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Book Review of Legal Cause in the Law of Torts

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LEGAL CAUSE IN THE LAW OF TORTS

By ROBERT E. KEETON. Columbus, Ohio: Ohio State University Press, 1963, 137 pp. $3.75

Professor Keeton in *Legal Cause in the Law of Torts* makes an erudite plea for the retention of a theory of legal causation known as the Risk Rule, most eloquently set forth in Judge Cardozo's opinion in the *Palsgraf* case.

In an Introduction citing the need for a precise, yet flexible, rule the author focuses his attention on legal responsibility or duty. The reader is then plunged into a thicket of theoretical verbosity in which the Risk Rule is explained, then compared to other less preferable rules. From there it is a short trip to the application of the author-favored doctrine, and finally the reader emerges on the battle fronts of legal causation, a somewhat harrowing journey.

The problem Mrs. Palsgraf personified by standing too close to the scales in the train station, was that of the unforeseeable plaintiff and the duty owed to him. Judge Cardozo reasoned that there was no negligence between the parties, Mrs. Palsgraf being beyond the area of foreseeable harm, and that the question of liability was one of duty, not of mechanical causation. Keeton carries forth the banner of the Risk Rule (that liability depends on the results of the negligence being within the risk undertaken) as a panacea for the problems of duty owed and scope of liability.

Professor Keeton first attacks other existing rules: 1) The non-rule of practical politics (which, as Judge Andrews said in the Palsgraf dissent, means that "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). Keeton says this rule does not yield a reasonable predictability of legal cause. 2) The "natural and probable consequences" rule. Here the author finds too many ambiguities of meaning. 3) The "order and nature of antecedents" rule (that one is responsible for the natural and proximate causes of his negligence—the *In Re Polemis* rule). The author decries the lack of a valid test for direct and indirect causes.

After this discussion, Professor Keeton applies the Risk Rule to various cases to show that it meets the exigencies of clarity and predictability.

In the final section, he reports the trend toward strict liability, and with seeming approval of the trend, shows that the Risk Rule if applied with greater judicial control, can remedy the ambiguities and uncertainties of the other rules. His suggestion is that the Judge in a negligence case involving causation use the Risk Rule as a guide to the jury in their determination of whether the defendant owed a duty to the plaintiff and whether the plaintiff was within the area of foreseeable harm. The author feels that by this precise formula, juries will have a more uniform idea of what they are deciding and where the limits of liability should be.

Dean Prosser in his *Law of Torts* says that the present state of the law in this area is one of troubled waters, in which anyone may fish. The remaining question is whether Keeton in casting in his line has not further served to tangle the existing lines. It is a laudable attempt to synthesize from theory a workable rule that could lead us out of the labyrintn of unpredictability which now exists. Plaintiffs, attorneys, and courts could ascertain with more certainty whether when one domino is pushed over, responsibility lies for all the dominoes that subsequently fall, or, less picturesquely, where the area of duty lies.

A rule of law designed to cover such a broad field must be so general that it is inherently ambiguous. A jury, no matter how well they are instructed to view subjectively what could have been foreseen, will still always be looking at an accident after it has occurred. Something that might appear well-nigh impossible before the event, appears perhaps highly probable afterwards. But with these inherent limitations, the Risk Rule as presented by Professor Keeton appears to offer a workable solution.

The approach on a theoretical plane has served to obfuscate rather than elucidate the argument here and not until the final section does Professor Keeton get into the specifics that make the rule seem highly plausible. Nevertheless, this publication constitutes an important step toward a uniform guideline for decision in this area.

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