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The Remoteness Doctrine: A Rationale For a Rational Limit on Tort Liability

Victor E. Schwartz*

I. INTRODUCTION

Since I had the great opportunity to begin teaching torts over three decades ago, I have learned that there are certain aspects to this wonderful subject that fascinate students. One of those aspects is the cornucopia of cascading tort law words, “new words” that the students had not known before.

Some of these words I call “tort fuel.” They make tort law go faster. Strict liability is such a word; comparative negligence is another such term. When comparative negligence entered California law in the case of *Li v. Yellow Cab*,¹ it swiftly ended an archaic, two century-old rule that made people lose cases even if they were one percent at fault.

But there are also “brake words” in tort law. These are words to limit tort law explosions and keep liability exposure from going all over the place and causing complete mayhem. Assumption of risk is a brake word. Why should somebody who absolutely knows there is a risk and fully understands it and decides to encounter it be entitled to collect money for the very harms caused by the very risk the person knowingly encountered?

Proximate cause is another brake word. Causation cannot extend forever. Duty is another. Even though somebody may be at fault and have proximately caused “harm,” there may be public policy reasons why a duty is not owed to a particular plaintiff. In California, for example, for a period of time the California Supreme Court flirted with the idea of letting people recover damages for

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¹. *Li v. Yellow Cab* 532 P.2d 1226 (Cal. 1975).

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emotional harm because a loved one was injured, even though the claimant was not present when the loved one was hurt. After thirty years, the Supreme Court of California finally put the brakes on such a claim and held that there was no duty owed to such claimants.\(^2\) Sure, we may be sympathetic about the person’s emotional harm, but should people who hear about a serious injury be allowed a monetary damage claim in addition to the very serious claim that is held by the injured person?  

Sometimes the magic words of tort law so excite law students (and lawyers) that they embrace them too much. The words take on a life of their own, and one forgets the basic common sense that always should be applied in both life and in the law of torts. The words in themselves create no real magic, but are there to provide rational and reasonable guidelines.

I would like to discuss such a word today, “remoteness.” It is a brake word in tort law, and provides a rational limit on tort claims. Unlike words such as “proximate cause,” “duty,” “comparative negligence,” the terms “remoteness” or “remoteness doctrine” have not found a carefully articulated rationale in many judicial opinions.

The remoteness doctrine is sometimes used to dismiss claims—a court concludes that a claim is “too remote” to permit recovery. Today, I would like to share with you a rationale for the remoteness doctrine, and show why sound public policy sponsors its application in some of the most controversial cases of our day.

II. THE REMOTENESS DOCTRINE: YOU CAN JUST FEEL IT

Basic common sense is an inextricable part of the law of torts. Common sense can make virtually anyone have the “feel” for the remoteness doctrine as the rational limit on tort law.

For example, virtually every day on the freeways of Los Angeles, there is an accident. Often it involves the negligence of one or more individuals. Similar acts of automobile driver negligence occur on crowded thoroughfares throughout the country. When these accidents occur, they bring with them huge traffic tie-ups. Many people are delayed, sometimes for a long period of time, all because of the negligence of one or two people.

When people are delayed are highways, it is quite foreseeable that in some instances, the result would be more than a mere inconvenience. People may need to get to hospitals under emergency conditions, and not make it. Millions of dollars, perhaps billions of dollars, are lost in economic opportunities. A person may fail to meet at a given time for a job interview, and loses the opportunity. A person may fail to show up for a sales opportunity that was virtually certain, and loses the sale as a result of the delay. But, if a person who is hurt is unable to get to a hospital, or the person who has lost a job opportunity, or a person who loses

the sale sues the negligent driver, they would lose. While we may "feel their pain," their claim is too remote. The case law is absolutely clear on this issue, as is common sense.

There are many other plain, common sense examples of the remoteness doctrine. The torts casebook I coauthor is filled with some, even approaching the humorous. For example, in one case, a manufacturer sold a defective dog collar. The collar broke and the dog escaped from the grips of its owner. It bit someone. The victim sued the collar's manufacturer. A court held, with sympathy and understanding, that the plaintiff had no cause of action against the manufacturer of the dog collar. The harm was too remote.

III. THE LEGAL STEEL BEHIND REMOTENESS

Apart from common sense, there is legal steel behind the remoteness doctrine. One can trace this steel back 150 years to the case of *Anthony v. Slaid*. In that case, the plaintiff contracted to provide support to all the paupers in a small Massachusetts town for a specific period of time. Defendant Slaid assaulted a pauper and caused him significant injuries. As a result, plaintiff suffered an economic loss. The Supreme Judicial Court of Massachusetts clearly and unequivocally rejected the plaintiff's claim against the defendant as too remote.

The legal steel behind the remoteness doctrine is seen most clearly in the context of injuries in the workplace. A worker is injured after a safety guard breaks off a power tool he is using. The employer suffers a very foreseeable economic loss and pays the worker $50,000 in worker compensation. The employer also suffers other foreseeable economic harms. The worker has to be replaced; somebody new has to be trained; The job site does not produce as much during that time period. There is a whole litany of adverse economic results, and all of them are quite foreseeable.

But the law is steel in this area. The employer's right to recover for economic harms focuses solely on the amount he or she paid in worker compensation. No more and no less. The employer has no independent cause of action against the company that made the machine. The employer's right is derivative in nature. It stems from and is tied to the injured worker's product liability claim. The employer can recover its worker compensation costs if the employee's product

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5. 52 Mass. 290 (1846).
liability claim is successful. Lawyers call this basic principle "subrogation." Courts agree that an independent, separate claim by the employer is simply "too remote."

The same remoteness principle has been applied to the Federal Government when it has suffered an economic loss that is derived from an injury that was negligently inflicted upon a soldier or citizen. This point takes on added significance in light of discussions that the United States may try to bring a direct claim against manufacturers of tobacco products to recoup Medicare costs allegedly incurred as a resulting of treating illnesses allegedly caused by smoking.

The United States Supreme Court has been clear on this subject. For example, in a case stemming back fifty-two years, United States v. Standard Oil of California, a Standard Oil truck negligently hit a member of the Armed Forces. The United States provided the serviceman with hospitalization and helped him recover. The United States then tried to bring a separate, independent cause of action against Standard Oil to recover the costs of medical services it provided to the serviceman. The Supreme Court clearly and unequivocally held that the United States had no independent cause of action—its claim was too remote. The Court stated that if the law was to be changed, it should be done by the Congress.

IV. WHAT IS BEHIND THE STEEL?

Looking at cases over the past 150 years that have applied or not applied the remoteness doctrine, one can derive certain principles that the court uses to explain when the brake on liability will be enforced. Sometimes the remoteness doctrine is intertwined with traditional concepts of "proximate cause." While other times it may be intertwined with duty limitations. These particular labels can cause more confusion than clarity; but the remoteness doctrine stands on its own and a rationale explaining its application can be gleaned from the cases. There are four key factors to consider in applying the remoteness doctrine.

7. 332 U.S. 301 (1947).
8. See id. at 302.
9. See id.
10. See id.
11. See id. at 314.
12. See id. at 317. Congress has given the United States certain procedural advantages in suing tortfeasors that have injured servicemen and federal workers. See Medical Care Recovery Act, 42 U.S.C. § 2561 (discussing that the Government is subject to the same substantive rules of tort law that apply to injured persons, but procedural rules such as statutes of limitation applicable to injured persons do not bar the Government's claims). Congress also has permitted direct actions against primary medical care insurers (but not individual tortfeasors) for costs arising under Medicare. See Medicare Secondary Payer Act, 42 U.S.C. §§ 1395y(b)(2)(b)(ii) and (iii).
A. Were There Intervening Acts Between the Defendant's Conduct and the Plaintiff's Loss?

The greater the number of separate intervening acts between the defendant's conduct and plaintiff's loss makes it more likely that the remoteness doctrine will be applied. While sometimes discussed under the rubric of foreseeability, the focus is much more on whether separate and independent acts have intervened between the defendant's wrongful act and the plaintiff's harm.

For example, in the New York case of Kingsman Transit Co. v. City of Buffalo,13 a defendant negligently and improperly moored a ship at a dock.14 The river on which it was docked was filled with floating ice.15 The ice and debris accumulated and built a wedge between the ship and the dock; this was intervening act No. 1.16 Pressure from the wedge snapped the mooring line; this was intervening act No. 2.17 The ship floated downstream and hit another ship; this was intervening act No. 3. That ship in turn broke loose—this was intervening act No. 4.18 The two ships floated down the river together and were about to hit a drawbridge.19 The crew that normally would be on the drawbridge was not present; this was intervening act No. 5.20 The ships hit the bridge and as a result, the plaintiffs whose ship was moored below that bridge could not deliver grain upstream.21 The United States Court of Appeals for the Second circuit held that the defendant's negligent act was too remote.22

B. Duplicate Recovery For The Same Harm Should Be Avoided

A theme stressed again and again in cases applying the remoteness doctrine is that the law should prevent the possibility of duplicate recovery for the same harm. This can be seen very clearly in the Standard Oil case, where the United States

13. 388 F.2d 821 (2d Cir. 1968).
14. See id. at 822.
15. See id.
16. See id.
17. See id.
18. See id.
19. See id.
20. See id.
21. See id.
22. See id. at 824.
tried to bring a claim for the medical services it provided to a serviceman.\textsuperscript{23} It is also seen in the case where an employer is seeking an independent claim for medical costs it expended on behalf of a worker.

In both instances—the one with the serviceman and the one with the worker, the primary claim is that of the injured party.\textsuperscript{24} The injured party often brings a claim where there is negligence. In that claim, the injured party is entitled to recover all of his or her economic losses, regardless of whether they already had been reimbursed by an employer or, in the instance of the serviceperson, by the United States. As those of you who enjoy the law of torts know, that is the essence of the so-called “collateral source rule,” the defendant cannot benefit from the fact that the plaintiff was already compensated by another source.

If courts begin to permit independent economic loss claims that proceed or follow primary claims by injured persons, opportunities are rife for duplicate recoveries.

C. An Avalanche of Claims Can Prompt the Application of the Remoteness Doctrine

Recall the situation of the negligent driver on the freeway. It was clearly foreseeable that people would be delayed, and the delay could cause a person not to get to a hospital or miss a job opportunity. The situation presented very real and potential economic losses. But what was also clear was permitting claims beyond those who were directly hurt in the accident could result in an avalanche of claims. Hundreds of people could claim an economic loss. Many people might claim an indirect physical harm. Concerns about a potential avalanche of claims which would drown the original primary claim are a real and legitimate reason for application of the remoteness doctrine.

D. Indirect Economic Harm Suggests Remoteness

As our casebook and other basic texts on torts reflect, there is a “harm priority pyramid” in the law of torts. At the top of the pyramid is personal injury, tort law first and properly respects claims involving a direct, physical harm to a person. Next, it respects and allows claims for negligent or wrongful damage to property. On the bottom of the “tort priority pyramid” are claims for pure economic harm. Sometimes they are allowed and sometimes they are not.\textsuperscript{25} They are much more likely to be deemed remote when they are indirect economic harms, such as an

\textsuperscript{23} See U.S. v. Standard Oil of Calif. 332 U.S. 301 (1947).

\textsuperscript{24} See generally id.

\textsuperscript{25} See WADE supra note 3, at 448-60.
employer's lost profits, because a worker was injured.

V. UNPOPULAR DEFENDANTS AND THE REMOTENESS DOCTRINE

Adult beverages such as beer, wine, and liquor, firearms, fast automobiles and high fat foods may cause personal injuries to individuals. They also can cause a myriad of very foreseeable, indirect economic harms. Should the remoteness doctrine be applied in such cases?

The most experience on this question is gained from recent litigation involving tobacco products. For almost fifty years, smokers have brought personal injury claims against tobacco companies. Most of these claims have been unsuccessful, because of the assumption of risk defense, problems proving causation, and other facts.

The new trend tobacco cases have not been brought by smokers but by states, cities, union pension funds, private insurers, and others who claim to have suffered indirect economic losses because of injuries to smokers. In these cases, the remoteness doctrine has been a significant obstacle for plaintiffs. Attorney Generals and plaintiffs’ lawyers have struggled to develop new theories to create "independent" causes of action that would leave the common law barrier of the remoteness doctrine. Surprisingly, despite the unpopularity of tobacco defendants, most courts have followed basic principles of tort law and have applied the remoteness doctrine to dismiss claims that had involved indirect economic losses and are derivative in nature. The same has been true with guns. Let us review the remoteness factors and see how they apply in these cases.

A. Are There Intervening Acts Between the Defendant’s Conduct and the Plaintiff’s Loss?

With cigarettes, a person’s choice to smoke can be deemed an independent act. While arguments have been made that the smoker really has no choice because the

smoker is addicted, that standard is more applicable to the smoker’s personal claim than an indirect economic harm to third parties claim. A person who has suffered an indirect economic harm because a third party was shot faces a major intervening act between the sale of the product and his indirect economic injury—that of the gunman. The same is true if a case were brought against a manufacturer of liquor or beer because of the acts of a drunk driver.

B. Duplicate Recovery For The Same Harm Should Be Avoided

Whether it be liquor, guns, tobacco, or other unpopular defendants, allowing a third party a direct claim for the injury of another person, raises a clear potential for duplicate recoveries, just as it has under traditional cases that have applied the remoteness doctrine for over 150 years.

C. Avalanche of Claims Can Prompt The Application of The Doctrine

One need not speculate whether failure to apply the remoteness doctrine in indirect economic claims brought against unpopular defendants will lead to an avalanche of claims. Once the remoteness doctrine was abandoned by a few lower courts in tobacco cases, others who thought they could show an indirect economic loss saw an opening for claims, including health providers, Indian tribes and, most recently, foreign countries including Guatemala, Bolivia, Costa Rica, Israel, and France.

Just as would be true with the avalanche of claims that could stem from an accident on the highway, the remoteness doctrine’s disappearance in cases that may seem sympathetic puts forth a legal change that would encourage an avalanche of claims.

Consider an example that is currently being pondered by some of my friends in the plaintiffs’ bar. Almost any automobile can be driven over 100 miles an hour—just look at your own speedometer. In virtually every state, speeds over eighty miles per hour are illegal. Consider an individual who is hit by a speeding car. Suppose his medical costs are paid for by the state or a health insurer. Should the state or a medical insurer be permitted to proceed against the automobile’s manufacturer? As my friends in the plaintiffs’ bar suggest, governors can be placed on all automobiles that would prevent them from exceeding the maximum legal speed limit. The avalanche of claims envelope pushed further, includes everyone who has suffered an economic loss due to high speed accidents. One then gets closer to an understanding of the potential avalanche of claims in the tobacco and gun cases.

There is more to the food chain of a potential avalanche of claims. Although it is sometimes trivialized in terms of what could become “real law,” sellers of high fat foods could one day be defendants. High fat foods are a substantial health
hazard. They are particularly hazardous to certain parts of our population; for example, many males in their early 20s unknowingly suffer from preliminary arteriosclerosis. Those who sell high fat foods intend that all people heartily consume their products—simply look at the playgrounds outside so many McDonalds that entice parents and children alike, or even at Ronald McDonald himself. Their products—french fries and hamburgers—are being used “as intended.” This use may lead to serious health hazards and major indirect economic losses to Medicaid, Medicare and health insurers. The abandonment of the remoteness doctrine could allow claims if coupled with abandonment of certain other fundamental tort principles, such as the need to identify a particular defendant. When defendants are unpopular, those barriers can also fall.

How does such abandonment of legal principles occur? Let’s look at how the remoteness doctrine was overcome in the State Attorney General tobacco cases. No State Supreme Court in the Attorney General tobacco cases created a new and independent cause of action by the state against tobacco companies or rejected the remoteness doctrine. Its rejection came in a few lower court decisions which created a new rule that the state had an independent “quasi-sovereign” right which superceded the traditional remoteness doctrine.27 There was no precedent or principles supporting this theory.

The only precedent for the “quasi-sovereign” doctrine was to allow states to obtain injunctive relief to prevent harm, not to create causes of action for indirect economic loss against unpopular defendants.

As I have indicated, the specific “quasi-sovereign” theory was rejected by the Supreme Court of the United States in the Standard Oil case as applied to the United States.

The remoteness doctrine also can be trumped by a legislature. That was done in Florida and Vermont.28 Such attempts could occur at the federal level, in the not-too-distant future.

VI. CONCLUSION

As I look back at the thirty years of study and practice in the law of torts, I am impressed by the fact that when tort law principles have been put to the test by unpopular defendants, most judges have upheld those principles, but it has not always been so. For example, about fifteen years ago, some courts created an


“asbestos law” of super strict liability that applied only against manufacturers of asbestos–containing products. When the same principles were applied against manufacturers of drugs, courts ran away from the new doctrine they created. One can stand back and make moral judgments about “tobacco law,” “gun law” or “asbestos law” without being in the actual shoes of a judge—I do not choose to do so. I can only state the dilemma judges face in the context of tobacco, guns, liquor, and other products that create manifold remote risks of indirect economic harm. On the one hand, the remoteness doctrine has a long history and a clear public policy rationale. As most judges have appreciated, the rationale and precedent should lead to dismissal of such claims. On the other hand, judges may believe strongly that the harms created by guns, tobacco or liquor are such a threat in our society, that remoteness principles should be abandoned, regardless of the theoretical and practical implications of doing so.

The most difficult issue is whether tort law principles should be set aside for some defendants and not others. That leads to the toughest question of all—whether the theme of equal justice under the law still has life in America.
