Admitted Fault in Negligence Actions:

The Defendant's Conduct is Still on Trial


by Tony Seaton and Brian G. Brooks

One of my first personal injury trials took place in Washington County thirty years ago before a seasoned jurist who I held in high esteem. I meticulously prepared my notebooks and trial materials, complete with witness lists and exhibit lists. To say that my stomach resided in my throat is an understatement. I was hauling my boxes of papers and exhibits into the courtroom the morning of trial when the defense attorney came up to me and said: "By the way, we are going to stipulate liability."

I relaxed at counsel table thinking this was a win for us and waited for the judge to enter the courtroom. I naively thought this stipulation would be a blessing. I would have to call less than half of my witnesses and my trial would not be as long and stressful. And a win was guaranteed; the other side admitted liability!

The defense attorney announced his intentions to the court after which the judge interpreted the result of this stipulation. "Gentlemen, since the defense has stipulated liability, the plaintiff shall not introduce any evidence of the car wreck or the liability of the defendant and I will instruct the jurors that they are here only to determine the damages of the plaintiff, if any." I assumed the old judge knew what he was doing, so I ambled through the jury selection, rewrote my opening statement, and rearranged the witness list. The trial was finished in less than a day.

We all know how this story ends. The jury never had the opportunity to judge the carelessness of the defendant, the seriousness of the impact, and the mechanism by which my client's head impacted the side of the car. And the defense planted the notion that the plaintiff was in the courtroom solely to gain a large economic benefit and for no other reason. So, the jury returned a very inadequate verdict in view of the seriousness of the damages.

The defense attorney patted me on the back, told me what a great case I tried and apologetically commented: "you know how conservative these juries are in these parts!" For some strange reason the whole scenario didn't feel right.

And it wasn't. The manner in which the venerable trial judge handled the stipulation on liability was error that short-circuited my case. Indeed, the judge's approach deprived the jury of complete instruction on the role damages play in the law of negligence, which as set forth in the 2nd Restatement, is meant to serve multiple ends:

> The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:
>
> To give compensation, indemnity or restitution for harms;
> To determine rights;
> To punish wrongdoers and deter wrongful conduct; and
> To vindicate parties and deter retaliation or violent and unlawful self-help.

Restatement (Second) of Torts § 901 (1979).[1]

Particularly damaging, the judge's approach to the stipulation on liability allowed the defense to contest causation in a vacuum without any evidence at all informing the causation decision. Had I taken the time to pull out my old Torts hornbook authored by William L. Prosser, I could have reviewed the concept of proximate cause or legal cause, which would have allowed me to try the case the jury needed to hear and see. Essentially, proximate cause requires that in order for the plaintiff to prove all of the elements of negligence, he or she must prove that the consequences of the defendant's actions were foreseeable. Another way to state this is the plaintiff must prove that the defendant should have envisioned, anticipated or predicted that his or her actions could cause the injuries to the plaintiff. Prosser writes:

> Foreseeability of consequences, or, as it is sometimes called, the risk of harm, is only one of the factors which are important in determining negligence. Into the scale with it there must also be thrown the gravity of the harm if it is to occur, and against both must be balanced the utility of the challenged conduct.[2]

Proximate or legal cause is one of the essential elements of a negligence claim that must be proven by the plaintiff. A stipulation as to "liability" is not, contrary to the judge's decision, a stipulation as to causation and is certainly not a stipulation as to proximate cause. And a contest as to what injuries were caused by a tortious act necessarily requires a jury to hear all

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of those facts the trial judge excluded from my case. If I had insisted on that approach, my case would have been better and inevitably so would my result.

So, how do you convince a trial judge to allow the plaintiff to try his or her case effectively and correctly when the judge sees the defendant's stipulation as to liability as a way to shorten a long and tedious trial? Reminding the judge what negligence is and what a stipulation as to liability means is the path. We travel it now.

A. Negligence Law Requirements

Consistent with the common law in virtually state,[3] Tennessee requires that a plaintiff establish, by a preponderance of the evidence, the following elements to prove negligence:

> 1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below that standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.[4]

A stipulation as to liability does not necessarily stipulate as to all of these elements. Taking them one at a time explains why.

1. DUTY

The trial judge decides as a matter of law whether the defendant owes a duty of care to the plaintiff.

Duty is the only portion of the negligence case left exclusively in the hands of the trial judge.[5] It is not a finding of fact made by the jury. Typically, where a defendant challenges the existence of a duty of care he or she asks the trial court to exercise its role as gatekeeper and declare as a matter of law that no duty exists either by way of a proper motion for summary judgment or upon the completion of the plaintiff's proof at trial. While the question is one of law, it is informed by the facts, and the court should consider the facts in the light most favorable to the plaintiff then should determine whether the matter should proceed or be dismissed based upon the law.[6]

The court decides duty as a matter of law, but does the stipulation to liability also stipulate the existence of a duty? The question is academic at best. By failing to challenge the existence of a duty, the defendant concedes that one exists. The stipulation as to liability should be viewed as encompassing the existence of a duty by the defendant to the plaintiff.

A vexing question exits in Tennessee law and elsewhere about whether the trial court should consider the foreseeability of the harm in making this duty analysis.[7] For present purposes, it is enough to write that a stipulation as to liability concedes that a duty exists.

2. BREACH OF DUTY

A breach of duty usually occurs when a person fails to act with the same reasonable care that an ordinary person would use in the same circumstances. Breach of duty is a question of fact for the jury.

The jury's task begins with determining whether the duty the law defines is breached. The Tennessee Pattern Jury Instructions define negligence as:

> The failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under all of the circumstances in this case. The mere happening of an injury or accident does not, in and of itself, prove negligence. A person may assume that every other person will use reasonable care, unless a reasonably careful person has cause for thinking otherwise.[8]

It is the function of the fact finder to decide whether a duty has been breached as a matter of fact. This is usually determined following a trial on the merits and is the first determination to be made before proceeding further.[9]

A liability stipulation logically concedes breach. Indeed, if put to the test, one presumes that defendants would typically view a stipulation of liability as a stipulation as to breach. In other words, when defendants stipulate to "liability," they are most likely only stipulating that they breached the duty they owed to the plaintiff.

3. CAUSE IN FACT

Cause in fact occurs when the negligent conduct directly contributed to the plaintiff's injury and without it plaintiff's injury would not have occurred.

The jury's task continues with determining cause in fact. Actual cause, also known as "cause in fact," is straightforward. When a truck strikes a car, the truck driver's actions are the actual cause of the accident and the injuries resulting from it. The traditional test is whether the plaintiff's injuries would not have occurred "but for" the defendant's actions. In other words, an act or omission is not the cause of an event if the particular event would have occurred without it.[10]

The Tennessee Pattern Jury Instructions' definition is:

> The defendant's negligent conduct is a cause in fact of the plaintiff's injury if, as a factual matter, it directly contributed to the plaintiff's injury and without it plaintiff's injury would not have oc-

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> curred. It is not necessary that a defendant's act be the sole cause of plaintiff's injury, only that it be a cause.[11]

Cause in fact (as well as legal cause) are questions to be determined by the fact finder.[12]

Whereas a defendant's stipulation as to liability is comfortably seen as a stipulation as to duty and breach, it is just as typically not a complete stipulation as to cause in fact. In the example used above, the stipulation is that the breach is the cause in fact of the accident, but it does not necessarily stipulate that the defendant actually caused the injuries the plaintiff claims. Indeed, it is most common that a defendant intends to challenge that the breach of the duty actually caused at least some of the plaintiff's claimed injuries.

4. LEGAL CAUSE

Legal cause requires proof that the conduct must have been a substantial factor in bringing about the harm being complained of AND the harm could have been reasonably foreseen or anticipated by a person of ordinary intelligence and care.

A legal cause of loss or harm is one that in the natural and continuous sequence of events produces the loss or harm and without which it would not have occurred. *Dixon v. Cobb,* No. M2006-00850-COA-R3-CV, 2007 Tenn. App. LEXIS 434 (Tenn. Ct. App. July 12, 2007).

> The Tennessee Supreme Court defined legal or proximate cause in *King v. Anderson Cnty:*
>
> Proximate cause focuses upon "whether the policy of the law will extend responsibility for that negligent conduct to the consequences that have occurred." *Kilpatrick,* 868 S.W.2d at 598. As this Court has stated previously, "'legal responsibility must be limited to those causes which are so closely connected with the result and are of such significance that the law is justified in imposing liability.'" *Id.* (quoting *Doe v. Linder Const. Co., Inc.,* 845 S.W.2d 173, 181 (Tenn. 1992)) and quoting Prosser and Keeton, *The Law of Torts* 264 (5th ed. 1984)). Proximate cause is the means by which courts determine where that boundary will lie. *Id.* "Proximate cause puts a limit on the causal chain, such that, even though the plaintiff's injury would not have happened but for the defendants' breach, defendants will not be held liable for injuries that were not substantially caused by their conduct or were not reasonably foreseeable results of their conduct." *Hale v. Ostrow,* 166 S.W.3d 713, 719 (Tenn. 2005) (citing *Haynes v. Hamilton Cnty.,* 883 S.W.2d 606, 612 (Tenn. 1994)). "Proof of negligence without proof of causation is nothing." *Doe v. Linder Const. Co., Inc.,* 845 S.W.2d at 181 (quoting *Drewry v. Cnty. Of Obion,* 619 S.W.2d 397, 398 (Tenn. Ct. App. 1981)).[13]

The Supreme Court then discussed the standard that courts must follow to determine whether negligent conduct meets the requirements of proximate cause:

> In Tennessee, courts use a three-pronged test to assess proximate cause: (1) the tortfeasor's conduct must have been a substantial factor in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.[14]

The Supreme Court proclaims that "foreseeability is the test of negligence." *Doe v. Linder Constr. Co.,* 845 S.W.2d 173 (Tenn. 1992). Thus, if the plaintiff is going to prove his or her case at all, he or she must be allowed to show the foreseeable risks associated with the defendant's conduct.

> This standard is echoed by the Tennessee Pattern Jury Instructions:
>
> Once you have determined that a defendant's negligence is a cause in fact of the plaintiff's injury, you must decide whether the defendant's negligence was also a legal cause of the plaintiff's injury.
>
> The law in Tennessee sets out two requirements to determine whether an act or omission was a legal cause of the injury or damage.
>
> 1. The conduct must have been a substantial factor in bringing about the harm being complained of; and
> 2. The harm giving rise to the action could have been reasonably foreseen or anticipated by a person of ordinary intelligence and care.
>
> To be a legal cause of an injury there is no requirement that the cause be the only cause, the last act, or the one the nearest to the injury, so long as it is a substantial factor in producing the injury or damage.
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> The foreseeability requirement does not require the person guilty of negligence to foresee the ex-

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> act manner in which the injury takes place or the exact person who would be injured. It is enough that the person guilty of negligence could foresee, or through the use of reasonable care, should have foreseen the general manner in which the injury or damage occurred.[15]

Both cause in fact and proximate cause must be proven by the plaintiff by a preponderance of the evidence in order for the plaintiff to prevail. See Tenn. Pattern Jury Instruction Section 3.20:

> A negligence claim requires proof of two types of causation: cause in fact and legal cause. Cause in fact and legal cause are distinct elements of a negligence claim and both must be proven by the plaintiff by a preponderance of the evidence.

White v. Lawrence discussed the distinction between proximate cause and cause in fact:

> The distinction between cause in fact and proximate, or legal, cause is not merely an exercise in semantics. The terms are not interchangeable. Although both cause in fact and proximate, or legal, cause are elements of negligence that the plaintiff must prove, they are very different concepts. Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for the conduct. In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. Proximate or legal cause is a policy decision made by the legislature or the courts based on considerations of logic, common sense, policy, precedent and 'our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.' (Citations omitted).[16]

A stipulation of liability is seldom a stipulation as to proximate cause of an injury. The defendant has every intention of challenging his or her legal liability for at least some of the plaintiff's claimed injuries on the basis that they were not proximately caused by the breach of duty the defendant concedes he or she committed. The foreseeability portion of the proximate cause element is often the battleground where this question is fought out. Thus, particular attention is paid to it.

B. Foreseeability

King v. Anderson Cnty. characterized the importance of foreseeability in the proximate cause analysis:

> Foreseeability is the crucial factor in the proximate cause test because, if the injury that gives rise to a negligence case could not have been reasonably foreseen, there is no proximate cause and thus no liability despite the existence of negligent conduct. *Rathnow v. Knox Cnty.,* 209 S.W.3d 629, 633-34 (Tenn. Ct. App. 2006) (citing *Ray Carter, Inc. v. Edwards,* 222 Tenn. 465, 436 S.W.2d 864, 867 (Tenn. 1969)). "A risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable." *Downs ex rel. Downs v. Bush,* 263 S.W.3d 812, 820 (Tenn. 2008) (citing *West v. E. Tenn. Pioneer Oil Co.,* 172 S.W.3d 545, 551 (Tenn. 2005)); *Doe v. Linder Const. Co.,* 845 S.W.2d at 178. However, "[t]he plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility." West, 172 S.W.3d at 551 (citing *Tedder v. Raskin,* 728 S.W.2d 343, 348 (Tenn. Ct. App. 1987)); Doe, 845 S.W.2d at 178. Foreseeability must be determined as of the time of the acts or omissions claimed to be negligent. Doe, 845 S.W.2d at 178.[17]

As alluded to above differences of opinion exist about whether foreseeability should be considered by the court in its initial duty analysis. *Satterfield v. Breeding Insulation Co.* indicates that foreseeability is part of the duty analysis to be taken on by the court:

> While every balancing factor is significant, the foreseeability factor has taken on paramount importance in Tennessee. *Hale v. Ostrow,* 166 S.W.3d 713, 716-17 (Tenn. 2005); *Biscan v. Brown,* 160 S.W.3d at 480. This factor is so important that if an injury could not have been reasonably foreseen, a duty does not arise even if causation-in-fact has been established. *Doe v. Linder Constr. Co.,* 845 S.W.2d 173, 178 (Tenn. 1992). Conversely, foreseeability alone is insufficient to create a duty. *McClung v. Delta Square Ltd. P'ship,* 937 S.W.2d 891, 904 (Tenn. 1996). Thus, to prevail on a negligence claim, a plaintiff must show that the risk was foreseeable, but that showing is not, in and of itself, sufficient to create a duty. Instead, if a risk is foreseeable, courts then undertake the balancing analysis.[18]

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Justice Holder's dissent disagreed,[19] and the Court of Appeals holding in *Stockton v. Ford Motor Co.,* requested the Tennessee Supreme Court to revisit the question of whether Tennessee should adopt the Restatement (Third) of Torts approach to foreseeability.[20] To the extent foreseeability concerns duty, the stipulation to liability removes it from the case.

The complications arising from foreseeability are heightened when one recognizes that foreseeability is quite often a factor to be considered in determining breach.[21] The foreseeable consequences of an act factor into the level of care a person must exercise.[22] Whether it is a breach of a duty of care to stop on the side of the road to view the sunrise can depend on whether the road is an isolated country road with little or no traffic or I-40 in Nashville on a Monday morning.[23] This foreseeability question is conceded by the stipulation to liability.

In any event, foreseeability is clearly a part of the factual burden a plaintiff carries to prove proximate cause, even if it is also an element of the duty analysis and the breach analysis. The T.P.I. is clear about that. And the typical stipulation to liability does not concede foreseeability in the proximate cause context. Thus, the burden still remains upon the plaintiff to prove foreseeability by a preponderance of the evidence.

Again, proximate or legal cause is the mechanism for determining whether the policy of the law will extend responsibility for that negligent conduct to the consequences that have occurred. Tennessee case law has declined to extend that responsibility in numerous instances either as an element of the duty analysis, the breach analysis, or by holding that no reasonable jury could find a breach by the defendant to be a legal cause of the plaintiff's injury.[24] On the other hand, in many cases the plaintiff needs to prove the harm caused by the negligent act is foreseeable, even one as simple as a driver of a car running a traffic light. It would be up to the plaintiff to show the harm that could result could be very serious or that the defendant should anticipate that any number of people and vehicles could incur significant damages from the defendant's negligence. Similarly, if a trucking company failed to maintain its trucks regularly, the company should envision that the trucks may wreck and cause serious damages. The burden is upon the plaintiff to ask these questions and produce proof by a preponderance of the evidence.

"Historically, trial judges, like my trial judge, and lawyers have misunderstood the continued responsibility of the plaintiff to prove both cause in fact and legal causation in admitted liability cases."

C. The Effect of the Admission of Fault

Returning to the question arising from my case, what should happen when the defense attorney decides to "admit liability?"[25] Historically, trial judges, like my trial judge, and lawyers have misunderstood the continued responsibility of the plaintiff to prove both cause in fact and legal causation in admitted liability cases. The result is cases, like my case, in which juries are left to determine causation after being deprived of the factual basis for doing so.

Stipulating liability is not stipulating fault. The two should not be confused with one another. A stipulation of fault must be agreed to by both parties. By definition a stipulation is an agreement "which is entered into mutually and voluntarily by the parties." *Overstreet v. Shoney's, Inc.,* 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999).

More importantly, the extent of what is being stipulated to must be clearly defined. When the defense admits liability, the legal effect must be examined closely based on the extent of the stipulation. If the defense admits liability or fault and admits actual and legal causation, then the defense relinquishes its rights to question the plaintiff's cause of injuries and the case should proceed to the determination of the value of the damages. Under this scenario, the defense admits both the nature and extent of all damages and the defendant should not be allowed to put on proof or make any argument that would impeach or contradict the plaintiff's assertions in regard to injuries or losses. Defendants' admissions are rarely to this extent. They rarely admit that they deviated from the standard of care required of them, the deviation caused an accident, and the injuries the plaintiff claims to have suffered were caused by the deviation leaving only the value of those injuries to be determined by the jury.

It is far more likely that the defendant is admitting only that he or she breached the applicable standard of care. The defendant will not admit that the breach caused any particular injury, and certainly not admit that the deviation caused all of the injuries claimed by the plaintiff. The defense will want to question whether the actions of the defendant caused any of the plaintiff's injuries or losses; or, the defense will try to deny the nature and extent of the injuries and losses.

With this typical "admission of liability" in place, the plaintiff's case doesn't really change much. The plaintiff will still be required to put forth proof of matters such as how the accident happened, the impact of the accident, and the nature of the in-

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juries in order to prove both actual and legal causation. By way of a simple example, a car wreck plaintiff who claims a severe neck injury when the defendant ran a stop sign is required to prove the following; the speed of the cars, the nature of the impact, and the extent of the injuries to the plaintiff. The purpose of this proof is to show that one should foresee that the failure to use ordinary or reasonable care may result in specific danger and specific injuries. . The admission of "liability" alone does not do that much.

This approach is well established in the law, although too often missed. The Tennessee Pattern Jury Instructions provide for it:

> [Defendant admits that the [incident] was caused by the defendant's negligence. However, defendant denies that the defendant's negligence caused any of the plaintiff's claimed injuries and losses.]
> [Defendant admits fault which caused injury to the plaintiff, but defendant denies the nature and extent of the injuries and losses claimed by the plaintiff.]
> The plaintiff has the burden of proving the following issues by a preponderance of the evidence:
> 1. [Did the plaintiff receive an injury that was caused by the incident] [What is the nature and extent of the plaintiff's injuries caused by the incident]; and
> 2. What amount of damages will compensate the plaintiff for the injury, if any, that the plaintiff received?
> The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that an allegation is probably true. To prove an allegation by a preponderance of the evidence, a party must convince you that the allegation is more likely true than not true.
> If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence and the party having the burden of proving that issue has failed.
> You must consider all the evidence on each issue.
> The admission of liability should not prejudice you for or against the defendant in fixing the amount of damages, if any.[26]

"Don't assume an admission of liability ends the need to present the facts surrounding the negligent act. They do not more often than not. Your case still has to be presented to allow a jury to decide causation in an informed manner."

Don't assume an admission of liability ends the need to present the facts surrounding the negligent act. They do not more often than not. Your case still has to be presented to allow a jury to decide causation in an informed manner.

D. Plaintiff's Requirements Under the Law to Make an Offer of Proof

But what happens when the trial court disagrees and limits the proof to the value of damages but the defendant questions the cause or extent of the plaintiff's injuries? It is imperative for the plaintiff to make an offer of proof. This is because, of course, the plaintiff bears the burden of proof to show the fact finder actual and legal causation.[27]

Tennessee Rule of Evidence 103 provides the mechanism for submitting an offer of proof.[28] In *Thompson v. City of LaVergne,* the Court of Appeals discussed the critical nature of an offer of proof:

> [A]n offer of proof must contain the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, by stipulating to the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence. Neil P. Cohen, et al. Tennessee Law of Evidence § 103.4, at 20 (3d ed. 1995).

In this situation the plaintiff's attorney should request jury-out hearings in which to present the matters such as the carelessness of the defendant, the seriousness of the impact, and the mechanism by which the injuries to the plaintiff were sustained. Additionally, the plaintiff's attorney should produce proof during the jury-out hearings to show that the defendant could have envisioned, anticipated or predicted that his/her actions were dangerous to the public and could cause serious injuries.

How Courts Should Approach Admitted Liability

It would be best if upon request of the plaintiff, the defense should be required to elect within a reasonable time period whether it intends to admit liability. Requiring a time frame for this election compares to the requirement of scheduling orders, which are the norm and allow both parties to review witness lists, exhibit lists, and require parties to file motions *in limine* within a certain time period. Our system of justice does not promote "trial by ambush." *Hungerford v. Boedeker,* No. E2014-01381-COA-R3-CV, 2015 Tenn. App. LEXIS 313 (Ct. App. May

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11, 2015). Allowing a party to admit liability on the eve of trial is often employed by the defense to throw the plaintiff's trial strategy into disarray or to cause a delay in the trial. Plaintiff's counsel should not have to adjust the entire trial strategy, including opening statements, presentation of witnesses and exhibits and closing arguments on the day of trial. Defense counsel should have as much knowledge about trial strategy 30 days before the date of trial as it does on the actual trial date.

Irrespective of when it happens, upon admission of fault or liability, the court should question the defense to determine exactly what is being admitted by asking the following:

1. Does the defense contend that the defendant's negligence did not cause any of the plaintiff's claimed injuries and losses? (Use paragraph 1 of the Admitted Liability jury charge and the plaintiff must prove actual and legal causation).
2. Does the defense deny the nature and extent of the injuries and losses claimed by the plaintiff? (Use paragraph 2 of the Admitted Liability jury charge and the plaintiff must prove actual and legal causation).
3. Does the defense admit liability as well as actual and legal cause such that the matter should proceed solely to resolve the issue of the calculation of the damages resulting from the uncontroverted injuries?

Regardless of whether foreseeability is relevant to duty and breach as well as legal cause, it is the plaintiff's responsibility to prove all of the elements of the tort claim by a preponderance of the evidence, and when an admission of liability does not concede causation, foreseeability must still be shown as part of the proximate cause analysis. Therefore, if any questions exist about the existence or extent of the plaintiff's injuries then it is the burden of the plaintiff to prove the defendant's foreseeability of the incident as well as the resulting effects.

Finally, if the defense questions the existence or nature and extent of the plaintiff's injuries, then the plaintiff should proceed to prove all of the elements of causation (both actual and legal) that are required by law, including the elements of foreseeability. In the event that a trial judge erroneously rules that the plaintiff is precluded from proving legal causation when in fact the defense questions the existence or nature and extent of injuries, then the plaintiff should make offers of proof throughout the trial in compliance with Tennessee Rule of Evidence Section 103 (a)(2) in order to properly preserve the record for appeal.

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Mr. Seaton did the heavy lifting on this article including developing the concept, conducting the initial research, and putting the article in near final form. Mr. Brooks arrived late to reflect, assist and polish.

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[1] "Deterrence" is one of the foundational and traditional purposes of American Tort law. It is historically and repeatedly proclaimed in black letter law. It is lauded and recognized in the Restatement of Torts as well as precedential case law. The deterrent purpose of tort law was reaffirmed recently by the Tennessee Supreme Court in Dedmon v. Steelman, 535 S.W.3d 431, 2017 Tenn. LEXIS 720 (Tenn. 2017), when it wrote, The rule of law is also intended to promote tort deterrence. See Bozeman [v. State], 879 So. 2d [692, 699 [(La. 2004)]. According to the Bozeman Court, 'tort deterrence has been an inherent, inseparable, aspect of the collateral source rule since its inception over one hundred years ago.' Id." Id. at 2017 Tenn. LEXIS 720 at *28.

Deterrence is not the same as punishment or punitive damages; instead, deterrence is an attempt to prevent careless and harmful conduct from occurring again. Many in the bar would equate deterrence with punitive damages but traditional black letter law finds the two concepts fundamentally different from each other. The defendant should be "deterred," by the jury awarding a full and fair verdict. Punitive damages are reserved for egregious conduct. Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

[2] *Handbook of the Law of Torts,* William L. Prosser, (1971) page 267.

[3] The "virtually" is a mere precaution because, when any doubt is run to ground, all of the elements likely exist in every state. For example, Professor Cardi identifies two states that arguably short-circuit a duty requirement, Arkansas and Oregon. Cardi, Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts, 58 Vand. L.Rev. 739, 743, n.11 (2005). Respectfully, Prof. Cardi's concern with at least Arkansas is misplaced. Duty is an element of a tort claim in Arkansas. See e.g.. Jackson v. Petit Jean Elec. Co-op., 606 S.W.2d 66 (Ark. 1980), and Stolze v. Arkansas Valley Elec. Co-op. Corp.. 127 S.W.3d 466 (Ark. 2003). These cases, and cases relying on them or arguing about their reach, are all about whether a duty of care exists. That the statement of the elements of a tort claim in the case cited by Prof. Cardi, Union Pac. R.R. v. Sharp, 953 S.W.2d 658 (Ark. 1997), inexplicably omits mention of duty should not lead one to the conclusion that duty is absent from Arkansas tort law.

[4] *Bradshaw v. Daniel,* 854 S.W.2d 865, 869 (Tenn. 1993) (citations omitted); *Coln v. City of Savannah,* 966 S.W.2d 34, 39 (Tenn. 1998); *Satterfield v. Breeding Insulation Co.,* et al., 266 S.W.3d 347, 356 (Tenn. 2008).

[5] The existence or nonexistence of a duty owed to plaintiff is entirely a question of law for the Court. Carson v. Headrick, 900 S.W.2d 685 (Tenn. 1995).

[6] T.R.C.P. 56.

[7] *Stockton v. Ford Motor Co.,* No. W2016-01175-COA-R3-CV, 2017 Tenn. App. LEXIS 308 (Tenn. Ct. App. May 12, 2017), is a recent Court of Appeals decision that highlights the challenge that tort law scholars face when determining the issue of foreseeability. Stockton is a case in which a wife contracted mesothelioma after washing her husband's clothes and being exposed to asbestos from his work environment. A $3.4 million jury verdict was rendered on the basis of negligence of Ford, but there were no instructions to allege that Ford's products were unreasonably dangerous or defective. The Court of Appeals declared a new trial on this basis but further held that the jury did not consider the question of whether the plaintiff's injuries were reasonably foreseeable.

Citing W. Jonathan Cardi, *Purging Foreseeability The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts,* 58 Vand. L. Rev. 739 (2005), the Court noted: "Professor Cardi opines that "concept of foreseeability is a scourge, and its role in negligence cases is a vexing, crisscrossed morass." Cardi, *supra,* at 740. The *Satterfield* case elucidates this point. Clearly, the respective roles of judge and jury in the foreseeability inquiry is not settled in Tennessee." *Stockton* at 34.

[8] T.P.I. § 3.05 Definition of Negligence.

[9] *See* T.P.I. Civil Form 1. The first question on the model jury instruction states: "Do you find the defendant to be at fault? (The plaintiff has the burden of proof.) If your answer is "no", stop here, sign the verdict form and return to the Court. If you answer is "yes", proceed to Question 2."

[10] *King v. Anderson Cnty.,* 419 S.W.3d 232, 246 (Tenn. 2013).

[11] T.P.I. § 3.21 CAUSE IN FACT.

[12] *Haynes v. Hamilton Cnty,* 883 S.W.2d 606, 612 (Tenn. 1994).

[13] *King v. Anderson Cnty.,* 419 S.W.3d 232, 247 (Tenn. 2013).

[14] *Id.*

[15] T.P.I. § 3.22 LEGAL CAUSE.

[16] 975 S.W. 2d 525 (Tenn. 1998) (Citing *Snyder v. LTG Lufttechnische GMbH,* 955 S.W.2d 252, 256 n. 6 (Tenn. 1997). See also *Kilpatrick v. Bryant,* 868 S.W.2d 594, 598 (Tenn. 1993).

[17] *King v. Anderson Cnty.,* 419 S.W.3d 232, 248 (Tenn. 2013).

[18] 266 S.W.3d 347, 366 (Tenn. 2008).

[19] *Id.* at 376.

[20] No. W2016-01175-COA-R3-CV, 2017 Tenn. App. LEXIS 308 (Tenn. Ct. App. May 12, 2017). Another extensive article discussing the significance of foreseeability in duty, breach and proximate cause can be found at Zipursky, Benjamin C., Foreseeability in Breach, Duty and Proximate Cause (May 6, 2010). Wake Forest Law Review, Vol. 44, No. 1247, 2009; Fordham Law Legal Studies Research Paper No. 1601303. Available at SSRN: https://ssrn.com/abstract=1601303.

[21] *Cardi, Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts,* 58 Vand. L.Rev. 739, 744-747 (2005), discusses the role of foreseeability in the breach analysis.

[22] *Ibid.*

[23] *Id.* at 746.

[24] *In Doe v. Linder Constr. Co.,* 845 S.W.2d 173 (Tenn. 1992), the Tennessee Supreme Court upheld the trial court's grant of summary judgment. The plaintiff was raped by construction workers who obtained access to her partly unfinished home by taking a master key to a model home that contained a "pass key" to her home. The Court determined that as a matter of law the conduct of the seller defendant did not fall below the standard of care and that the seller had no duty to protect against the criminal acts of third parties. The Court further stated that although the determination of proximate cause is one for the jury, these facts were not in dispute and that summary judgment was also proper as a matter of law. Thus, Doe found the plaintiff's case lacking in foreseeability in all three areas where it is relevant.

King v. Anderson Cty., 419 S.W.3d 232, 248 (Tenn. 2013), was a Tennessee Supreme Court opinion in which the sole question of proximate or legal cause was determined by the trial court and reversed by the Supreme Court. King was mistakenly arrested for driver's license suspension and jailed. The next day he appeared in court and the judge ordered his release. The officer in charge of processing his release was approximately three hours late in releasing him. During that delay, King was physically and sexually assaulted by two other inmates who thought he was holding drugs.

In a non-jury trial the trial court, although not directly finding foreseeability, implied that the attack was foreseeable because King had been housed with dangerous men. The Court of Appeals affirmed but the Supreme Court overturned holding that the three-pronged test to assess proximate cause had not been met.

The majority opinion held that the second and third prongs of this rule were not satisfied. The second rule was not satisfied because there is a widespread recognition that jails cannot be insurers of inmate safety. The Court also found that there was no foreseeability of the event because there was no prior notice to anticipate the attack.

[25] Some jurisdictions state that an admission of negligence does not admit proximate cause while an admission of liability does. See *Springer v. Smith,* 153 N.W.2d 300, 302 (Neb. 1967). Regardless, the threshold question that the trial court should ask the defense is whether they are denying either the injuries or the extent of the injuries.

[26] T.P.I. § 3.02 ADMITTED FAULT.

[27] Tenn. R. Evid. 103

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

[28] *Thompson v. City of Lavergne,* No. M2003-02924-SC-R11-CV, 2006 Tenn. LEXIS 360 (Tenn. Ct. App. Apr. 24, 2006)