PROXIMATE CAUSE—
WHAT IF THE SCALES FELL IN OKLAHOMA?

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It seems clear that proximate causation is essential to recovery in a torts negligence action in Oklahoma. The state supreme court has called it elemental that a plaintiff may not recover from a defendant whose conduct, however wrongful, was not the proximate cause of plaintiff's injury. The same court has listed proximate cause of such injury—along with existence of a duty to protect plaintiff from injury and the breach of that duty—as one of the three requirements of actionable negligence. The court has emphasized that plaintiff cannot recover merely by showing his injury, or by showing defendant's negligence; plaintiff must, in addition, establish the proximate causal link between the negligence and the injury. This is true regardless of the seriousness or extent of defendant's negligence. And it is true even though defendant's negligent conduct involved violation of a statute or of a municipal ordinance. The violation will establish negligence per se in the absence of justification or excuse,

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1 Ellis v. Hollis, 398 P.2d 832, 834 (Okla. 1965).
4 Larkey v. Church, 79 Okla. 202, 192 P. 569 (1920) (no liability for driving on wrong side of road since this was not established as proximate cause of accident); St. Louis & S.F.R.R. v. Hess, 34 Okla. 615, 126 P. 760 (1912).
5 See Bales v. McConnell, 27 Okla. 407, 112 P. 978 (1910) (worker close to machine slipped from wagon, threw out hand to steady himself, was injured by cogs on machine; unguarded cogs found proximate cause of injury). Cf. Beesley v. United States, 364 F.2d 194 (10th Cir. 1966), applying Oklahoma law under the Federal Tort Claims Act.
7 Elam v. Loyd, 201 Okla. 222, 204 P.2d 280 (1949). The proximate cause problem should be distinguished from the requirement that in order for violation of a criminal statute to be used in establishing tortious negligence, it must be shown the statute was intended to protect the class of persons to which plaintiff belongs from the type of harm plaintiff suffered. As to the latter requirement, see Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453 (1933). Cf. Larrimore v. American Nat'l Ins. Co., 184 Okla. 614, 89 P.2d 340 (1939).
but the violation must also be shown as the proximate cause of the injury, and it is reversible error not to instruct the jury on the proximate cause requirement.\footnote{Woodward v. Kinchen, 446 P.2d 375 (Okla. 1968) (inattention while driving not proximate cause); Harbour-Longmire Bldg. Co. v. Carson, 201 Okla. 580, 208 P.2d 173 (1949).}

Despite this emphasis on the requirement in Oklahoma, it has accurately been observed that proximate cause is a "confusing area of Oklahoma tort law."\footnote{Freeborn v. Holt, 100 Okla. 50, 227 P.136 (1924).} Two main reasons for the confusion are apparent. The Oklahoma court has sometimes mentioned or discussed proximate cause where that issue was not actually relevant, and, when proximate cause has been both applicable and applied, the Oklahoma court has employed a number of different tests. Thus, it may be well first to consider discussions of "proximate cause" that really involve distinguishable concepts, then to determine the various tests of proximate causation used in Oklahoma, and, finally, to ask what is and should be the Oklahoma law on this subject. This last query may be put in terms of the most famous American case in the proximate cause area, the \textit{Palsgraf} case,\footnote{Hardware Mut. Ins. Co. v. Lukken, 372 F.2d 8, 13 (10th Cir. 1967) (Murrah, J.).} in which plaintiff was injured when defendant-railroad's employees caused a package containing fireworks to fall upon the railroad tracks and the resulting explosion led to some scales, a distance away, falling on plaintiff. What would be the outcome if the scales fell on Mrs. Palsgraf in Oklahoma?

\textit{The Proximate Cause Problem Distinguished from Other Concepts}

Leaving aside discussion of proximate cause, it is generally agreed that a negligence action requires showing that the defendant's conduct did not measure up to the legal minimum (usually the standard of the reasonable person under the circumstances), and that this failure to "measure up" actually (as a purely factual matter of cause and effect) resulted in harm to plaintiff. The breach of the reasonable person standard is often in itself referred to as "negligence," although a tort action of negligence will obviously require more.\footnote{See W. PROSSER, \textit{TORTS} 143-44 (4th ed. 1971), setting forth the elements of a negligence action.}

In order to establish that defendant's behavior was unreasonable
under the circumstances and thus breached the legal standard, it is necessary to show that some harm was a foreseeable result of such conduct. If no harm can reasonably be anticipated as following from an act, that act cannot be considered negligent. This consideration of foreseeability sometimes is confused with proximate cause, as foreseeability is also one test employed to determine the scope of proximate causation. In some Oklahoma cases, although proximate cause is defined, it is clear there was no unreasonable conduct anyway and thus that the definition is not really applied. If a power company constructs its power line so that it is safely removed from all anticipated uses of the adjoining roadway, this is reasonable conduct, and for that reason, no negligence action will lie if someone unforeseeably raises a pole to such height that it comes close to or in contact with the high voltage wires. The discussion of proximate cause in such cases is superfluous; there is no breach of the legal standard as to anyone, since there is no unreasonable conduct at all. The same principle applies although defendant's conduct does involve some risk of harm to some people—but so slight a risk that, when weighed with the seriousness of the harm that might occur and the burden of precautions against it, the conduct is still reasonable. Again, if no breach of the standard is found (even though there is a closer question on the matter), the discussion of proximate cause is unnecessary. Where a failure to administer a medical treatment or test allegedly results in harm to a patient, there is similarly no proximate cause problem if there had been no apparent need for the treatment or test and thus no breach of the standard in failing to utilize it. The same is true where a patient under psychiatric care commits suicide, but everyone concerned had exercised reasonable care to keep the decedent from harming himself.

14 Well stated in Mendelson v. Davis, 281 F. 18 (8th Cir. 1922); Gaupin v. Murphy, 295 Pa. 214, 145 A. 123 (1928). See C. Morris, Torts 171-74 (1953); Seavey, Negligence—Subjective or Objective?, 41 HARV. L. REV. 1, 5-7 (1927).


17 See Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956) (Oklahoma law—no liability where home permanent solution injured unusually susceptible individual). The reasoning applied by the majority (Cardozo) opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), would add the qualification that plaintiff must have been within the foreseeable risk (i.e., the range that might foreseeably be affected by defendant) in order for there to be negligence as to him. See note 12 supra.


On the other hand, it is clear that action can breach the reasonable person standard if it involves an unreasonable risk of harm to others, even though the exact injury that does occur could not have been foreseen. Thus, where the dangers to the human ear are well known if pressure is not maintained during aircraft flight, or if descent in flight is too rapid, breach of the standard may be found in the decompression of an airplane cabin, although the precise harm that plaintiff suffered was not foreseeable.20 Here we do reach the question of proximate cause—of whether or not there is liability for unforeseen consequences. But in merely deciding whether defendant’s conduct breached our legal standard, we use foreseeability of harm—any harm—as a factor to weigh in determining the reasonableness of the conduct.

Just as the question of breach of the reasonableness standard is separate from the proximate cause problem, so is actual causation a distinguishable concept.21 Proximate cause concerns the extent of liability, i.e., the range of potential legal responsibility. It is a matter of legal policy. Actual causation is a matter of fact—of whether defendant’s conduct “caused,” in the everyday sense of the term, plaintiff’s harm. If defendant’s alleged negligence was failing to replace the missing radiant of a stove, but there is no showing that the lack of the radiant had any connection with plaintiff’s injury, the action fails.22 This is true without regard


Distinguishable from those cases in which defendant’s alleged negligence related directly to plaintiff’s suicidal tendencies are cases in which defendant otherwise injured plaintiff and the injury led plaintiff to commit suicide, as where he kills himself due to harm suffered in an automobile accident caused by defendant. Here the knowing, voluntary taking of one’s own life is usually held an unforeseeable, superseding cause, cutting off liability; but defendant may be held liable if plaintiff kills himself while suffering from insanity or delusions caused by the accident, so that plaintiff does not realize the nature of his act. See Note, 33 TENN. L. Rev. 540 (1966). There may be recovery even for knowing self-destruction under Workmen’s Compensation, Graver Tank & Mfg. Co. v. Arizona Indus. Comm’n, 97 Ariz. 256, 399 P.2d 664 (1965), or where defendant’s wrongful conduct was intentional, Cauverien v. De. Metz, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (1959), noted 13 OKLA. L. Rev. 459 (1960).

See also Tarasoff v. Regents of Univ. of Cal., 529 P.2d 553, 118 Cal. Rptr. 129 (Cal. Sup. Ct. 1974), where a cause of action was held stated against psychotherapists who treated a mentally ill patient and knew of his announced intention to kill decedent, but took no steps to warn her. She was subsequently killed by the patient. In a case such as this, there are questions of actual and proximate causation, as well as of negligent conduct.

22 Toombs v. Cummings, 151 Okla. 166, 3 P.2d 177 (1931).
to the question of the extent of liability—i.e., without regard to proximate cause. The initial limitation on all tort liability is that of cause-in-fact. If a patron sues a storeowner because the patron was struck by a car on the store's parking lot, some negligence as to condition of the premises—such as a failure adequately to light the lot or mark the entrance—will ordinarily have to be established as contributing to plaintiff's harm in order to state a cause of action. The causal chain must also be shown in cases where the alleged negligence involved violation of a criminal statute. Wherever plaintiff fails to show the cause-and-effect relationship, there is no need to discuss proximate cause, although the court sometimes does.

The real problem is lack of actual cause.

The concepts are, of course, related in that "proximate cause" almost invariably employs tests weighing the remoteness or nearness of the cause from the effect. Thus, it is not surprising that the two ideas are sometimes discussed in the same sentence, and that definitions of "proximate cause" often include, along with additional limitations, such phrases as "the cause that sets in operation the acts which result in the injury." Given the use of the foreseeability factor in determining both negligence and proximate cause, it is also not surprising that the court sometimes speaks of proximate cause, even though it concludes that neither negligence nor actual causation was established. Two or more events may sometimes be found to meet the tests of both actual cause and proximate cause, and there may then be concurrent liability of the parties responsible for all such events. But the two tests do involve different ideas, and ideally each should be separately applied to each potentially responsible event.

Putting aside the definitions of "proximate cause" in cases in which the separate issues of negligence or actual causation were really determina-

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24 See Elam v. Loyd, 201 Okla. 222, 204 P.2d 280 (1949) (injury complained of must be proximate result of violation, person injured must be member of class protected by statute, and injury must be kind that statute intended to prevent).
25 As in Ellis v. Holli, 398 P.2d 832 (Okla. 1965), where defendant was sued by plaintiff real estate broker for a commission and cross-petitioned as to plaintiff's negligence in preparing the contract but was unable to show a causal connection.
26 See Clinton & O.W. Ry. v. Dunlap, 56 Okla. 755, 156 P.2d 654 (1916), where the court seems to equate "causal connection" and "proximate cause."
28 See Mathers v. Younger, 172 Okla. 294, 58 P.2d 857 (1936) (defendant apparently acted reasonably when he found emergency brake was not released on car he was driving; plaintiff-passenger hurt trying to get out of car).
29 Green v. Sellers, 413 P.2d 522 (Okla. 1966) (truck in which plaintiff was riding left road to avoid hitting one defendant's car, which was passing other defendant's stalled truck; plaintiff's judgment against both defendants affirmed).
tive, there remains one other group of cases in which discussion of proximate cause must be taken with a judicious grain of salt. Cases in this group involve what is often called the "egg-shell skull" theory. All authorities agree that if defendant's negligence actually results in harm to plaintiff, and if the proximate cause test is met as to the basic fact of plaintiff's injury, then defendant is liable for the full extent of the harm even if, because of plaintiff's peculiar physical nature (his "egg-shell skull"), those injuries are much graver than would possibly have been anticipated. This may certainly be considered a qualification on proximate cause theories, but it does constitute an area separate from those of real controversy.

It has been said that one rule of proximate cause applied in Oklahoma is that "[a] wrongdoer is responsible for all the consequences of his act if a prudent man would foresee that the wrongful act would result in an injury of some sort, however trivial." But as has been noted, the Oklahoma cases stating this doctrine have been concerned with the magnitude of plaintiff's injury, not with whether the initial fact of harm to plaintiff was within the scope of possible liability. Thus, the "egg-shell skull" rule has been applied in an Oklahoma wrongful death action in which decedent's preexisting condition led to his decease where a less extreme result would ordinarily have been expected. Application of the rule is sometimes justified by the statement that the exact consequences need not be foreseeable in order for defendant to be liable therefor, and sometimes by the statement that a person who is negligent should be held liable for all consequences that could have been considered reasonably possible to flow from the act. Both statements are also sometimes made in discussions of proximate cause in which the "egg-shell" rule is not involved. But again, it is wise to keep the "egg-shell" cases separate because there is general agreement in them as to the extent of liability.

30 See Williams, The Risk Principle, 77 L.Q. Rev. 179, 193-97 (1961); Note, 43 MARQ. L. REV. 511 (1960). Cf. Burke, Rules of Legal Cause in Negligence Cases, 15 CAL. L. REV. 1 (1926), suggesting that there is usually liability even for unforeseen consequences following "the first impingement" of defendant's wrong, but not where the initial impingement is itself unforeseeable.

31 Hardware Mut. Ins. Co. v. Lukken, 372 F.2d 8, 14 (10th Cir. 1967), summarizing Oklahoma law on proximate cause.


33 Black Gold Petroleum Co. v. Webb, 186 Okla. 584, 99 P.2d 868 (1940). Among the leading cases in accord are Heppner v. Atchison, T. & S.F.R.R., 297 S.W.2d 497 (Mo. 1956); Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926).


Three concepts are thus related to, but distinguishable from, proximate causation: the need for breach of the legal standard (usually reasonable conduct under the circumstances) in negligence cases; the requirement of a link of cause-in-fact between the breach and plaintiff's injury; and the rule that, if all requirements for liability to plaintiff are met, defendant is liable to the full, although possibly unanticipated, extent of plaintiff's injury. Of far more controversy is the question at the heart of proximate cause: Can there be liability where the accident to plaintiff is itself a remote or unforeseeable consequence of defendant's act? The question can be put in terms such as Cardozo used in the majority opinion in Palsgraf: Was injury to plaintiff within the risk foreseeable from defendant's act? If not, defendant in committing his act owed plaintiff no duty and thus cannot have been negligent as to him. If so, however, then a duty (usually of reasonable care) was owed, and if it was breached, there may be liability (subject to some possible further proximate cause limitations, which, however, Cardozo never reached). Or, it may be put in the terms of Andrews, who, in his Palsgraf dissent, assumed a duty of reasonable care toward all the world. He asks whether, if this duty was breached, plaintiff was within the range of proximate cause. Oklahoma has not squarely endorsed the philosophy or the questions of either Cardozo or Andrews, but over the years has given at least some degree of endorsement to five slightly varying tests relating to the proximate cause problem.

First, it has been asserted that Oklahoma has applied the direct causation test, the most famous application of which is found in the English Polemis case. This test says that so long as some harm could have been foreseen from defendant's act (as is normally necessary for negligence to

36 Hardware Mut. Ins. Co. v. Lukken, 372 F.2d 8, 14 (10th Cir. 1967).

exist at all), defendant is liable for all direct consequences of that act; only an independent, intervening cause (and usually it must also be an unforeseeable one) will relieve defendant of liability. Aside from the above-discussed "egg-shell" cases, this test has little support in Oklahoma. The word "direct" has occasionally been included with other modifiers in descriptions of proximate cause. But far more often, it has not appeared at all; and the Oklahoma court has also said that a proximate cause may be only an indirect factor in producing an injury.

Of much greater importance in Oklahoma has been the foreseeability test of proximate cause. This test has often been stated in such terms as these: "For an act to be deemed the proximate cause of an injury, it must be such that a person of ordinary intelligence would have foreseen that the injury was liable to be produced from the act." Thus, if a particular accident, such as the operator of a hay baler getting his hand caught between the rollers of the machine, is not foreseeable, there can be no liability for lack of a rope leading to the shut-off lever, even though the failure to provide the rope might be considered negligent and its absence might, as a matter of cause-in-fact, have contributed to the accident. On the other hand, where the negligence consists of failure to discover the broken shaft of an engine, it is a foreseeable consequence from this that the person taking the vehicle with the broken engine out on the road may attempt to repair the defect and be injured in the effort.

The phrasing of this test has varied over the years. One of the earliest statements was that liability is limited to "the probably injurious consequences which were to be anticipated." Several cases have simply said that the test of whether an occurrence is proximate or remote is whether


39 Ross v. Gearin, 145 Okla. 66, 69, 291 P. 534, 537 (1930), where liability was found when defendant ran out of gas on the highway at night, left his truck unlighted on the road, and plaintiff ran into the truck when his vision was obscured by oncoming headlights.


it was an event to be anticipated.\textsuperscript{45} Others have stated that an injury is proximate if the person of ordinary prudence, judgment, and experience would foresee it as a likely or probable result of the negligent act.\textsuperscript{46} The scope of proximate cause has sometimes been limited to consequences reasonably expected to arise or those which the parties themselves contemplated might arise.\textsuperscript{47} Reasonable expectations would seem the key; and it has been held, for instance, that it is unforeseeable that one using a highway will drive clear off the shoulder and along the ditch, thereby being injured by colliding with a utility pole four feet from the road.\textsuperscript{48}

As under any of the tests, it is commonly here recognized that even if the requirement of proximate cause is otherwise met, liability will be cut off by “an efficient independent cause which was not in itself foreseeable.”\textsuperscript{49} To qualify as a true superseding cause that cuts off possible liability for the original negligence, a cause in Oklahoma must meet at least three requirements: (1) it must be independent of the original act; (2) it must be adequate of itself to bring about the result; and (3) it must not have been a reasonably foreseeable event.\textsuperscript{50}


\textsuperscript{46} Missouri, K. & T. Ry. v. Stanton, 78 Okla. 167, 173, 189 P. 753, 758 (1920); Corrigan v. Oklahoma Coal Co., 68 Okla. 35, 171 P. 47 (1918); Ponca City Ice Co. v. Robertson, 67 Okla. 86, 87, 169 P. 1111, 1112 (1917).

\textsuperscript{47} Spicers, Inc. v. Rudd, 199 Okla. 576, 188 P.2d 692 (1948); Stephens v. Oklahoma City Ry., 28 Okla. 340, 341 P. 611 (1911).


Defendant may arguably be relieved of liability by a superseding cause whenever primary responsibility for the injury-producing condition has passed to someone else prior to plaintiff’s harm. See Greenwood v. Lyles & Buckner, Inc., 329 P.2d 1063 (Okla. 1958) (contractor not liable for defective condition of road where Highway Department had assumed control seven months before accident).

\textsuperscript{50} Champlin Oil & Ref. Co. v. Roever, 477 P.2d 662 (Okla. 1970). Jurisdictions vary somewhat in their definitions of “superseding cause,” although there is general agreement that lack
The foreseeability test of proximate cause is appropriate even where defendant owed plaintiff a higher than ordinary degree of care, as where defendant was a common carrier and plaintiff its passenger or potential passenger.\footnote{51} It is also appropriate where the alleged negligence involves a violation of a criminal statute or ordinance.\footnote{52} Some cases do hedge a bit on this test by merely saying that foreseeability is one element of proximate cause,\footnote{53} but no other elements are usually listed. Some cases suggest that a broader range of liability might be allowed where defendant’s conduct was not merely negligent but wanton,\footnote{54} but no different test has actually been laid down for such situations.

It is clear that this test does not limit liability to injuries that were specifically foreseeable in all their details,\footnote{55} nor to consequences whose of foreseeability is an important factor. Some opinions do not require that such a cause be independent of defendant’s negligence or capable alone of causing plaintiff’s harm, but require that the cause be at least a substantial factor in producing the injury. Some cases, especially if applying the direct-causation test, require that the superseding cause be “new,” not a force that existed at the time of defendant’s act. See McLaughlin, Proximate Cause, 39 HARv. L. Rev. 149, 159 (1925). Cf., Note, 26 GEO. L.J. 167 (1936), distinguishing “intervening causes” and “concurring causes.” And sometimes recovery is allowed despite an unforeseeable intervening cause if the end result is foreseeable. See Note, Proximate Cause: Must an Intervening Force Be Foreseeable?, 18 U. FLA. L. Rev. 538 (1966). This is often justified on the basis that the exact manner in which the harm occurs need not be foreseeable. Cf. the leading case of Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6th Cir. 1933).

\footnote{51} Stephens v. Oklahoma City Ry., 28 Okla. 340, 114 P. 611 (1911) (street car failed to stop for prospective passengers; they were run down by fire wagon as they tried to return to sidewalk; no liability). \textit{But cf.} Schaff v. Roach, 116 Okla. 205, 243 P. 976 (1925), as to common carrier’s high duty which may sometimes extend to guarding against rather remote risks. See also Bauer, Common Carrier’s Negligent Delay Plus Act of God, 8 Notre Dame Lawyer 394 (1933).

\footnote{52} Woodward v. Kinchen, 446 P.2d 375 (Okla. 1968).

\footnote{53} See John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970) (applying Oklahoma law).

\footnote{64} Northup v. Eakes, 72 Okla. 66, 69, 178 P. 266 (1918); Mayne v. Chicago, R.I. & P. Ry., 12 Okla. 10, 69 P. 933 (1902). \textit{But cf.} cases cited in notes 1 and 6 supra and accompanying text. Liability for conduct that is intentional, or is bordering on the intentional, is often extended to even remote consequences. The foreseeability limitation is not applied; to the extent any limitation is applied, it is the direct-causation test. See Derouin v. New England Tel. & Tel. Co., 81 N.H. 451, 130 A. 145 (1925). See generally Bauer, The Degree of Moral Fault as Affecting Defendant’s Liability, 81 U. Pa. L. Rev. 586, 592-96 (1933).

exact manner of occurrence is known. Although "proximate cause" may technically be taken to require limiting liability to occurrences necessarily resulting from a negligent act, a reasonable possibility of the occurrence is all that the courts actually require. "It includes what a reasonable person should realize might flow from certain conduct, if he took time to think about it."

A third test of proximate cause that has been employed in Oklahoma may be called the "natural and probable" rule, stating that defendant's negligence makes him liable for all results following in a natural and probable sequence from his act. This test overlaps the foreseeability one because a natural and probable consequence has been defined to mean that which might have been expected. And the "natural and probable" language is often followed and qualified by statements requiring foreseeability also. Thus, it may well be that "The term natural and probable result has no more definite meaning than foreseeability. ... [N]atural and probable results are those which are foreseeable, within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent." On the other hand, the "natural and probable" test has also been stated in connection with the court's emphasizing that ultimate consequences need not have been specifically foreseeable in order for liability to exist.

Again, there are minor variations in language and application of this test. Sometimes it is said that a "natural and continuous sequence" is required, as in finding liability for destruction of a tractor where defendant negligently buried its oil pipeline too close to the surface, plaintiff struck the pipe with his tractor while plowing a fireguard, and oil from the pipe

56 Northup v. Eakes, 72 Okla. 66, 178 P. 266 (1918) (defendants allowed oil to flow into stream; it flowed to plaintiff's property, became ignited, and destroyed barn; no one certain what caused fire). It is often stated that defendant need not foresee the exact manner in which the result occurs, so long as the result itself is foreseeable. See W. Prosser, Torts 286-89 (4th ed. 1971).


59 Dunagan v. Bledsoe, 267 P.2d 586, 587 (Okla. 1954). See generally Bohlen, The Probable or the Natural Consequence as the Test of Liability in Negligence, 49 Am. L. Rev. 79 (1901). The "natural and probable" test has been criticized as not adequately separating the issues of causation and scope of liability as they are submitted to the jury. See Dewey v. Klawness & Co., 379 P.2d 560 (Ore. 1963).

60 Wichita Falls & N.W. Ry. v. Cover, 65 Okla. 110, 111, 164 P. 660, 662 (1916).


sprayed onto the tractor, causing it to ignite. As indicated by the "continuous sequence" language, there is often an emphasis in these opinions on the presence or absence of any intervening cause sufficient in itself to create the injury. If defendant negligently leaves a ditch he has dug on plaintiff's land open and unbarricaded, and plaintiff's cow falls into the ditch, and the plaintiff is injured while making prudent efforts to extricate the cow, a continuous chain unbroken by any unforeseeable event has been found.

Some opinions emphasize the "natural" aspect of the test, stressing that the result must be what could be considered a usual, ordinary outcome of defendant's act. Other cases place more emphasis on the "probable" aspect, saying that the injury must be a likely result from defendant's conduct. It is unnecessary that the conduct have been more likely than not to cause the injury, but the outcome must have been more than a mere possibility; the result must be something the reasonable person would foresee as a likely result of the initiating negligent act. Thus, the "probable cause" once again employs foreseeability and is often defined in terms of what is reasonably to be anticipated.

The fourth test of proximate cause also uses foreseeability, but is nonetheless clearly distinguishable from the others in that it looks back on defendant's conduct and asks whether the outcome was a reasonably possible one. This is sometimes called the "hindsight" test and may be considered an extension of the Polemis direct causation theory. Where gas

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67 See Prickett v. Sulzberger & Sons Co., 57 Okla. 567, 157 P. 356 (1916). "Strictly defined, an act is the 'proximate' cause of an event when in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event..." Id. at 586, 157 P. at 362.
69 O'Neal v. Vie, 94 Okla. 68, 220 P. 853 (1923).
70 See Merrill v. Beaute Vues Corp., 235 P.2d 893 (10th Cir. 1956).
71 Oklahoma Gas & Elec. Co. v. Lukert, 16 Okla. 397, 412, 84 P. 1076, 1081 (1906) (decedent killed when came into contact with electrically charged wire; held proximate result of defendant allowing its electric wires to deteriorate so that they fell onto telephone wires, which became charged with electricity also, and they all fell to ground).
72 See Mayne v. Chicago, R.I. & P. Ry., 12 Okla. 10, 16, 69 P. 933, 935 (1902) (defendant's train blocked path to depot; plaintiff had to take different route, tripped over railroad tie; no proximate cause since injury not foreseeable from negligence, if any).
73 Note, Torts: Foreseeability as a Requirement of Proximate Cause in Oklahoma, 21 Okla. L. Rev. 111 (1968), where the "hindsight" theory is discussed and the leading American case is said to be Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961). The English Polemis case and its overruling are discussed in note 37 supra.
is turned on when the condition of the gas pipes is unknown, an explosion is a reasonably possible consequence.\textsuperscript{74} Where defendant drives with a flat tire on hot pavement, it has been held reasonably possible (at least in 1934) that the tire would ignite, fly off the wheel, and cause a fire on a nearby farm.\textsuperscript{75} Thus, it does seem this test may allow recovery where other formulae, such as the pure foreseeability test, might not. On the other hand, a number of the recoveries under this test might well be allowed under differing doctrines also, as where defendant negligently disconnects plaintiff’s gas service, plaintiff (having no phone) has to go out in the rain several times to get service restored and consequently catches a cold.\textsuperscript{76} However, even under this test, some results are held too remote for liability. Where defendant-railroad failed to make prompt delivery of plaintiff’s trunk containing his carpenter tools and certificate, and plaintiff therefore had to go to work for defendant as a section-hand rather than as a bridge carpenter, any negligence of defendant as to the trunk delivery could not be considered the proximate cause of plaintiff’s being hit in the eye by a rock fragment while engaged in the section-hand service.\textsuperscript{77}

This test is usually stated as meaning that a person guilty of negligence will be held liable for all consequences that the prudent and experienced person, fully aware of all the circumstances (whether or not these could have been ascertained by reasonable diligence), would have thought, at the time he acted, reasonably possible to follow his act.\textsuperscript{78} Two points are worth noting in such statements of the rule: There is an obvious emphasis on defendant’s guilt for negligence or omission of duty, seeming to bolster the view that as a wrongdoer, defendant should be made to pay for all harm he has caused. And the test is not purely one of hindsight since it holds defendant liable only for consequences he should have considered reasonably possible \textit{at the time of his negligent act}. But two differences between this and other tests should also be emphasized. (1) It holds defendant liable for possible consequences, not just reasonably likely ones, thus contradicting the Oklahoma authority that says the law deals only in probabilities.\textsuperscript{79} (2) It holds defendant liable for consequences that would have been

\textsuperscript{74} Oklahoma Nat. Gas Co. v. Courtney, 182 Okla. 582, 79 P.2d 235 (1938).
\textsuperscript{75} Butts v. Anthis, 181 Okla. 276, 73 P.2d 843 (1937).
\textsuperscript{76} Oklahoma Nat. Gas Co. v. Graham, 188 Okla. 521, 111 P.2d 173 (1941).
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considered possible if he had known all circumstances, even those that reasonable care would not have revealed. In this, the theory contradicts much of the general law of negligence and proximate cause. This test does, however, follow the usual rule of recognizing that an unforeseeable and independent intervening act will cut off liability.

The fifth and final test of proximate causation used in Oklahoma may be called the "cause v. condition" method. This oft-stated rule is usually expressed in such language as, "The proximate cause of any injury must be the efficient cause which sets in motion the chain of circumstances leading to the injury; if the negligence complained of merely furnishes a condition by which the injury was possible and a subsequent independent act caused the injury, the existence of such condition is not the proximate cause of the injury." Thus, negligence in maintaining a parking lot has been held a mere condition where plaintiff was struck, while walking through the lot, by a car traveling the wrong way in a one-way lane of traffic. The same has been held as to a railroad's negligence in failing to ring its bell or blow a whistle at a crossing when decedent was riding in a car with poor brakes and the driver of the car saw the approaching train in time to stop if his brakes had been working adequately; the railroad's failure was a mere condition of the collision at the crossing, and the proximate cause was the slowness of the brakes.

Many of the cases in which this test is employed could perhaps be as well decided under principles of contributory negligence. A plaintiff who

80 Concerning application of the reasonableness standard in determining what the actor should have known, see W. Prosser, Torts 157-61 (4th ed. 1971); H. Terry, Leading Principles of Anglo-American Law § 200 (1884). See generally Seavey, Negligence—Subjective or Objective?, 41 Harv. L. Rev. 1 (1927). On limiting proximate cause to risks that should reasonably have been known, see Mauney v. Gulf Ref. Co., 193 Miss. 421, 9 So. 2d 780 (1942); Campbell, Duty, Fault, and Legal Cause, 1938 Wis. L. Rev. 402. But cf. Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633 (1920), supporting a direct-causation limit on liability.

81 See Sturm v. Green, 398 P.2d 799 (Okla. 1965). However, the Restatement (Second) of Torts has now largely abandoned foreseeability as to both consequences for which there can be liability and intervening causes, and, as to both, has adopted a test of whether a consequence or cause is "normal," or is instead something that is, upon hindsight, a "highly extraordinary" outcome. Restatement (Second) of Torts §§ 433, 435, 442. Cf. Leposki v. Railway Express Agency, 297 F.2d 849 (3d Cir. 1962).


85 See Note, Proximate Causation in Oklahoma, 19 Okla. L. Rev. 348, 351 (1966). Cf. Sztaba v. Great N. Ry., 147 Mont. 185, 411 P.2d 379 (1966) (contributory negligence treated as part of proximate cause). In the past, it did not seem to matter whether a case was decided
slams on his brakes unnecessarily may be denied recovery under either proximate cause or contributory negligence, although defendant-railroad was negligent in allowing warning lights to flash when no train was approaching.\textsuperscript{86} The same is true of a plaintiff who jumps from an oil derrick floor to the earth below.\textsuperscript{87} or who operates heavy road equipment on a slope in disregard of his employer's instructions.\textsuperscript{88} In some such cases, the court seems thus to sidestep an actual decision on whether plaintiff's conduct was negligent by simply deciding that it, and not defendant's conduct, was in any case the proximate cause of plaintiff's harm. Similarly, the test can be used instead of, or in addition to, assumption of the risk, by the court's finding that plaintiff's use of a product known to be defective was the proximate cause of his own injury.\textsuperscript{89}

This test has been used in a variety of contexts. It has, for instance, been employed to determine what jurisdiction's law applies to a tort action, because it should be the law of the state where the negligence occurred that proximately caused the accident.\textsuperscript{90} It has been discussed in connection with deciding the time allowable for seeking to remove a case to federal court.\textsuperscript{91}

for defendant on the basis of lack of proximate cause or of existence of plaintiff's contributory negligence, because either ground amounted to a complete bar to plaintiff's recovery. With the recent adoption of comparative negligence in Oklahoma under 23 Okla. Stat. §§ 11-12 (Supp. 1974), it will be far more important to make the distinction. The lack of proximate cause will continue to defeat any recovery, but plaintiff's contributing fault will only result in apportionment of damages. See generally Note,\textit{Torts: Oklahoma's Uncharted Land of Comparative Negligence}, 27 Okla. L. Rev. 122 (1974).

\textsuperscript{87} Munroe v. Schoenfeld & Hunter Drilling Co., 178 Okla. 149, 61 P.2d 1045 (1936).

\textsuperscript{89} See Hunt v. Firestone Tire & Rubber Co., 448 P.2d 1018 (Okla. 1968), where plaintiff was denied recovery because he drove with a tire he knew was defective. Again, as with contributory fault (note 85 supra), assumption of the risk may no longer be a total bar to recovery, while lack of proximate cause is such a bar. But the status of assumption of the risk under the new comparative negligence statute is in doubt. See Note, \textit{Torts: Comparative Negligence + Implied Assumption of Risk = Injustice}, 27 Okla. L. Rev. 549 (1974). Since the Hunt case, supra, there has also been a change in the standard that Oklahoma applies to determine liability in defective product cases, the state having adopted Manufacturers' Products Liability (largely equivalent to strict liability in tort) in Kirkland v. General Mtrrs. Corp., 521 P.2d 1353 (Okla. 1974). Under this, assumption of the risk is not itself a defense, but knowing assumption of a defect is, as is misuse. See McNichols, \textit{The Kirkland v. General Motors Manufacturers' Products Liability Doctrine—What's in a Name?}, 27 Okla. L. Rev. 347, 380-408 (1974). There would seem to be no other "proximate cause limits" on liability under this doctrine, although an unforeseeable intervening cause might be recognized as cutting off liability. See W. Prosser, \textit{Torts} 667-68 (4th ed. 1971).

Probably the factual situation to which it has been most often applied is that in which plaintiff has had a collision with, or allegedly due to, some obstruction in a road. Again, if plaintiff has *himself* run into an obstruction created by defendant, a denial of recovery may be justified due to contributory negligence. But this test of proximate cause has also been used to deny recovery where defendant negligently parked his car so as to obstruct a road, causing another motorist to strike defendant’s automobile and then glance into plaintiff, who was clearly not negligent at all. The parked vehicle may be considered a condition and the later action of colliding with, or taking evasive action as to, that vehicle may be considered the cause. The same is true where the alleged negligence is in failing to put out reflectors to warn of a stopped vehicle. This test would appear sometimes to defeat recovery where, under another test, it could be allowed; it certainly might be a foreseeable consequence of negligently parking a vehicle, for example, that a car trying to avoid that vehicle would hit another car or person. Like the others, this can defeat recovery even though defendant’s negligence involved violation of a criminal statute or municipal ordinance.

But what is to distinguish a condition from a proximate cause? There is authority that the key is again foreseeability—that an act or situation will be deemed a mere condition as to a later event if that event is not a reasonably foreseeable consequence of the prior act. There is similar authority that negligence is a mere condition of later injury if an independent, unforeseeable act (a superseding cause) intervenes between the original negligence and the injury. Therefore, it is surely true that

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92 See Ryel v. B.F. Walker, Inc., 527 P.2d 584 (Okla. 1974) (proximate cause was not defendant’s illegal parking but plaintiff’s own negligence in striking the vehicle).
95 So held in Ross v. Gearin, 145 Okla. 66, 291 P. 534 (1930) (liability for leaving unlighted truck on road at night).
97 Pepsi-Cola Bottling Co. v. Von Brady, 386 P.2d 993 (Okla. 1963) (truck in no-parking zone found mere condition); Cheatham v. Van Dalsem, 350 P.2d 593 (Okla. 1960) (defendant violated ordinance by having no red taillights; found a mere condition).
under this test, as the others, such a superseding act will cut off liability.\(^{100}\)

Three generalizations about this last test seem appropriate. (1) Oklahoma has a definite, never fully explained propensity to find parked vehicles (even if illegally parked) and other roadway obstructions to be mere conditions as to subsequent injury, not giving rise to liability. (Perhaps some of the cases simply reflect the lack of seriousness with which improper parking is generally viewed.) (2) The "cause v. condition" test is seldom accompanied by definitions of those key terms. (3) Where the distinction is explained, it is either purely in terms of foreseeability, or in terms of superseding causes—in either case, leading us back to foreseeability as at least a highly important factor. Beyond that, it may be observed that the test in Oklahoma seems quite favorable to defendant—or perhaps is used to justify a judgment for defendant that is really thought valid on some other, often unexpressed ground.

**What Is, and What Should Be, the Oklahoma Rule?**

Oklahoma has thus given some amount of support to five different theories of proximate causation, which we may label direct causation, foreseeability, natural and probable cause, reasonable possibility, and cause v. condition. To return to our earlier question—how would Oklahoma decide a case such as *Palsgraf*? It seems clear that in language and analysis, Oklahoma does not follow Cardozo's majority opinion in that case. While he declares that there is simply no negligence in the absence of any duty, and no duty beyond the range of foreseeability, Oklahoma finds negligence on the basis of *some* possible harm, then asks whether the harm is within the rule of proximate cause.\(^{101}\) Thus, where the foreseeability test is used,

peals), where a cook's failure to check the contents of a drum before pouring hot grease into it was held not a supervening cause so as to cut off restaurant's liability for unsafe system of grease disposal.

The problem of liability where defendant (as in the *Merchants* case, *supra*) leaves his keys in the ignition and someone steals the car and causes damage, has been much debated. Most cases find no liability due to lack of proximate cause, lack of duty to plaintiff, presence of unforeseeable intervening cause, etc. See Annot., 45 A.L.R.3d 787 (1972); Note, *Torts: Liability of Owner Leaving Key in Automobile for Damages Caused by Thief*, 8 Okla. L. Rev. 371 (1955). Violation of statute or ordinance by leaving the keys in the ignition has sometimes been a significant factor, but probably a majority of cases have denied recovery even where such violation is shown. See Note, 37 N.C.L. Rev. 104 (1958).

\(^{100}\) Norman v. Scrivner-Stevens Co., 201 Okla. 218, 204 P.2d 277 (1949) (defendant negligently sent employee out in truck known to have defective brakes; brakes caused accident; employee struck and killed by another vehicle when he went onto highway to get license number of car with which he collided—no proximate causation by defendant's negligence). *Cf.* Runyon v. Reid, 510 P.2d 943 (Okla. 1973) (voluntary act of suicide).

\(^{101}\) See Larkey v. Church, 79 Okla. 202, 192 P. 569 (1920).
an act may be determined negligent, but the court then poses the further question of whether plaintiff's injury would reasonably be expected to arise.\textsuperscript{102} "... [A]n act may be negligent without being the proximate cause of an injury, and hence not actionable."\textsuperscript{103} The same is true where the natural and probable test, or similar language, is employed.\textsuperscript{104} The reasonable possibility test seems to rest on the premise that a defendant found "guilty" of negligence should pay for all the harm he has caused; thus, cases using this standard invariably find negligence first, then apply the rule on scope of liability.\textsuperscript{105} Moreover, cases talking of cause v. condition often emphasize that defendant has been negligent, but nonetheless can be held only for an act that was an efficient cause, not a mere condition, of the injury.\textsuperscript{106}

The language mirrors the analysis: negligence is found to exist without regard to how far liability may extend—without regard to whether plaintiff might foreseeably be injured by the allegedly negligent act. But this is what Cardozo would consider meaningless as mere "negligence in the air."\textsuperscript{107} Cardozo talks in terms of duty to plaintiff. Whether or not there is duty determines whether there can be liability, and the scope of foreseeable risk is the limit on duty. Oklahoma often does not speak of duty at all in negligence cases; where it does, it is normally in terms of establishing the standard of conduct to which defendant will be held—usually a standard of reasonable care, but occasionally varying somewhat where defendant is sued as a land occupier, a common carrier, etc. Such references do not concern the extent of liability once the standard is breached.

The Oklahoma analysis goes like this: (1) the standard of care ap-

\textsuperscript{102} Snider v. Sand Springs Ry., 62 F.2d 635, 638 (10th Cir. 1933) (Oklahoma law); Spicers, Inc. v. Rudd, 199 Okla. 576, 578, 188 P.2d 692, 694 (1947).


\textsuperscript{104} See Wichita Falls & N.W. Ry. v. Cover, 65 Okla. 110, 111, 164 P. 660, 662 (1916), stating the "natural and probable" test and also saying that liability extends only to consequences that might have been expected.


\textsuperscript{106} See Evans v. Caldwell, 429 P.2d 962, 964 (Okla. 1967), and cases discussed therein.

\textsuperscript{107} Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99 (1928), \textit{quoting} F. Pollock, \textit{Torts} 455 (11th ed. 1920); Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920). \textit{See generally} James, \textit{Scope of Duty in Negligence Cases}, 47 Nw. U.L. Rev. 778 (1953). Cardozo also indicates in dictum that for there to be negligence as to plaintiff, not only plaintiff himself but his particular interest that was invaded must have been within the foreseeable risk, but this limitation has seldom been applied. See W. Prosser, \textit{Torts} 259-60 (4th ed. 1971). \textit{See generally} Machin, \textit{Negligence and Interest}, 17 Mod. L. Rev. 405 (1954); Payne, \textit{Negligence and Interest: A Comment}, 18 Mod. L. Rev. 43 (1955).

\textsuperscript{108} See Midland Valley R.R. v. Williams, 42 Okla. 444, 141 P. 1103 (1914).
plicable to defendant's conduct is determined; (2) whether that standard was breached is determined; (3) the question is answered of whether the breach has, as a matter of fact, caused (i.e., substantially contributed to) plaintiff's harm; and (4) the question is answered of whether plaintiff's harm was within the scope of proximate cause, according to which one of the five possible tests of proximate cause is used. The last two parts of the analysis are sometimes largely combined. Part I of the analysis—establishing the standard—is for the court, while the other three are generally for the jury, with the court laying down guidelines. But in all cases and under any of the tests, negligence (which is usually treated as being established by the first two parts of the analysis) is initially determined, and then the court talks of causation and/or proximate cause. This is very much like the language and analysis of Andrews in the Palsgraf dissent. He would find a duty to all the world, and where that duty (usually of reasonable care under the circumstances) is found to have been breached, he then asks whether plaintiff's harm followed from the breach and was within the range of proximate cause. Proximate cause becomes not a limitation on negligence itself, but a policy that limits liability for negligence.

To say, however, that Oklahoma uses the language and organization of Andrews is not to say that Oklahoma uses his test of proximate cause. It is the test employed that is really the key consideration, not the words in which it is garbed or the analytical point in time at which it is applied. Oklahoma may not follow the Cardozo philosophy that there is a duty only to those foreseeable, and thus that negligence is possible only as to them. But the Oklahoma test of proximate cause that is most frequently applied, and that often permeates the application of other supposed tests, is foreseeability. Andrews would have us utilize foreseeability, but only as one factor in determining proximate cause, together with such other considerations as proximity in time and space, number and efficacy of intervening forces, and so on. There is some Oklahoma authority that

109 One Oklahoma case that does seem to find that negligence depends on whether or not there was a duty to plaintiff as a foreseeable person is Wichita Falls & N.W. Ry. v. Cover, 65 Okla. 110, 164 P. 660 (1916). The court there questions whether there was any duty on the railroad's part to a person trying to board a moving train; assuming there might be such a duty and thus negligence in having defective handholds, the court then moves to the question of proximate cause and finds none. Cf. Chicago, R.I. & P. Ry. v. Nagle, 55 Okla. 235, 154 P. 667 (1916). But cf. Jorgensen v. Meade Johnson Laboratories, 483 F.2d 237 (10th Cir. 1973) (action stated for tortious conduct and breach of warranty as to prenatal injury if harm proximately caused by defective product, no discussion of duty).


might support such a test. By far the greater amount of authority supports the use of foreseeability alone to determine the scope of liability, even though the court uses Andrews' term—"proximate cause"—in speaking of such scope of liability.

Oklahoma uses, as has been seen, five different tests to determine proximate cause. But the first of these, direct causation, has scant support in the state. The second is a test purely using foreseeability. The third speaks of "natural and probable" results, but these terms, where defined, mean little more than "foreseeable." The fourth test, "reasonably possible" or "hindsight," employs foreseeability, although it holds defendant liable as if he had known matters that he did not and could not reasonably know, and it holds him for mere possible results of his act, not just for probable ones. The final test—cause v. condition—is often not further explained other than by the use of these terms. Sometimes it seems largely a test of cause in fact, not of proximate cause. Sometimes (as to parked vehicles) it seems to rest on little more than precedent. But where explained as a test of proximate cause, it also rests on foreseeability as the guideline for distinguishing mere conditions from causes.

Philosophically, Oklahoma would appear to be with Andrews, but practically speaking, it is with Cardozo. Is this justifiable? It is submitted that it is. The Cardozo philosophy is difficult to grasp, speaking of negligence as existing only as to specific plaintiffs, and perhaps even specific interests of those plaintiffs. The law requires that negligence be judged in light of all surrounding circumstances; this seems equitable, but is hard to accomplish if one's vision is narrowed to only certain potential plaintiffs. "Negligence" is basically a jury question. To the jury, the term no doubt means careless conduct, and the human tendency is initially to judge this according to whether some persons or interests are likely to be harmed thereby, not according to whether any one particular person or

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112 See Meyer v. Moore, 329 P.2d 676, 681 (Okla. 1958); Norman v. Scriver-Stevens Co., 201 Okla. 218, 219, 204 P.2d 277, 279 (1949), both saying that proximate cause must be determined "upon mixed considerations of logic, common sense, justice, policy, and precedent." Cf. John Long Trucking, Inc. v. Greear, 421 F.2d 125, 127 (10th Cir. 1970), saying foreseeability is "an essential element" in determining proximate cause in Oklahoma. Compare Mozer v. Semenza, 177 So. 2d 880, 883 (3d Dist. Ct. App. Fla. 1965): "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." For good critical analyses of both the foreseeable risk theory and Andrews' "proximate cause" approach, see Probert, Causation in the Negligence Jargon—A Plea for Balanced "Realism," 18 FLA. L. REV. 369 (1965); Note, Causation, Duty, and Negligence: Some Recent Developments in Oregon Law, 45 OREG. L. REV. 124 (1966). Increasingly, it is recognized that the hunt for a single proximate cause is senseless and misleading. See Green, Proximate Cause in Texas Negligence Law, 28 TEX. L. REV. 471 (1950).
interest may be harmed. Negligence is simplified if it can be limited to the question of breach of standard, and kept apart from problems of scope of duty or liability. Besides, why apply at this point a limitation on prospective plaintiffs, if once again, at some later time, an additional proximate cause limitation will be applied? Cardozo never adequately explains this.

Proximate cause is also generally a jury question. Again, as in defining negligence, it is well to limit the concept to a simple, graspable term. What is reasonably foreseeable, reasonably to be expected—this is an easily understood standard. Surely, it is easier than weighing a number of factors and policy considerations. The situation under any test will become further complicated if alleged "superseding causes" enter the picture—and these appear to be recognized under all tests. But foreseeability is again a key (under all tests) in determining if a cause is superseding. At least there is some consistency if this is also the general test of proximate cause.

It is surely possible to agree with Andrews that proximate cause is basically a liability limitation of a public policy nature, but still to find his test of proximate cause unwieldy. It is surely appropriate in today's society to find appeal in the idea that a basic duty of reasonable care exists as to everyone—but still to recognize that practicality demands some limit on potential liability. And, as the test for establishing such a limit, it is surely workable and logical to adopt the rule of reasonable expectations. This, in essence, is what Oklahoma has done—not always, not consistently, but in a great many cases, including those which have the support of general tort principles and of authority from other jurisdictions.