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For Double Purpose of Orderly Change and Evolutionary Growth: The Paradox of Stability and Change

*Lawrence Vold**

Dr. Vold examines the widely recognized paradox in man's desire to be governed by rules which provide both stability and opportunity for change. He concludes that the applicable law should be construed broadly or narrowly as the equities in the instant case may require.

I. Legal Causation—Perplexity

Lawyers and judges often find legal causation problems very troublesome. Viewpoints about these problems may differ sharply, each more or less supportable by earlier authority. Both the lawyer, who must give responsible advice, and the judge, who must make a ruling on the case before him, face perplexity. Assume a tortious actor harms an innocent victim. Should the actor pay the victim for the harm he, at least in part, caused? Without more shown, should the tortious actor or the innocent victim bear the loss? To what extent? Within what limits? Why? Why not? So viewed, legal allocation of the harm one causes to another is the basic problem in tort law.

Proximate cause. Legal cause. Legally responsible cause. Natural and probable cause. Independently intervening cause. Justly attachable cause. Some other kind of cause. Regardless of the label, these concepts continue to confuse beginners and others unless and until helpfully clarified.

The abstract skeleton of legal rules and principles can seem as dull as dry bones. What they involve can best come alive in down-to-earth examples of tort disputes: Tragic problems of shattered living people—broken bones—torn flesh—spilled human blood—distressed human feelings—perplexed understanding.[1]

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1. (a). Intentional Wrongdoing: Unintended Victim

Defendent inteutionally struck at a third party, but missed his intended victim. His blow, however, hit and injured plaintiff. Defendant neither knew nor had reason to know that plaintiff was endangered. How far, if at all, should defendant be subject to liability for plaintiff's injury? Why? Intended battery. Unintended harm to another. See note 21 *infra* and the authorities cited therein.

Suppose defendant in the instance used a gun. How far, if at all, should this vary—what application of the law is then proper? Why? Why not? See People v. Rothrock,

These perplexing legal causation problems have intrigued many learned legal commentators,[2] who have earnestly tried to clarify them. Although they have drawn largely on materials in the records and reports of appealed cases, these learned legal commentators, like other lawyers and judges, largely disagree among themselves, and their analyses often diverge. Frequently, it seems, one reasons from

21 Cal. App. 2d 116, 68 P.2d 364 (1937) (defendant shot at Y, the bullet passing through Y into X's arm, held guilty of attempted murder of X).

(1) Analysis: Wrongdoer's act is intentional. Victim is wholly innocent. Unintended and even unforeseeable damage to the victim results. As between these two, who ought to bear the risk and suffer the loss? Our innate sense of justice in these times readily senses the answer. With facts of this type so do the available judicial authorities. He who creates the danger and takes the benefit should also prima facie suffer the loss. We require the intentional wrongdoer to pay the innocent victim for unintended but actually inflicted harm "as if" it were intended. This is fair play between the parties. It also seems to be sound public policy to put the burden on the intentional wrongdoer, thus to deter such conduct or cut down his means for its perpetration.

Broadly supporting this outlook, see CAL. CIV. CODE § 3521; ("He who takes the benefit must bear the burden"—one of the maxims of jurisprudence).

(b). Negligent Conduct: Unforeseen or Unforeseeable Results

Defendant, negligently speeding, swerved his car over the middle line, thereby colliding with plaintiff and tipping plaintiff's car on its side. He badly damaged plaintiff's car, but fortunately only bruised him slightly. Another motorist, also negligently speeding, crashed into the overturned car, seriously injuring the plaintiff. Morrison v. Medaglia, 287 Mass. 46, 191 N.E. 133 (1934). How far, if at all, should defendant be subject to liability for injuries inflicted on plaintiff by the other motorist? Why?

Under Professor Keeton's guidance one basis for workable answers can here be found. See note 2 *infra*. However, this is not the only basis. See, *e.g.* note 20 *infra*.

(c). Onesideness of Benefits and Dangers: Explosives: Trend Toward Strict Liability in Abnormally Dangerous Activities

Defendant, in repairing his irrigation canal, set off explosives. Plaintiff operated a mink farm nearby, where he bred and raised minks for sale. The explosives threw no stones or other debris on plaintiff's farm, but the noise and vibration greatly excited and frightened the mother minks. Thus stimulated, they, according to their nature, destroyed their young "kittens." Madsen v. East Jordan Irrig. Co., 101 Utah 552, 125 P.2d 794 (1942). How far, if at all, should defendant be subject to liability for this destruction of the mink "kittens." Why?

Under Professor Keeton's guidance one basis for workable answers can here be found. See note 2 *infra*. However, this is not the only basis. The judicial authorities are widely conflicting.

The most notable of these authorities are indicated and briefly considered in Professor Keeton's limited but carefully prepared notes to his text. See KEETON, LEGAL CAUSE IN THE LAW OF TORTS 135-37 (1963). Occasional comments on some of these also appear in the text itself. *Id.* at 87-117.

RESTATEMENT (SECOND), TORTS (April 20, 1964) deals extensively with strict liability for abnormally dangerous activities; not only in analysis and comment, but also in listing of available judicial authorities. See §§ 519, 520, 520A, 520B and 520C; also 41 ALI PROCEEDINGS 450-84 (1964).

2. The most notable works of learned commentators are cited frequently and at times are briefly discussed in Professor Keeton's brief but carefully prepared footnotes. See *id.* at 125-37.

premises challenged or ignored by others. Their conclusions often conflict.

What are we to make of all this? Are these legal causation materials merely a conglomerate mass of contradictory fragments? As guides to conduct, are they Judge Cardozo's "mere futility . . . unknown and unknowable"?[3] Under our broadly inclusive inherited legal system of justice the answer is an unqualified "no." Choices, to be sure, must be made among rules available for application. These choices need not, however, be purely arbitrary. They can be guided by established principles and can be based on reason and justice in the light of available experience. That aspect of legal causation materials in this setting invites serious attention.

II. Legal Causation Rules as Community Peacemakers

Despite their shortcomings, our legal causation rules serve broadly, with other laws, as community peacemakers. Without rules or principles of law to resolve disputes, what then? Answer: much too often, self-help by one, resisted by another. Results: a fight[4]—fists, clubs,

3. Quoted by the late Mr. Justice Jackson, dissenting, in SEC v. Chenery Corp., 332 U.S. 194 (1947) (citing Cardozo, The Growth of The Law, 3 (1924), and touching the deep-seated elusive question of *justice without law*).

Speaking for the Supreme Court in Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U. S. 292, 302-04, 307 (1937), Mr. Justice Cardozo stated the same point this way: "Not only are the facts unknown; there is no way to find them out. . . . How was it possible for the appellate court to review . . . and intelligently decide . . . when the evidence was unknown and unknowable?

"The right to such a hearing is one of the rudiments of fair play. . . . Nothing . . . gave warning of the purpose of the Commission . . . to fix the value of the system without reference to any evidence, upon proofs drawn from the clouds."

In the *Chenery* case, Mr. Justice Jackson, dissenting, took this Cardozian view of the Commission's reasons: "In this decision the Court approves the Commission's assertion of *power to govern the matter without law.*

"The reasons which lead it to take one course as against the other remains locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, *this power to decide without law,* is what the court seems to approve." SEC v. Chenery Corp., *supra* at 216. (Emphasis added.)

After piling quotation upon quotation from the Court's majority opinion as exhibits of its reasoning, Mr. Justice Jackson went on as follows:

"The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it never before had been confronted!

"I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" SEC v. Chenery Corp., *supra* at 213-14. On "justice without law," see note 4 *infra.*

4. See, e.g., Lamb v. Woodry, 151 Ore. 30, 58 P.2d 1257 (1936). On buyer's default on a conditional sales contract, seller forcibly overcame buyer's resistance to retaking. *Held:* seller is guilty of assault and battery. See also Deevy v. Tassy, 21 Cal. 2d 109, 130 P.2d 389 (1942).

If so-called "justice without law" is morally directed and fairly administered, it

knives, guns—force, not reason—might instead of right—a far cry from justice according to law. Example: Fights among disputing children. To his assailant's attack the victim's "I'll tell Mama" is his basic appeal to higher authority for justice according to law.[5]

In this light, as part of available justice according to law, our legal causation materials help to preserve the peace. The current practical problem is how to construe and apply them in pending cases.[6] A few suggestions point the way.

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can, in various settings, have certain advantages. A mother's love for her children whom she governs in her household can often afford a vivid example. In many other settings it can be both troublesome and dangerous, especially when administered by officials who lack firm moral direction and are weak or corrupt. On "justice without law," see 2 POUND, JURISPRUDENCE § 75, at 352-74, 383-84 (1959) [hereinafter cited as POUND]. See also 4 POUND § 116, in which he lists and discusses six different modes of individualizing the application of legal precepts in our Anglo-American system: (a) individualization in equity; (b) individualization by the jury; (c) individualization by the court through latitude of application under guise of choice or ascertainment of a rule; (d) individualization through legal standards; (e) individualization through a series of mitigating devices in criminal procedure; (f) individualization through wide discretion of magistrates in petty causes. For a still more sweeping view of the almost infinite variations possible in the judicial processes of applying law to ever-varying facts, see GREEN, JUDGE AND JURY (1930); Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77-89 (1961).

5. As to the bearing of legal procedure on justice according to law, see CLARK, PROCEDURE THE HANDMAID OF JUSTICE 69-71 (1961). See also note 6 *infra*.

For a penetrating and comprehensive study of justice according to law, see the highly usable and scholarly work of 2 POUND 347-466; Pound, *Justice According to Law*, (pt. 1), 13 COLUM. L. REV. 696 (1913); (pts. 2-3) 14 COLUM. L. REV. 1, 103 (1914). These three successive law review articles present the following subdivisions, each citing abundant supporting material: (1) justice without law, (2) justice according to law, (3) legislative justice, (4) executive justice, and (5) judicial justice.

6. During the 1920's Judge Cardozo of the New York Court of Appeals delivered three sets of university lectures which were subsequently published in booklet form. PARADOXES OF LEGAL SCIENCE (1928), THE GROWTH OF THE LAW (1923), THE NATURE OF THE JUDICIAL PROCESS (1921). In these booklets, he commended the creative insights of Dean Pound and others. These creative insights of juristic scholars largely stimulated his own. Partly in their light he formulated his lectures.

These lectures discussed judicial application of available legal precepts to the grist of ever-varying problems currently coming before courts for decision. His underlying theme in these booklets is the age-old but ever-present paradoxical problem in our continually changing world; how, in the instant case, to find the best-fitting balance between stability and change. He quotes Dean Pound's famous statement that the "Law must be stable, and yet it cannot stand still." CARDOZO, THE GROWTH OF THE LAW 2 (1923), quoting POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

This age-old but ever-present problem was superbly described by the late Mr. Justice Jackson as a task of reworking existing law for a double purpose: "to preserve its essential character and at the same time to adapt it to contemporary needs" Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 864 (1951).

Two familiar Biblical phrases personify these two divergent deepseated outlooks and beliefs: "Remove not the ancient landmarks" Prov. 22:28. "The Sabbath was made for man, not man for the Sabbath" Mark 2:27. Such is the deepseated paradoxical problem which lawyers and judges face in construing and applying legal causation materials in pending cases. See also notes 8 & 9 *infra*.

A. *How To Find Out What Really Happened? "Fair Trial"? "Truth"?*[7]

Disputed facts underlie most serious legal controversies. Parties to a dispute can use legal procedures to establish which version of the facts shall be accepted as correct. For this purpose our law provides a "fair trial." How is it to be attained? It is attained through a proper hearing under sound rules of procedure administered by an impartial and adequate tribunal—whether administrative or judicial —whose personnel consists of honest, intelligent and competent administrators, judges, jurors, and lawyers. Within the framework of a "fair trial," there is an attempt to resolve the dispute on the basis of truth. But among witneses, whom do you believe and whom do you distrust? As to each witness, what part of his testimony do you

7. Arthur T. Vanderbilt was a distinguished lawyer, judge and legal educator who successfully led the fight for judicial reform in New Jersey, and devoted much of his professional life to improvement of the administration of justice. In 1952 he published his CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION (1952). The following excerpts from that book show his active approach to the developing current problems relating to fair trial.

"It is hoped that the student will come to see procedure in its proper perspective, not as a mass of technicalities governing a trial at which the judge is a mere umpire, but as a set of workable rules designed to aid in the simple, speedy and just disposition of controversies between man and man or between a citizen and his government." *Id.* at XVIII-XIX.

"The most fundamental premise of the federal rules is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons. *Id.* at 10.

"Rule 1 of the Federal Rules of Civil Procedure provides, 'these Rules . . . shall be construed to secure a just, speedy, and inexpensive determination of every action'; and Rule 2 of the Federal Rules of Criminal Procedure reads, 'These Rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.' " *Id.* at 23.

"A trial or an appeal is not a sporting event in which the rival lawyers are the leading players but an orderly search for the truth in the administration of justice." *Id.* at 27.

"All legal rights depend directly on the right to a fair trial under sound rules of procedure administered by honest, intelligent and competent judges, jurors and lawyers." *Ibid.*

Judge Vanderbilt predicted further development for "the growing concept of the right to a fair trial." We see fulfillment of his prediction in daily court struggles. In this connection two aspects deserve special emphasis. These were recently most effectively expressed by Lewis F. Powell, Jr., then President of the American Bar Association, as follows: "(1) The problem of prejudicial publicity, through the press or other media which may prevent a fair trial" and "(2) the problems relating to the assuring that indigent defendants are properly represented by counsel." Powell, *An Urgent Need: More Effective Criminal Justice*, 51 A.B.A.J. 437, 438 (1965).

One can readily reach a mass of further supporting references on "fair trial." See, *e.g., Daly, Insuring Fair Trial and Free Press: A Task for Press and Bar Alike*, 50 A.B.A.J. 1037 (1964); LeWine, *What Constitutes Prejudicial Publicity in Pending Cases*, 51 A.B.A.J. 942 (1965); Powell, *President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821 (1965); Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534 (1965).

believe? Honest witnesses may disagree. Whose version seems the most dependable, the least distorted, the most nearly accurate? Indeed, although all witnesses may be in part mistaken, each can be partly correct. Somewhere in between the conflicting versions, a closer approach to the truth, perchance, may be found.

Why is a "fair trial" used to settle the facts? Finding the facts, as near to the truth as practicable, is important, not because the court wants to favor one disputant over the other, but because it wants, so far as practicable, to apply the law correctly to the real facts. Thus, as between the parties, the aim is to do justice according to law. At stake in some degree, too, in every trial and appeal is the interest of the public. Its interest is in living, not under lawlessness, but under justice according to law.

B. *Which Rule or Principle Rightly Applies? "The Rule That Fits The Case."*

Basic principles can guide those choices which courts necessarily make in selecting, construing and correctly applying available law in the varying cases before them. The law to be applied is that which best fits the particular combination of facts.[8] Under this ap-

8. The choice between authoritative premises under which to work out the grounds for deciding the particular case "involves choice of the analogy to be taken as the starting point." 2 POUND § 76, at 376. For Pound's views about individualization in application of such chosen established authoritative analogies, see note 4 *supra*.

Law can provide standards for activity the details of which are so varied that rigid rules are unworkable. Example: Standard of reasonable care in highway auto traffic. Such standards can largely formulate the experience of the past in administering justice. A judge, therefore, can effectively deal with much of what comes before him "by applying formulas which he has no time to work out anew, which, moreover, he need not know how to reach independently." POUND § 76, at 385.

Mr. Justice Stone, later Chief Justice, stated in 1936 that "law performs its function only when it is suited to the way of life of a people. With social change comes the imperative demand that law shall satisfy the needs which change has created, and so the problem, above all others, of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future." Stone, *Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

Mr. Justice Cardozo has described in some detail the judicial approach to merit-based choices: choices of available analogy or principle as guides to reasoning and decision. A few significant highlights from his book, *The Growth of the Law*, are as follows:

"The estimate of the comparative value of one social interest and another, when they come, two or more of them, into collusion, will be shaped for the judge . . . in accordance with an act of judgment in which many elements cooperate. It will be shaped by his experience of life; his understanding of the prevailing canons of justice and morality; his study of the sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice. The web is tangled and obscure . . . . Justice itself which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times." CARDOZO, THE GROWTH OF THE LAW 86-87 (1923).

In continuing he supposes that "there had arisen a new situation which could not

proach it is for the court, after a proper hearing, to decide several basic matters: (a) What is the proper scope of the basic principle whose application is disputed? (b) Does some established exception or deviation from this basic principle better fit the facts? (c) Does another basic principle better fit the facts?

C. *How To Construe Flexibly, Broadly or Narrowly, To Achieve the Purpose Toward Which the Established Principle or Exception Is Aimed.*[9]

Basic principles can usually serve as flexible guidelines in analyzing and judging disputed claims. If applied merely mechanically or arbitrarily, however, they can badly shackle and cripple proper activity. Under this approach, courts and lawyers face some very practical choices in the application of one or another basic principle or exception. Shall the court properly construe broadly or narrowly? Tentative answer: as broadly, or as narrowly, as is reasonably required in the instant case to achieve the purpose (or redress the mischief) toward which that basic principle or exception is aimed.

force itself without mutilation into any of the existing moulds. . . . The choice that will approve itself to this judge or to that, will be determined by his conception of the end of the law, the function of legal liability. . . . The deductions that might have been made from pre-established definitions were subordinated and adapted to the fundamental principles that determine, or ought to determine, liability for conduct in a system of law wherein liability is adjusted to the ends which law should serve." *Id.* at 100-01.

9. The so-called "mischief rule" was proclaimed by the Sir Edward Coke, in Heydon's Case, 2 Coke Rep. 7, 76 Eng. Rep. 637 (1584): "[F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1st. What was the common law before making the Act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and 4th. The true reason of the remedy: and *thus the office of all judges is always to make such construction as shall suppress the mischief,* and advance the remedy." *Id.* at 9, 76 Eng. Rep. at 638. (Emphasis added.)

The late Mr. Justice Frankfurter, in a foreword to *Symposiums on Statutory Construction,* 3 VAND. L. REV. 365 (1950), said: "Nor, indeed, has much been added by way of generalities to the wisdom of the resolutions in Heydon's Case, as reported in the robust English of Coke's Reports."

The Uniform Commercial Code has now been widely enacted: as of April 18, 1966, in 46 American jurisdictions. It in effect adopts Coke's "mischief rule" for construing and applying law to ever changing facts of marketing practices. Section 1-102 provides that "this Act shall be liberally construed and applied to promote its underlying purposes and policies." UNIFORM COMMERCIAL CODE § 1-102.

These purposes and policies this section also in several paragraphs recites. Construing the terms of each of the recited purposes broadly will make them conflicting. The Code comment explains this as follows: "The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be *construed narrowly or broadly as the case may be,* in conformity with the purposes and policies involved." See *id.* § 1-102, comment 1 (Emphasis added.)

III. LEGALLY RESPONSIBLE CAUSE: SOME FLEXIBLE GUIDELINES EMERGE

Professor Robert E. Keeton, in his recently published and challenging book *Legal Cause in the Law of Torts*,[10] sets forth in the opening sentences of the preface a widely recognized paradox: the partial self-contradiction involved in basic human yearnings to have both stability and change. There is a yearning, on the one hand, for a precise rule, rigid consistency, and stability. On the other hand, there is a yearning for a flexible rule—a rule more favorable to sensitively administered justice affording wider discretion in application. These two divergent yearnings or values influence the development of guidelines in this field as elsewhere. For legal causation materials, this paradox concerns the extent to which there should be liability for tort injury. It poses far-reaching problems of construction with respect to both facts and law.

We cannot, says Professor Keeton, fully satisfy both of these yearnings. Nor can we totally exclude either. In the development of legally responsible cause materials, as elsewhere, there have been recurring frustrations of attempts to reach "a reasonable accommodation"—rules that are precise "but yet do not operate arbitrarily when faithfully applied." Professor Keeton points toward such workable reasonable accommodation, however, when he observes that "enduring legal principles have been emerging in the literature of legal cause."[11]

"However, the proper construction of the Act requires that its interpretation and application be limited to its reason." See *id.* § 1-102, comment 2.

The flexible aspect of how to construe was described by Mr. Justice Cardozo as follows: "*Some* theory of liability, some philosophy of the end to be served by *tightening or enlarging* the circle of rights and remedies, is at the root of any decision in novel situations when analogies are equivocal and precedents are silent. As it stands today, the judge is often left to improvise such a theory, such a philosophy, when confronted overnight by the exigencies of the case before him. Often he fumbles about, feeling in a vague way that some such problem is involved, but missing the universal element which would have quickened his decision with the inspiration of a principle." CARDOZO, THE GROWTH OF THE LAW 102 (1923). (Emphasis added.)

How decisive, in an individual case, construing available law broadly or narrowly can become is strikingly shown in Dalehite v. United States, 346 U.S. 15 (1953) (explosion of fertilizer grade ammonium nitrate manufactured and shipped by United States Government: victims claimed government liability for negligence under Federal Tort Claims Act 28 U.S.C. §§ 2671-80 (1964); denied, in a 4-3 decision construing broadly, despite sharp dissent, that statute's "discretionary function" exception. 28 U.S.C. § 2680(a) (1964). Construing that statute's other exceptions broadly or narrowly can in the instance become equally decisive. See, *e.g.*, 28 U.S.C. § 2680(b) (1964) (postal service exception); 28 U.S.C. § 2680(h) (1964) (covering exceptions of certain named intentional torts).

The *Dalehite* case affords a superb example of the judicial process in operation—to select, construe and apply available law broadly or narrowly, guided by merit-based reasons recognized by the court in the instance under the "mischief rule."

10. KEETON, *op. cit. supra* note 2, at IX.

11. *Id.* at VIII.

In fact, the primary objective of his book is "to reach an understanding of the guidelines to decision and prediction in cases involving problems of legal cause."[12]

In short, we face a choice. As lawyers and judges we apply available guidelines to current cases as they arise. One guideline tends to emphasize the long-recognized interest in stability. Another emphasizes the urge toward adaptation and growth, recognizing growing human needs and wants in our world of continual change. How do we find the most reasonable and workable accommodation of such partly conflicting guidelines? Answer: *Construe broadly* or *narrowly as the equities recognized in the instant case may reasonably require.*[13] Worked out through investigation, analysis and reasoning, its final practical test is its application in the pending cases. Of course a pervasive problem still persists: How broadly or how narrowly to construe one or another of the flexible guidelines?[14]

Professor Keeton puts no label on this flexible aspect of how to construe the emerging guidelines. He seems, however, to focus his discussion more narrowly than the broad sweep of his preface. The book focuses largely on "the central problem of the scope of liability for negligence."[15] He states that judicial utterances on the scope of liability for negligence have a predominant theme: risk—a proposition (expressible in various ways) that for convenience is referred to as the "Risk Rule."[16] Negligence is the "creation of unreasonable risk."[17] "As used in the 'Risk Rule' . . . 'risk' implies a standard based on foresight from the point of view of the standard man in the actor's circumstances."[18] In short, under Profesor Keeton's "Risk Rule," negligence liability depends on fault. Therefore, the scope or extent of liability for the negligent actor's conduct under the "Risk Rule" should be similarly limited—limited to results "of which the *negligent aspect of his conduct* is a cause in fact."[19]

12. *Ibid.* Professor Keeton in his preface clearly seems to recognize both need and authority for a flexible rule. His "Risk Rule" may properly be used as a flexible guideline, rather than a rigid straight-jacket. For some examples of how his text at times turns to this aspect, see note 28 *infra.* In chapter III, "Battlefronts in the Law of Causation," he skillfully uses this flexible "Risk Rule" technique. His conclusion: Construe broadly or narrowly in choosing the type of fact description to achieve in the instance the goal or purpose regarded as supported by sound (merit-based) policy reasons. *Id.* at 87-117.

13. In his own words: "We cannot satisfy both yearnings. We do not satisfy either fully, and perhaps, cannot do so. . . . The remaining choice is to develop an accommodation." KEETON, *op. cit. supra* note 2; see note 9 *supra* and accompanying text.

14. See notes 20 & 21 *infra* and accompanying text.

15. KEETON, *op. cit. supra* note 2, at 3.

16. *Id.* at 4.

17. *Id.* at 8.

18. *Id.* at 11.

19. *Id.* at 9.

One comment, at least, seems pertinent at this point. "As if" liability might attach in negligence cases for other reasons than the foreseeability of the harm that resulted.[20] So it does, too, in certain other settings.[21] The "as if" aspect of negligence liability seems largely to be ignored by this book. In matters of first impression, what then? The outlook presented in this book, if accepted on this point, then would tend to limit rather than to extend "as if" liability by analogy.

IV. THE "RISK RULE" AS A FLEXIBLE GUIDELINE

Professor Keeton sets forth the following condensed form of his guiding "Risk Rule." "A negligent actor is legally responsible for that harm, and only that harm, of which the *negligent aspect of his conduct* is a cause in fact."[22] He also suggests, however, a more elaborate form. "A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent."[23] He seems to intimate that his "Risk Rule" "serves the policy interest in having rules that yield a reasonable degree of certainty and predictability,"[24] and that practical necessity requires some limit of responsibility.[25]

Professor Keeton recognizes that his rule is subject to various established deviations or exceptions.[26] In this connection he suggests that

20. Examples of "as if" liability: Defendant negligently injuring victim held liable also for injuring victim's unforeseeable but reasonably-acting rescuer. Wagner v. International R.R., 232 N.Y. 176, 133 N.E. 437 (1921) (rescuer injured in coming to help victim injured by defendant's negligence). "The wrongdoer may not have foreseen the coming of a deliverer. He is accountable *as if he had.*" Bond v. Baltimore & O.R.R., 82 W. Va. 557, 96 S.E. 932 (1918) (rescuer plunging in saved child on track from being run down; was himself injured by defendant's negligently operated train); Eckert v. Long Island R.R., 43 N.Y. 502 (1871) (rescuer plunging in saved young child on track from being run down; was himself fatally injured by defendant's negligently operated train). PROSSER, TORTS § 51, at 316-17 nn. 73-81 (3rd ed. 1964).

21. Examples: Defendant, an intentional wrongdoer, liable for unintended results. Talmage v. Smith, 101 Mich. 370, 59 N.W. 656 (1894) (defendant threw stick at one trespassing boy but hit another of whose presence he was not aware); Carnes v. Thompson, 485 S.W.2d 903 (Mo. 1932) (blow with pliers aimed at X who dodged; blow struck X's wife nearby); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), pupil during school time, as a prank intending no injury, kicked schoolmate lightly on leg, causing serious injury); PROSSER, *op. cit. supra* note 20, § 10, at 36-7 nn. 74-84. See also note 1, *supra*.

22. KEETON, *op. cit. supra* note 2, at 9.

23. *Id.* at 10.

24. *Id.* at 26. This intimation seems implicit also in other passages in this book. See, *e.g., id.* at VIII, 19, 26, 51, 58-59.

25. Explaining further, he says, "The theory of the Risk Rule is that the scope of liability should be commensurate with the basis for liability." At this point, Professor Keeton also quotes Professor Seavey as follows: "Prima facie, at least, the reasons for creating liability should limit it." *Id.* at 10.

26. *Id.* at 60-73.

"rules of law—even bad ones—are rules of reason in the sense that they are devices in aid of reasoned decision."[27]

In the rule's practical application, Profesor Keeton recognizes the importance of "broad" or "narrow" interpretations of the facts involved in the particular disputes.[28] In applying his flexible rule, he skillfully uses the device of construing broadly or narrowly to achieve, in his battle fronts of causation,[29] the goals or purposes he regards as supported by sound (merit-based) policy reasons. The rule thus affords a wide range for analysis and reasoning in arguably close cases. Which application of available law best fits the case in hand? Lawyers on either side can here find a broad field for persuasive arguments. Such arguments may convince a groping judge, particularly if the opposing counsel, also groping, presents no clear and convincing alternative.

Thus used, Keeton's flexible "Risk Rule" operates as a community peacemaker. It becomes part of the legal material which achieves, for disputing parties, some type of merit—based justice according to law. Its flexible use can reach much farther than simply the disputes litigated in court; it can extend to all matters on which

27. *Id.* at 47.

28. Professor Keeton explains: "The description of risks and result that are used in applying the "Risk Rule" are fact-oriented in the sense that they are heavily dependent upon interpretation of the facts in the particular case. . . . Indeed, the *breadth or narrowness of the description* of risks upon which the Court relies is usually a more significant influence on the particular decision than the choice of rule on legal cause." *Id.* at 49. (Emphasis added.)

Keeton further analyzes whether or not the result is within the risk under this "Risk Rule" as follows: "Was the result . . . within any of the risks by reason of which the defendant's conduct was characterized as negligence? If we use a detailed mechanism-of-harm description of the result and the risks, the answer will be negative . . . . If we use a very generalized description of the type of harm that was foreseeable and of the type of harm that occurred, an answer that the result was within the risk is inevitable. The choice of description involves a degree of orientation toward type of harm on the one hand or toward mechanism of harm on the other hand, with neither point of view wholly rejected; and many cases will produce differences of opinion about what description is appropriate." *Id.* at 51-52.

Professor Keeton also makes some valuable suggestions toward getting at decisive underlying reasons—reasons to guide courts in their choice of description of risk and result in deciding cases: "One . . . must study the precedents . . . also from the point of view of finding in the body of decisions a sense of the tendencies manifested in fact-oriented evaluative findings."

"Regrettably, courts do not customarily advert to the considerations that influence their choice of orientation of the descriptions of risk and result employed in deciding cases. This is not to say, however, that one cannot identify the considerations and the tendencies of *broad or narrow description.* Indeed, by careful study of opinions from the point of view of fact types, one can discern patterns of assumed description for types of cases that have been the subject of judicial opinions and can even discover tendencies and trends. This kind of study is the Key to use of precedents on legal cause for guidance in decision or prediction." *Id.* at 58-59. (Emphasis added.)

29. KEETON, *op. cit. supra* note 2, at 87-117.

lawyers advise clients in advance. Furthermore, after trouble has arisen, use of Keeton's flexible rule can extend to advice on settlement.

As mortal human beings we find ourselves in a world of inexorable change. Much is to us unknown. Many imponderables affect our judgment on what is the best or the proper thing to do. Keeton's flexible rule may by its adaptability afford some basis for stability in this setting. Professor Keeton speaks of "a reasonable degree of certainty and predictability."[30] On this basis the "Risk Rule" provides some sense of a home within a wilderness, some rest upon the way, some protection against fortune's threatening storms. In our actual world, the "Risk Rule," like other parts of the law, "must be stable and yet it cannot stand still."[31] In Keeton's own words, it must seek "a reasonable accommodation in rules that are precise but yet do not operate arbitrarily when faithfully applied."[32] Keeton's flexible rule, "faithfully applied," can within its range render very useful service. Instead of lawlessness, it can within its range provide some type of merit-based justice according to law.

V. CONSTRUE BROADLY OR NARROWLY PROPERLY TO FIT CHANGING FACTS: DANGEROUSLY DEFECTIVE PRODUCTS AND PROTECTION TO ULTIMATE USERS AND CONSUMERS: HOW FAR?

Courts now hold makers and sellers of dangerously defective goods subject to liability more widely than before. Contract warranty may apply. So may negligence. So may strict liability in tort.[33] Traditionally, buyers injured by dangerously defective products could recover against their sellers only under a contract warranty.[34] In recent decades sellers have been liable to their customers under modern negligence law.[35] Present day decisions concerning danger-

30. *Id.* at 26.

31. CARDOZO, THE GROWTH OF THE LAW 2 (1924), quoting POUND, INTERPRETATIONS OF LEGAL HISTORY 1.

32. KEETON, *op. cit. supra* note 2, at VII.

33. Examples: Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1959), (grinding wheels); Henningsen v. Bloomfield Motors, 32 N.J. 158, 161 A.2d 69 (1960, (automobile); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964) (automobile). See also Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965) (truck: recovery sustained on warranty basis; divergent dicta on applicability of strict liability under the facts shown); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 297 (1962) (shopsmith combination power tool); Coldberg v. Kollsman Instrument Corp., 12 N.Y.S.2d 432, 191 N.E.2d 81 (1963) (airplane).

34. Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923) (cake with nail baked into it; not discoverable by inspection); McFarland v. Newman, 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839) (horse with an incurable disease called glanders).

35. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) (perfume with harmful ingredients; manufacturer liable on negligence basis for harm to retailer's customer); McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (automobile).

ously defective products have more expansively construed the available legal materials. They hold such sellers subject to far-reaching strict liability in tort; and they extend this protection not only to such contract buyers but also to users and consumers of their dangerously defective products.[36] Their reasons, expressed in dicta, have at times gone farther still to protect even bystanders and strangers under such strict liability.[37] Section 2-318 of the Uniform Commercial Code in effect similarly extends strict liability for protection of certain types of bystanders or strangers.[38]

36. See note 33 *supra.* See also Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962) (chemical resin manufacturer subject to liability to remote buyers of its trademarked product through licensed dealers, under facts alleged, if proved: that such remote buyers had relied on manufacturer's misleading representations of product's characteristics; reaching remote buyers through trade journal advertisements, through circulars, and through manufactuer's labels attached to poduct when markcted; product, when applied, seriously damaging remote buyers' own goods); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773 (1961) ("at least" as to food and household goods). See also Suvada v. White Motor Co., 322 Ill. 2d 612, 210 N.E.2d 182 (1965). Manufacturer of defective brake installed in tractor unit by its seller was held answerable to the buyer-user. User had had to pay money to settle damage claims by injured parties; when failure of brakes caused collision with a loaded bus. Basis for liability? Strict liability in tort imposed upon remote supplier of dangerously defective component installed in tractor unit. RESTATEMENT (SECOND), TORTS § 402(A) (1965) was included among the recently developing authorities cited.

37 *E.g.*, (1) Divergent dicta on application of strict liability as well as express warranty under provisions of Sales Act or of Uniform Commercial Code, especially with respect to strict liahility for damages to property and economic loss as distinct from personal injuries, Seely v. White Motor Co., *supra* note 33. Defective truck: resulting accident seriously damaged truck and increased its owner's liabilities for repairs, etc.; didn't break his leg or otherwise inflict physical personal injury. (2) In Randy Knitwear, Inc. v. American Cynamid Co., *supra* note 36, appears the following: "Most of the courts which have dispensed with the requirement of privity in this sort of case have not limited their decisions in this manner. . . . And this makes sense. Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of articles or goods delivered. *Id.* at 15, 181 N.E.2d at 404.

In the *Randy Knitwear* case, seven judges were unanimous in supporting the result reached on the facts there shown. However, three of the seven concurred in the following statement: "We concur in result only . . . . We do not agree that the so-called 'old court-made rule' should be modified to dispense with the requirement of privity without limitation." *Id.* at 16, 181 N.E.2d at 404-05.

The same court again met this problem, as involved in the complicated litigation reported in Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). Involved in this case was a recently enacted New York statute, whose literal words as quoted only partly enlarged that state's jurisdiction over non-residents; with respect to torts perpetrated in that state. Contending that this statute properly should he construed more broadly, Desmond, C.J., said "I see no necessity or warrant for restricting the statutory language 'tortious act within the state' so narrowly as to defeat the apparent legislative purpose and deprive our eitizens of the intended benefits of the statutory plan." *Id.* at 472, 209 N.E.2d at 85.

38. In the literal words of the UNIFORM COMMERCIAL CODE § 2-318: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his bnyer or who is a guest in his home if . . . ."

Just how far does this properly apply? At its borderlines this question becomes very arguable. Often there are new facts. Often judicial authority in point is lacking; analogies may be conflicting or distinguishable.[39] In the field of dangerously defective products, as

Section 2-318 was omitted from the U.C.C. as enacted in California. The California supreme court, however, already had construed its common law materials on products liability even more broadly than the wording of the UNIFORM COMMERCIAL CODE § 2-318. Peterson v. Lamb Rubber Co., *supra* note 33 (grinding wheels). Said that court: "In view of modern industrial usage, employees should be considered a member of the industrial 'family' of the employer . . . and to thus stand in such privity to the manufacturer as to permit the employees to be covered by warranties made to the purchaser-employer." *Id.* at 347, 353 P.2d at 581.

Section 2-318 of the U.C.C. as enacted in Wyoming, WYO. STAT. ANN. §34-2-318 (Supp. 1965), broadly states its protective coverage in strict liability terms, as follows: "Any person who may reasonably be expected to use, consume or be affected by the goods."

UNIFORM COMMERCIAL CODE § 2-318, comment 3 states: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

This comment leaves open an important matter that lawyers now may seriously need to guard against in advising clients. It is this. Should courts broadly construe and apply by analogy both § 2-318 and its underlying judicial material? Reasons claimed in favor: Under present-day industrial production and marketing it is necessary to extend protection to anyone reasonably expected to be endangered by dangerously defective goods; strict liability to that extent, under whatever label urged. Reasons claimed in disfavor: Broadly, two. (1) There is a need for some reasonably predictable limits to burdens upon productive enterprise. (2) The legislature, rather than the courts, should, if needed, declare such basic changes in public policy.

For examples of such expansive trend, notably in products liability cases, see Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962) (one judge concurring in result without assenting to reasons given); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) (one judge vigorously dissenting). Browne v. Fenestra, Inc., 375 Mich. 566, 134 N.W.2d 730 (1965) (one judge concurring in result).

Examples of more restrictive trend on somewhat similar facts: Price v. Gatlin, 405 P.2d 502 (Ore. 1965), (one judge vigorously dissenting); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (one judge dissenting).

39. Consider in this connection the following statements from FULLER & BRAUCHER CASEBOOK ON BASIC CONTRACT LAW 327-28 (1964):

"How significant is this division of the decision so commonly made, into 'majority' and 'minority' views?

"An examination of the cases reported or summarized . . . will show how misleading such a division may be . . . .

"A consideration of the actual work of the lawyer will show how relatively unimportant to him is . . . lining cases up as . . . the 'great weight of authority' or the 'minority view.' In dealing with precedents the lawyer is concerned either to influence through his skill in argument the decisions of courts and other tribunals, or as a counselor advising clients to predict those decisions. . . . As counselor and negotiator . . . he is interested in the scope of the risk incurred by alternative courses of action. He must appraise, not merely the possibility that the 'minority view' may be applied to his case, but even the relative persuasive force of arguments which have not yet received any formal recognition in judicial decisions. . . .

"A full understanding of the law requires an understanding of the *reasons* for judicial decisions. Seeing what the court *might* have done is an essential part of understanding what it actually did. . . . By stressing dissimilarities in the language of the courts,

elsewhere, events often happen in new combinations. Fresh disputes arise therefrom. New outlooks, too, can develop on how properly to deal with such disputes.

Dean Prosser shows that no single legal formula adequately covers the materials involved in such cases.[40] He distinguishes five distinct problems, more or less unrelated, which in such cases are intertwined, and he admits that there may be still others. For each of these five[41] he discusses the arguments on some of the basic issues. He carefully documents his text with pertinent authorities, largely conflicting on almost every point. At almost every step of analysis he finds jury issues. At almost every step, he finds arguable questions about the proper scope for the application of available rules, whether direct or by analogy.

The obvious conclusion is that there is a five-fold gamble in every trial, multiplied by whatever number of subsidiary issues may be found in each of the five basic intertwining problems. Then what? Parties concerned, as well as their legal advisers, naturally often look elsewhere. In their practical affairs they want less risky and more effective alternatives for dealing with possible disputes.

VI. Counseling as Community Peacemaker

Here, then, is the moral that goes with this tale—counseling in advance. The normal goal or purpose of counseling is to keep legitimate

one can often argue with some plausibility that every decision in the series is, in some degree, 'inconsistent' with every other decision. By emphasizing dissimilarities in the factual situations involved, and thus explaining away apparent discrepancies in judicial treatment one can often argue plausibly that every case in the series is, on its actual decision 'consistent' with every other case. . . . The law that actually counts in the lives of lawyers and laymen is a process, not a neat diagram."

Still continuing with us: new facts; no authorities in point, divergent analogies inconclusive. Bar Association Lectures on Legal Topics 105 (1921).

40. Prosser, *op. cit. supra* note 20, § 49, at 288.

41. The five interwined problems, briefly labeled, may be examined in detail in the following portions of Dean Prosser's treatise.

1. Causation in fact. See *id.* § 41, at 240-47. This includes the procedural question of burden of proof.

2. Apportionment of damages. See *id.* § 42, at 247-57. This includes, among others, concerted action, common duty, single indivisible result, damage of same kind capable of apportionment, successive injuries, potential damages, and acts harmless in themselves which together cause damage.

3. Liability for unforeseeable consequences. See *id.* § 50, at 288-309. This includes limitation of liability to risk, natural and probable consequences, time and space, unforeseeable plaintiffs, particular interest, liability beyond the risk, "direct causation," and anatomy of foresight.

4. Intervening causes. See *id.* § 51, at 309-29. This incudes foreseeable intervening causes, normal intervening causes, unforeseeable results of unforeseeable causes, and foreseeable results of unforeseeable causes.

5. Shifting responsibility. See *id.* § 33, at 179-83. Many factors are intertwined here, and it is not easy to generalize. These matters relate to whether or not defendant whose conduct endangers plaintiff may be free to assume that someone else will protect plaintiff from defendant's danger.

practical affairs free—free for service, free for fulfilling human needs and wants, and free from needless interruptions, expense, frustration, and calamity incident to serious disputes and lawsuits. Counseling is also designed to keep parties out of trouble, for the benefit of all concerned. Such counseling is working successfully to achieve what the parties and their legal advisors regard as practicable, it seems, in at least ninety-eight per cent of the disputes that come to lawyers.[42] The possibility of "or else" litigation here helps. Without counseling, litigation looms in the background. Dog-in-the-manager traits tend to keep many people chilly, if not cold, to reasonable accommodation with others. Advocacy in actual litigation in court has to grapple with the obstinate refractory, dog-in-the-manger two per cent, which are not identifiable in advance.

This small two per cent, however, exerts a much larger influence proportionally. It greatly affects the settlements and adjustments in the ninety-eight per cent group. How? In that two per cent group are the appealed cases, reports of which are widely available. These reported cases establish the legal standards held controlling in trial courts. The effect is easy to notice from at least three angles.[43] First,

42. Relatively few disputes on which lawyers are consulted actually come to trial. Inclusive statistics on this are scarce. One dependable source reflects that only about one-fifth of the tabulated personal injury claims are ever filed in court. Of those filed only about 5% ever reach the trial stage. Only 2% or 3% are actually tried to a decision by court or jury. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 469 n.14 (1962), based on ZUSEL, KALVEN & BUCHOLZ, DELAY IN COURT 469 (1959).

A more detailed study relating to claims for physical injuries in New York City, may be found in 61 COLUM. L. REV. 1 (1961), compiled by the Columbia University Project for Effective Justice. According to this compilation, auto accidents reported in New York City in 1959 exceeded 220,000. Reported disposal of these I tabulate as follows (using round numbers): 29,000, some 13%, take no legal steps to seek redress; 116,000 are closed without suit; 38,000 reach the stage that they are ready for trial; 7,000 come far enough for the trial to begin; 2,500 reach jury verdict or bench finding; the others in which trials begin are settled or withdrawn during trial.

Conclusions shown for this particular compilation: (1) Less than 2% of such claims made in New York City are directly controlled by court adjudication. (2) The other 98% of such claims are disposed of and the money moved by a bargaining process. Accident victims, defendants, lawyers, and insurance companies are the chief participants. (3) Since most defendants are insured, some 63% of the cases are defended by a limited number of insurance company attorneys.

Common knowledge from observation among courts and lawyers also shows that relatively few cases decided by trial courts are appealed. Some 98% are never reviewed. Rutter, 15 J. LEGAL EDUC. 245 (1963).

Based on the foregoing figures, only some 2% of reported claims reach decision in trial courts. In turn, only some 2% of trial court decisions are reviewed on appeal. Judicial law formulated by appellate courts thus covers relatively few of the very many disputes on which lawyers were consulted. Only appellate decisions are set forth in widely published opinions. That narrow segment works out the legal standards held controlling on trial courts in the unlikely event of appellate review.

Pointing the same way are some other notable developments. Arbitration has been very helpful in recent decades in adjusting and disposing of disputes. See Coulson,

the reported appeals tend to shape the lawyer-counselor's analysis and thinking. In their light lawyers as counselors investigate and analyze new disputes brought to them. In their light such lawyers construe the relevance of the facts they find. In their light lawyers select and construe rules of law which they deem relevant as they advise clients. Secondly, the reported appeals similarly tend to shape the alert lawyer-advocates' analysis and thinking. With reference to patterns they find in reported appeals such lawyer-advocates select, organize and construe the facts and the law which they deem rele-

The Business Lawyer Discovers Arbitration, 50 A.B.A.J. 459 (1964) (with appellate judicial law available in the background, arbitration can save time, money and convenience, both for the parties and for the public.) Also helpful is acceptance by the courts of pleas of *noli contendere* (no contest), without admission of guilt. Briefly discussing this business aspect of the *noli contendere* plea, see Business Week, July 31, 1965 (an advantage to all concerned to avoid a long, hard and costly court contest).

43. Consider, also, statements from Karl N. Llewellyn, as follows:

"There is first the body of rules of law which one may call counsellor's rules or rules seen from the angle of the counselor. These have to do with the shaping of the transaction while it is still capable of being shaped, and they run in terms of the degree of safety with which one can rely on the courts to act in particular predictable fashion if this particular transaction in hand should come to be presented to them. . . . [T]he counsellor has found that there are some solid, settled, clear rules on which he can build; they are safe, they are *bedrock*.

"The second grouping of material is the body of rules of law seen from the angle not of the counsellor to whom the transaction has come early enough for him to shape the facts, but from the angle of an advocate to whom the transaction is brougbt only after the trouble has occurred. Bedrock law, so far as any of it is applicable, of course becomes important to such an advocate as setting the legal framework and pattern; on and with the help of which he arranges the facts. . . . But that vast range of law which is not so clear or not so settled, of rules which courts commonly recite only to find a way around them if their direct application appears unfortunate—that vast range is to the advocate not merely an area of risk, as it is to the counsellor; it is also to the advocate an area of opportunity: he may be able to win his case with the help of one or more of these available though far from wholly reliable rules. . . .

"Justice is a thing easier to feel than to think about. The conscious thoughts of courts run rather in terms of 'What is fair in this type of situation,' or 'What is good sense and decent in this type of situation.' . . . Case-law: (1) The prior decided case stands only for a point actually necessary to the judgment. Anything else in the opinion is dictum. Even if the rule carefully laid down would lead to the decision in the case and was unmistakably meant to, the case is still 'distinguishable' if you can distinguish it either on the facts or the issue. You can, you even should, disregard any case which is thus 'distinguishable.' (Thus the court can and does avoid the misguesses or misphrasing or misjudgments of prior cases which they now see have gone off-line on the job of sense and justice). Per contra, (2) anything said by a prior court (whether dictum or not) can be picked up as: 'The true rule was laid down' or 'We said' or 'We expressly held in . . .' And any 'distinguishable' case can be recognized as distinguishable, and yet be followed: 'But we think the reason (or: the principle) of that decision is equally applicable here.' The court can even rest on 'the tendency of our decisions' and cite cases none of which are in point, even in its langnage. (Thus they can and do capitalize the good judgments or phrasings of the past, where in their quest for sense and justice they find such phrasings or decisions helpful)."

The foregoing excerpts are from Llewellyn, *The Modern Approach to Counselling and Advocacy*, 46 COLUM. L. REV. 167, 167-70, 180-81 (1946), reprinted in book form with some of his other essays and addresses in LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 24-26, 338-39 (1962).

vant, in order to show the court how reasonable and just the client's case is. Thirdly, the reported appeals tend to shape the trial court's analysis and thinking during the trial. Some version of reported-appeal-pattern usually is urged upon the trial court by alert lawyer-advocates on both sides. The trial court tends to look at facts as counsel does, so that it can properly select and construe available law for application in the current case. After all, in regard to the case before it, the trial court at the outset knows nothing. For its understanding of the case, the court necessarily depends largely on counsel's research and analysis. It is for counsel to supply the court with what Justice Holmes called the "implements of decision."

In essence the effect is to set the judicial standards for enforceability in the trial courts. As earlier mentioned, however, the trial court can still construe broadly or narrowly the standards thus set, following its own understanding of what, in the case before it, best makes for good sense and justice. However, the reported appeals tend to shape legal analysis and thinking on what is good sense and justice.

Here, then, is the hard core of counseling—defending your advice before a court of law. Facts are continually in flux, and people's conduct must change with them. But not too much at once, nor too fast, nor in the wrong way. Open questions on all these points are usually met by counseling; only occasionally are they tested in court; seldom are they appealed.

As rules of law serve to keep peace in the community, so counseling broadly serves the same purpose. Similarly the ideas suggested with respect to applying rules of law, also apply to counseling. (1) Find out what happened through a fair trial. (2) The rule or principle of law which rightly applies is the one that correctly fits the case. (3) For application in the instant case, it should be construed broadly or narrowly to serve the purpose (or redress the mischief) toward which the rule or principle was aimed.

VII. CONCLUSION

Society is constantly changing. Because of the rapid developments in technology and related fields of science, the pace with which change will occur will accelerate. Law, also, as the recognized means of order in society must change rapidly to meet the demands of the new society. How can changes be implemented without destroying the stability? Short answer: A flexible legal process—a process not confined to rigid, precise rules, but a flexible process capable of meeting on the basis of reason and justice the cases as they arise.