 37.
168. 347 So. 2d 459 (Fla. 2d DCA), cert. denied, 352 So. 2d 176 (Fla. 1977).
169. Id. at 460.
170. Id. at 461.
171. Id. (emphasis in original).
whose senses have been dulled through constant repetition of causation’s soporific axioms. The allegedly unsafe Kinsey Sampler crushed the life out of Watson, just as surely as Shane’s red wagon struck her master’s playmate. The issue in Watson, never faced by the court, involved scope of liability. Moreover, the court’s awkward revival, in a no-fault context, of the contributory negligence defense through a proximate cause disguise has another disturbing feature. It means that in similar strict liability contexts the common law’s absolute defense of contributory negligence lives on sub rosa without the softening influence of the comparative negligence trade-off.\textsuperscript{172}

Strict products liability is less than ten years old in Florida, and few appellate cases involving this new theory of liability have invoked proximate cause reasoning.\textsuperscript{173} To the extent that Florida courts feel the need to soften the severity of strict liability, there are available doctrinal devices such as adjusting the definition of “defect.” The proximate cause escape hatch remains, however, a part of Florida’s products liability law, as evidenced by a federal court’s application of Florida law in \textit{Kroon v. Beech Aircraft Corp.}\textsuperscript{174} Pilot Kroon claimed after an accident that the gust-lock on his airplane was defective. The defendant manufacturer won at the pleading stage because Kroon carelessly had failed to check the gust-lock: The court found that Kroon’s negligence (and this, a strict liability case) was the “sole proximate cause of the accident.”\textsuperscript{175}

\textbf{X. Conclusion}

If in the beginning was the Word, and the Word was Proximate, we need a new beginning. Words should be slaves, not masters. The purpose of this Article has been to keep Moby Dick on the run and to keep exposed the scope-of-liability policy issues that arise in tort cases where, too often, traditional practice falls back on “traditional causation” for rationales too lame to withstand

\textsuperscript{172} See Parks, \textit{supra} note 166; see also Jones v. Auburn Mach. Works Co., 353 So. 2d 917 (Fla. 2d DCA 1977), \textit{aff’d}, 366 So. 2d 1167 (Fla. 1979) (sixteen-year-old boy hurt by machine in case similar to Watson, except that boy’s employer instructed him to move close to the machine. The second district this time held issue of proximate cause was for jury).

\textsuperscript{173} See Builders Shoring & Scaffolding Equip. Co. v. Schmidt, 411 So. 2d 1004, 1006-07 (Fla. 5th DCA 1982), \textit{petition for review denied}, 419 So. 2d 1200 (Fla. 1982). \textit{Schmidt} is typical in that the court assumed that the proximate cause defense lives in products liability law, although the court’s holding seems to be that plaintiff proved no defect.

\textsuperscript{174} 628 F.2d 891 (5th Cir. 1980).

\textsuperscript{175} Id. at 893.
Proximate cause is a legal headache principally because judges and lawyers too often debate proximate cause without clarifying the true nature of the issue. The distinction between cause-in-fact and scope-of-liability questions should be made and the functions of judge and jury allocated accordingly.

In strict liability cases, we need a language for talking sensibly about limits to liability. If fault is supposedly out the window in no-fault cases, its doctrinal trappings should also be scrapped. Answers to liability issues will spring from no magic formula. "Reasoned analysis must wrest dominion from the tyranny of doctrine." 176

176. Maleson, supra note 6, at 37.