ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

Whether the "new millennium" or the "new century" actually begins this year or next, the celebrations around the world that marked the start of the year 2000 could not help but give us reason to reflect upon the 1900's, and to consider what our own generation's legacy will be when the world debates which year actually begins the twenty-second century.

Jeffrey C. Briggs

My own reflections were particularly stimulated by recent books touting my grandparents' and parents' generations as having tested and brought out the best in the human condition. This made me wonder if we and our children will be viewed by those who usher in the next century as having seized or squandered the opportunity to expand the causes of liberty and justice for which our parents and grandparents fought.

Both of my grandfathers served in the first world war, confident they were fighting the "war to end all wars." Both then chose the legal profession, one eventually becoming a judge. My father served in both Korea and Vietnam, while others in his generation and the next fought for new liberty and justice within and without our own country. Reflecting on my predecessors' contributions to the twentieth century made me wonder for what battles will our generation be remembered?

The "Cold War" may have ended, but the causes working against freedom and justice continue in many new guises, as well as some of the old. What will we who usher in the new century leave as our own legacy to the cause for justice in a world where

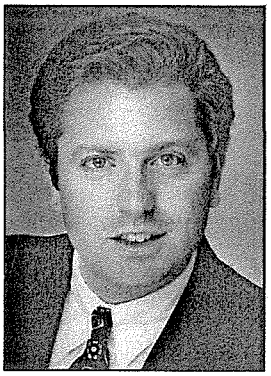
(Continued on page 12)

INSIDE

The New Anti-Cybersquatting Statute: Practical Solution or Litigator's Dream?

In November, the Anticybersquatting Consumer Protection Act was signed into law.

Whether this new law, which adds a series of new provisions to Section 43 of the Lanham Act (15 U.S.C. §1125), will make it easier for businesses and others to resolve domain name disputes or simply will increase legal fees and costs, without measurable benefit over the prior law, remains to be seen.



Gregory J. Sater

Prior to the enactment of the new law, litigants involved in domain name disputes usually invoked "traditional" principles of trademark and unfair competition law under the Lanham Act, requiring, among other things, proof that the defendant had engaged in some sort of commercial activity in connection with the plaintiff's mark, and that, as a result of that commercial activity, there was a likelihood of confusion among consumers. In other words, that the defendant was *using* the domain name *as a mark* to indicate the *source* of the defendant's goods or services. For registered marks, the Lanham Act requires that the use be "in connection with the sale, offering for sale, distribution or advertising of any goods or services" while for unregistered marks it requires use "on or in connection with any goods or services." 15 U.S.C. §§1114, 1125.

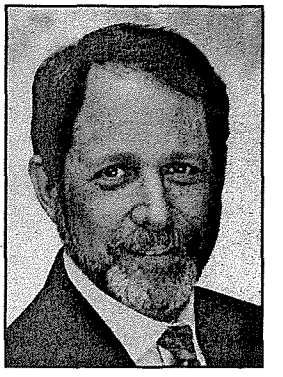
As a result, in the context of domain name disputes, the mere act by the defendant of registering the plaintiff's mark (or a confusingly similar one) as the defendant's domain name, without commercial conduct thereunder, was held to be *not* actionable under the Lanham Act, prior to the new statute. *Panavision Int'l L.P. v. Toeppen*, 945 F. Supp. 1296 (C.D. Cal. 1996), aff'd, 141 F.3d 1316 (9th Cir. 1998); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F.Supp. 949 (C.D. Cal. 1997). Still, despite the limitations of the Lanham Act in the context of cyberspace, courts were able to find a way to deal with cybersquatters or, at least, some of the various sub-species thereof, and arrive at a just result. For instance, where it was found that a defendant had registered its domain name (containing the plaintiff's mark) for the mere purpose of ransoming it to the plaintiff, the court satisfied the commercial use requirement by finding, essentially, that the defendant was in the domain name ransom business. *Intermatic, Inc. v. Toeppen*, 947 F.Supp. 1227 (N.D. Ill. 1996); *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). Similarly, where it was found that a defendant had registered its domain

(Continued on page 2)

Proximate Cause: A Question of Fact or Policy?

Some cases every lawyer remembers long after law school. One of them is *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Recall that Palsgraf's problems began when a railroad guard negligently pushed a passenger. The passenger dropped a bundle of fireworks; the fireworks exploded; the shock of the explosion threw down some scales many feet away at the other end of the platform; and the scales fell on Palsgraf. *Id.*, 248 N.Y. at 341. The majority held that the defendant owed no duty to protect Palsgraf because she was an unforeseeable plaintiff. *Id.* at 345-47. The dissent argued that a duty was owed and that the question that should have been presented to the jury was whether the defendant's conduct was the proximate cause of the damage. *Id.* at 356 (Andrews, J. dissenting). The dissenting judge explained that what courts "mean by the word 'proximate' is 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." *Id.* at 352 (Andrews, J. dissenting). He concluded that the fact the events occurred in a natural and continuous sequence, coupled with the fact there was little remoteness in time or space, rendered the issue one of fact for the jury. *Id.* at 356.



Robin Meadow

Today, it is likely that the California Supreme Court would agree with the dissent in *Palsgraf*, concluding that the real question was one of proximate cause, not duty. In *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310 (1999), the California Supreme Court recently confirmed that public policy considerations govern the element of proximate cause and explained that those considerations protect defendants from liability for events beyond a certain point.

This article discusses how courts are applying proximate cause in business disputes, particularly with respect to the determination of damages. Predictions are risky. It is as true today as when Dean Prosser said it over 50 years ago that "Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze." William L. Prosser, *Proximate Cause in California*, 38 Cal.L.Rev. 369, 375 (1950). Nevertheless, *PPG* signals that when the question of proximate cause arises, counsel must carefully analyze both causal relationship and public policy implications.

The Two Elements Of Proximate Cause

Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment *proximately caused* thereby, whether it could have been anticipated or not." (Emphasis added.) Plaintiffs often urge a cause in fact reading — the idea that once the defendant starts the ball rolling, the defendant is liable for anything the ball hits, no matter how long it has been rolling or what other forces influenced its course. *See, e.g., PPG Industries,* 20 Cal. 4th at 315.

This isn't the law: "Civil Code section 3333 mandates recovery not simply for all detriment caused by defendant's negligence,

(Continued on page 6)

but for all detriment *proximately caused* thereby. The wording of the statute is manifestly designed to make the trier of fact focus closely on the issue of proximate cause." *Safeco Ins. Co. v. J & D Painting*, 17 Cal. App. 4th 1199, 1204 (1993) (emphasis in original) (decline in property's value during time required to repair damage from fire caused by defendant was too remote from defendant's conduct).

As the Court of Appeal explained in *Jackson v. Ryder Truck Rental, Inc.*, 16 Cal. App. 4th 1830 (1993), proximate cause requires a two-fold inquiry. The first question is whether the defendant's conduct was the cause in fact or "but for" cause of the plaintiff's injury—that is, "was defendant's conduct a necessary antecedent to plaintiff's injury?" *Id.* at 1847, citing *Maupin v. Widling*, 192 Cal. App. 3d 568, 573 (1987). (Note, however, that since *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1049 (1991), the test for this type of causation is whether the defendant's conduct is a "substantial factor" in bringing about the plaintiff's injury.) The second question is more abstract: whether the defendant's conduct was closely enough related to the plaintiff's loss so that the defendant *should* be held responsible. "This second component of proximate cause, which asks a policy question, has been termed the 'normative or evaluative element' of proximate cause." *Jackson*, 16 Cal. App. 4th at 1847 (quoting *Mitchell v. Gonzalez*, 54 Cal.3d at 1056 (1991) (Kennard, J. dissenting)).

Jennifer L. King

In *PPG Industries*, our Supreme Court explained that the reason for the second component is that without the limitation it provides, causation can go on forever.

> In the words of Prosser and Keeton: "[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" [Citation.] Therefore, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. [Citation.] As Justice Traynor observed, proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." (*Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 [157 P.2d 372, 158 A.L.R. 872] (conc. opn. of Traynor, J.).)

PPG Industries, 20 Cal. 4th at 315-16 (emphasis in original).

Proximate Cause: The "Normative Or Evaluative Element"

These principles apply to all tort actions. (*E.g., Osborn v. Irwin Memorial Blood Bank*, 5 Cal. App. 4th 234, 251 (1992) (court rejected as "obviously incorrect" the plaintiffs' argument that proximate cause "'is not even an element'" of a negligent misrepresentation claim); *Pepper v. Underwood*, 48 Cal. App. 3d 698, 710-11 (1975), overruled on other grounds by *Stout v. Turney*, 22 Cal. 3d 718, 730 (1978). *Pepper* specifically demonstrates their application in the fraud context. There, the plaintiffs claimed that the defendants fraudulently induced them into buying a motel by misrepresenting its value. They sought recovery of their down payment as consequential damages after they lost the property in foreclosure. The court of appeal reversed a judgment for the plaintiffs because, among other reasons, the damages instruction failed to state that the plaintiffs could only recover damages that the defendants proximately caused. The court observed that the plaintiffs' loss of their down payment did not necessarily flow from the defendants' misrepresentations and breach of fiduciary duty:

> [T]he jury considering the entire transaction might well conclude that the subsequent loss on foreclosure was neither damage nor proximately caused by the alleged fraud, but by bad fiscal management or other factors.

Id. at 711. Thus, the plaintiffs had to prove *both* that the fraud was why they entered into the transaction (i.e., that the defendant was the cause in fact of their loss, since there would have been no loss if they hadn't entered into the transaction) *and* that the fraud was the reason for the particular loss of their deposit (i.e., that the defendant should be held responsible for the loss).

Similarly, in *Gagne v. Bertran*, 43 Cal. 2d 481 (1954), the plaintiffs bought property in reliance on the defendant's negligent misrepresentation as to the amount of fill. The additional fill caused unexpected construction costs, but the Supreme Court held that the plaintiffs could not recover them: "The additional costs plaintiffs incurred in the installation of the foundation were not caused by defendant's misinformation, however, but by the physical condition of the land." *Id.* at 491. The Court indicated that the plaintiffs themselves broke the causal connection by electing to proceed with construction even though they knew it would be more costly. The Court noted that "this is not a case in which plaintiffs...completed their building before they discovered the truth and thereafter had to abandon it or make costly alterations that would not have been required had they known of the true condition of their land at the outset of construction. Such damages, had they been suffered, would have resulted directly from defendant's failure to report the truth and would clearly be recoverable." *Id.*

Other California fraud cases are in accord. *See, e.g., Helm v. K.O.G. Alarm Co.*, 4 Cal. App. 4th 194, 203 (1992) (affirming nonsuit on fraud claim because the plaintiffs had failed to show "a factual causal nexus between their reliance on the intentional misrepresentations made by the alarm company and the unmitigated theft/arson losses which they suffered"); *Roberts v. Karr*, 178 Cal. App. 2d 535, 542-43 (1960) (misrepresentation as to amount of saleable dirt on land; no recovery of money lost because of absence of dirt, because "[t]he lack of excess dirt, and

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Continued from page 6

not the misrepresentation of fact, caused the loss of contemplated revenue").

Outside California, federal courts and other state courts have elaborated on the normative proximate cause requirement in a variety of situations. Many of these courts use "transaction causation" and "loss causation" to denote the two components of proximate cause, and they require the plaintiff to prove both:

> [T]he plaintiff must prove both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentations or omissions caused the harm.

McGonigle v. Combs, 968 F.2d 810, 820 (9th Cir. 1992) (securities claims; court affirmed dismissal of specific claims as a matter of law).

The Ninth Circuit and six other federal circuits, the Illinois Supreme Court and the Arizona Court of Appeals explicitly follow this approach. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (RICO claims; rule 12(b)(6) dismissal affirmed); *Gasner v. Board of Supervisors*, 103 F.3d 351, 360-61 (4th Cir. 1996) (securities claims; court affirmed summary judgment for defendants); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 548-50 (5th Cir. 1981) (securities claims; error in refusing to submit loss causation to jury); *Bastian v. Petren Resources Corporation*, 892 F.2d 680, 684-86 (7th Cir. 1990) (securities claims; rule 12(b)(6) dismissal affirmed); *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1327-28 (8th Cir. 1991) (securities claims; plaintiff's verdict as to this issue affirmed); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988) (securities claims; directed verdict on this issue affirmed); *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 58-61, 643 N.E.2d 734, 746- 47 (1994) (consumer fraud; judgment for plaintiffs on this issue reversed); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 343-45 (Ariz. Ct. App. 1996) (auditing misrepresentations; jury verdict affirmed).

These courts recognize that the transaction causation/loss causation analysis embodies common law principles:

> [L]oss causation' is the standard common law fraud rule [citation], merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation.

Bastian, 892 F.2d at 683-84.

The factual variety of the cases in which the courts have applied these principles shows that, regardless of the label, it is never enough for a business-tort plaintiff to show transaction causation — that the defendant started the ball rolling. The plaintiff must also show a substantive connection between the misrepresentation and the specific loss claimed. For example:

• In *Bastian*, 892 F.2d 680, the plaintiffs alleged that they invested in oil and gas limited partnerships on the basis of misrepresentations about the defendants' competence and integrity. The partnerships became worthless, and plaintiffs sought to charge defendants with the entire loss. The Seventh Circuit, speaking through Judge Posner, rejected the plaintiffs' argument that they had sufficiently proven causation by showing that "they would not have invested but for the fraud; for if they had not invested, they would not have lost their money, and the fraud was therefore the cause of their loss." *Id.* at 683. The court held that the plaintiffs had to negate external reasons for their loss, such as a drop in oil and gas prices. "If the plaintiffs would have lost their investment regardless of the fraud, any award of damages to them would be a windfall." *Id.* at 684-85.

(Continued on page 10)

• *Movitz v. First Nat. Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998), followed the reasoning of Bastian in a non-securities context. A bank agreed with a real estate investor, Estock Corporation, to assist Estock in evaluating and buying property in Houston and then to operate and maintain it. Estock bought an office building for $5.1 million (including $2.2 million in cash) and later invested an additional $800,000, but ultimately lost its entire investment in foreclosure in the midst of Houston's early-1980s real estate depression. It turned out that the bank had failed to detect serious construction defects and had grossly overestimated the rental income. In its suit for breach of contract and breach of fiduciary duty, Estock recovered $3.3 million, representing its total out-of-pocket losses. The Court of Appeals, again speaking through Judge Posner, reversed the judgment with directions to enter judgment for the bank, because Estock had failed to prove loss causation. Rather, the evidence of loss was tied to the collapse of the Houston real estate market, and the loss would have occurred regardless of how well the bank had performed. The court rejected Estock's argument that loss causation analysis is limited to securities cases: "The requirement of proving loss causation is a general requirement of tort law." *Id.* at 763. And, in language reminiscent of the quotation from Prosser in *PPG Industries*, 20 Cal. 4th at 315-16, the court observed:

> As Estock reluctantly concedes, however, a finding of 'but for' causation (what philosophers call a 'necessary condition') is not a sufficient basis for imposing legal liability. If it were, then the estates of Santa Anna, Sam Houston, or Columbus might also be liable to Estock, plus the inventor of the elevator or the steel girder, or Hashim's [Estock's owner] parents, or OPEC, which brought about the increase in oil prices that fueled Houston's real estate boom in the 1970s, a boom that made investing in that real estate seem so attractive a prospect in 1980.

Id. at 762.

• *McGonigle*, 968 F.2d 810, arose when the value of private placement stock in a horse breeding operation plummeted. The District Court dismissed claims alleging various concealments that did not go to the value of the investment. *Id.* at 819. The *McGonigle* plaintiffs argued that the misrepresentations caused the loss because the investment and the loss "would not have occurred if the misrepresentations had not been made." *Id.* at 821. The Ninth Circuit rejected this argument, "because it renders the concept of loss causation meaningless by collapsing it into transaction causation." *Id.* Transaction causation and loss causation "are analogous to the basic tort principle that a plaintiff must demonstrate both 'but for' and proximate causation." *Id.*; *see Standard Chartered PLC v. Price Waterhouse*, 945 P.2d at 343-45 (following *McGonigle*).

• The Second Circuit adopted the same approach in a lender's RICO case against borrowers who allegedly induced loans by misrepresenting the value of the collateral: "[W]hen factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d at 769. This causation analysis is designed "to fix a legal limit on a person's responsibility, even for wrongful acts." *Id.* The plaintiff must prove that "external factors" did not contribute to the injury. *Id.* at 770. "Many considerations enter into the proximate cause inquiry including 'the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection.'" *Id.* at 769.

• Illinois also requires proof of loss causation. In *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, the plaintiffs alleged that a commodities options broker misrepresented the nature of transaction fees. The trial court awarded the plaintiffs their full investment losses because "but for Heinold's misrepresentations, plaintiffs would not have purchased LCO's [options] through Heinold." *Id.* at 43. Rejecting this analysis, the Illinois Supreme Court held that a plaintiff must prove proximate causation "even in instances of intentional torts where fiduciaries are involved." *Id.* at 59. The court framed the relevant question in Prosser's words: "'Would the decline in plaintiff's investment have occurred *even if defendant's misrepresentation had been true*? If the answer to this question is "yes," plaintiff has failed to prove that the misrepresentation proximately caused the decline.' W. Prosser, Torts § 110, at 732 (4th ed. 1971)." *Id.* at 62 (emphasis added). Indeed, "defendants, even where an intentional tort is committed, do not become insurers of plaintiffs who make unwise investments." *Id.*

• The court in *Criqui v. Pearl Music Company, Inc.*, 41 Ore.App. 511, 599 P.2d 1177 (1979), refused to permit a defrauded plaintiff to recover business operating losses, even though he bought the business partly in reliance on misrepresentations about the business' legality: "While there is no sympathy for one who commits fraud, such attenuated causation is not a sufficient basis for holding one responsible to make up every loss that would not have occurred had there been no fraud." *Id.* at 517.

How To Determine The Bounds Of Proximate Cause

Although causation is generally a question of fact, "[t]he outer bounds of legal causation are also for the Court to decide. This is because the existence of legal cause 'essentially depends upon whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.'" *Estate of Macias v. Lopez*, 42 F. Supp. 2d 957, 965 (N.D.Cal. 1999), quoting *Sundance Land v. Community First Federal*, 840 F.2d 653, 663 (9th Cir. 1988). Fortunately or unfortunately, courts have not elected to adopt bright-line rules to govern the setting of these bounds. Instead, "courts must examine the issue on a case-by-case basis, and in light of considerations of logic, common sense, justice, policy and precedent." *Id.* As the California Supreme Court noted in People v. Roberts, 2 Cal. 4th 271, 320, n.11 (1992):

> [T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily the question will be for the jury, though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus.

See also Mosley v. Arden Farms Co., 26 Cal. 2d at 221 ("[a]lthough the doctrine of proximate cause is designed to fix the limitations upon liability, it has not yet been so formulated as to have a fair degree of predictability in its application in marking the boundary between liability and nonliability") (Traynor, J. concurring).

On occasion, there may be circumstances where the public policy against imposing liability, standing alone, is so overwhelming that the court can decide, as a matter of law, that there is no proximate cause. *PPG Industries, Inc. v. Transamerica Ins. Co.* is a prime example.

In that case, the plaintiff suffered a judgment for compensatory and punitive damages. The insurer refused to pay the punitive damages. In its subsequent action against the insurer, the plaintiff alleged that the insurer unreasonably failed to settle the earlier lawsuit and that the failure to settle caused it to be personally liable for punitive damages. 20 Cal. 4th at 313-14. The Court affirmed summary judgment in favor of the insurer. It found that while the failure to settle was a cause in fact of the plaintiff's liability for punitive damages, multiple public policy considerations precluded the plaintiff from shifting its punitive damage obligation to its insurer. *Id.* at 316. According to the

(Continued on next page)

Continued from page 10

Court, "[t]o allow such recovery would (1) violate the public policy against permitting liability for intentional wrongdoing to be offset or reduced by the negligence of another; (2) defeat the purposes of punitive damages which are to punish and deter the wrongdoer; and (3) violate the public policy against indemnification for punitive damages." *Id.* at 319.

Few cases, however, fall at the far end of the public policy spectrum. More often, each side will be able to articulate one or two public policy principles in support of its position. In that event, the inquiry becomes more fact-based, focused on the degree of connection between the defendant's conduct and the plaintiff's loss.

The dissent in *Palsgraf* offered some criteria for determining proximate cause under this type of analysis:

> The proximate cause, involved as it may be with other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.

Palsgraf, 248 N.Y. at 354.

In *People v. Roberts*, 2 Cal. 4th 271, the California Supreme Court implicitly adopted many of these criteria. There, the defendant, a prison inmate, stabbed another inmate who then seized a knife, ran up a flight of stairs and fatally stabbed a guard. The question was whether the defendant proximately caused the guard's death. Acknowledging that there is no bright line separating a legally sufficient proximate cause from one too remote, the Court concluded that the question of proximate cause was one for the jury, since it was "foreseeable that a wounded inmate might try to arm himself with a weapon abandoned at the scene of a prison melee and pursue his attackers a short distance." *Id.* at 321.

Offering some insight into the basis for its conclusion, the Court described examples of situations where proximate cause could and could not be found:

> Shots that cause a driver to accelerate impulsively and run over a nearby pedestrian suffice to confer liability [citation]; but if the driver, still upset, had proceeded for several miles before killing a pedestrian, at some point the required causal nexus would have become too attenuated for the initial bad actor to be liable.... It is a natural consequence that shots fired at a boat may cause a passenger to leap out and thereby cause another in the boat to drown [citation]; but if the boat had capsized, floated some miles down the river and over a waterfall, and fallen on the head of another boater, the shooter probably would not be criminally liable for that boater's death.

Id. These examples demonstrate that, at some point, a court can determine as a matter of law that an actor's conduct is too remote, too disconnected from the loss, to impose liability. When the plaintiff is able to make a threshold connection between the conduct and the loss, however, the issue of proximate cause will go to the jury.

Counsel addressing a proximate cause question should therefore engage in a two-fold inquiry:

1. First, counsel should examine whether any public policy weighs either in favor of or against imposing liability. As *PPG Industries* indicates, public policy considerations alone may dispose of the issue.

2. Second, assuming there is no overwhelming policy dictating the result, counsel must focus on the factual connection between the defendant's actions and the plaintiff's loss. Defense counsel should look for breaks in the chain of causation and examine the impact of other causal factors, such as market forces. Plaintiff's counsel should try to anticipate the existence of other causative forces and be prepared to demonstrate a direct and substantial connection between conduct and loss. Perhaps even more significantly, plaintiff's counsel should be able to demonstrate that it makes sense to impose liability under the circumstances — that it is logical and fair to impose liability because the defendant's actions and ultimate result were not too distant from one another.

At bottom, the question of proximate cause involves a spectrum of possibilities. At one end, the court may make the determination of nonliability. Indeed, Prosser recognized that this was precisely the type of determination made in *Palsgraf*:

> What is the true reason that so many of us feel that the case was correctly decided, and that Mrs. Palsgraf should not recover?...It is that what did happen to her is too preposterous. Her connection with the defendant's guards and the package is too tenuous; in the old language, she is too remote. The combination of events and circumstances necessary to injure her is too improbable, too fantastic....

William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 27 (1953). Thus, while defense counsel will endeavor to keep the debate at this end of the spectrum, it is the responsibility of plaintiff's counsel to move the issue along the spectrum to the point — admittedly, a point that will be determined on a case-by-case basis—at which the issue becomes one of fact.

— Robin Meadow and Jennifer L. King