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## Three Kinds of Fault: Understanding the Purpose and Function of Causation in Tort Law

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# Three Kinds of Fault: Understanding the Purpose and Function of Causation in Tort Law

MARIN R. SCORDATO\*

*Causation is a concept of enormous importance in the law. In just the last two years, the United States Supreme Court has explicitly considered its importance and meaning on at least three occasions, in areas of the law as diverse as specific personal jurisdiction, Title IX, and Section 1981. It has also been the subject of sustained scholarly examination and debate.*

*In no area of the law is causation as foundational and omnipresent as in tort law, and in no sphere within tort law is it more prevalent than in its dominant cause of action, negligence. Unsurprisingly then, the causation requirement in tort law, and in negligence, has received a great deal of attention and analysis by both courts and commentators. Nevertheless, there remains a striking lack of consensus regarding the causation requirement, ranging from disagreement about the basic rationale for its existence as a part of the negligence claim, to the more specific details of its doctrinal organization and articulation.*

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\* Professor of Law, Columbus School of Law, The Catholic University of America. I am thankful to the Columbus School of Law for continuing support of this work. I am boundlessly grateful to and for Professor Paula Monopoli, in this as in so many other ways. Deep appreciation also to the Quaranteam of Chris, Victoria, Mr. B, and Ellie. All errors and omissions are mine.

*This Article contributes to this ongoing discussion by offering an account of the causation requirement in negligence that places at its core the role that requiring causation plays in seeking to restrict the formal liability generated by the negligence tort to only those defendants who are deemed to be genuinely socially responsible for the harm suffered by the plaintiff. On this account, causation exists as part of the prima facie case for negligence, and in tort law more generally, as a means of ensuring that all liable defendants possess a particular kind of fault with respect to the injury suffered by the plaintiff.*

*In developing this understanding of causation in negligence, the Article identifies three different kinds of fault that a defendant might have regarding a given harm, demonstrates how a workable system of injury compensation could exist that requires only one, and explains how and why the causation requirement operates to ensure that negligence liability is conditioned upon the presence of all three. Moreover, the Article describes how the long-standing doctrinal features of the causation requirement, including its best-known exceptions, can best be understood as serving this underlying policy purpose. Additionally, suggestions for improving the effectiveness of causation doctrine that follow from this analysis are identified and discussed.*

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## INTRODUCTION

In the past few years, there has been significant renewed interest in the topic of causation and more specifically in the causation requirement of tort law.<sup>1</sup> This renewed interest is evidenced in both scholarly literature and appellate court opinions, including recent repeated reliance on the doctrine by the United States Supreme Court in a variety of contexts.<sup>2</sup>

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<sup>1</sup> See generally Robert G. Schwemm, *Fair Housing and the Causation Standard After Comcast*, 66 VILL. L. REV. 63, 70–81 (2021) (exploring but-for and alternative causation standards); Noah Smith-Drelich, *Performative Causation*, 93 S. CAL. L. REV. 379, 383–90 (2020) (discussing specific causation); Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879, 884–93 (2019) (evaluating the but-for standard in multiple-sufficient-cause situations); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2163 (2017) (“It is perhaps unsurprising then that causation in tort law has been subject to rigorous analysis over the years by legal commentators and the courts.”); CAUSATION IN EUROPEAN TORT LAW 3 (Marta Infantino & Eleni Zervogianni eds., 2017) (“[Q]uestions lying beneath the assessment of causation are manifold.”); J. Shahar Dillbary, *Causation Actually*, 51 GA. L. REV. 1, 30–36 (2016) (focusing on causation and the but-for test); Richard W. Wright & Ingeborg Puppe, *Causation: Linguistic, Philosophical, Legal, and Economic*, 91 CHI.-KENT L. REV. 461, 462 (2016) (surveying “the linguistic, philosophical, legal, and economic usages and analyses of the concept of causation.”); Florence G’sell, *Causation, Counterfactuals and Probabilities in Philosophy and Legal Thinking*, 91 CHI.-KENT L. REV. 503 (2016) (acknowledging the varied theories and counterexamples of causation).

<sup>2</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (analyzing and ultimately rejecting the assertion that a but-for causation relationship between the defendant’s in-state activity and the litigation is required to confer proper specific personal jurisdiction in that state); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (asserting that Title IX incorporates the traditional tort standard of but-for causation); *Comcast Corp. v. Nat’l. Ass’n. of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014, 1019 (2020) (establishing that Section 1981 requires a showing that the plaintiff’s race was the but-for cause of its injury) (“It is ‘textbook tort law’ that a plaintiff seeking redress for a defendant’s legal wrong typically must prove but-for causation . . . . This ancient and simple ‘but

Scholars and appellate judges alike are seeking a workable understanding of the causation requirement that reconciles what is known about black letter causation doctrine with a coherent, rich, and theoretically satisfying account of the underlying social policies that the doctrine seeks to advance.<sup>3</sup> This is a goal that has been famously elusive.<sup>4</sup>

This Article contributes to this collective project and to the existing literature by offering a functional and accessible understanding of the causation requirement in tort law; specifically, its purpose, function, and operation as a requirement of the dominant cause of action in modern tort law—negligence. No claim is made that the account offered herein is the only way of usefully understanding the causation requirement, or that it encompasses and explains every possible valuable insight regarding causation, or even causation in

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for’ common law causation test, we have held, supplies the ‘default’ or ‘background’ rule against which Congress is normally presumed to have legislated when creating its own new causes of action.”); *Burrage v. United States*, 571 U.S. 204, 210 (2014) (“The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.”).

<sup>3</sup> MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 3–4 (2009) (exploring the difference between the real world meaning of ‘cause’ and the “technical, distinctively legal” meaning); Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 104 (1911) (“The question is not what philosophers or logicians will say is the cause. The question is what the courts will regard as the cause.”); Albert Levitt, *Cause, Legal Cause and Proximate Cause*, 21 MICH. L. REV. 34, 35 (1922) (distinguishing the course of action the law may follow when “a given person has produced the cause of the injury to another”); Norris J. Burke, *Rules of Legal Cause in Negligence Cases*, 15 CALIF. L. REV. 1, 2 (1922) (“Various tests of legal cause have been laid down by the courts.”); Leon Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 603–04 (1929) (describing the problems of causation).

<sup>4</sup> JULES L. COLEMAN, *RISKS AND WRONGS* 270 (1992) (“No course in the first year curriculum is more baffling to the average law student than is torts, and for good reason. In the first two weeks, the student learns that causation is necessary for both fault and strict liability. Two weeks later the student learns that causation is meaningless, content-free, a mere buzzword. Whereas every torts instructor preaches to students the centrality of causation, virtually no tort theorist takes causation seriously. Ordinary lawyers and law professors are as confused about causation and the role it plays in liability and recovery as are their students.”); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1737 (1985) (“In all of tort law, there is no concept which has been as pervasive and yet elusive as the causation requirement . . .”).

tort law. Instead, what follows is an explication of the causation requirement in negligence that seeks to provide courts with a practical understanding of the requirement that can be productively applied to the adjudication of actual negligence actions in the United States. It also offers to students and scholars of the subject a theoretical foundation underlying the acknowledged doctrine and leading cases in the area.<sup>5</sup>

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<sup>5</sup> See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1799–1800 (1997) (“Law students and working lawyers and judges need a factual causation approach that is relatively simple, rigorous enough to yield trustworthy answers, and just sufficiently flexible to avoid egregious injustice.”).

## I. FIRST-LEVEL CAUSATION DOCTRINE<sup>6</sup>

In the United States, a prima facie case for the tort of negligence consists of duty, breach, causation, and harm.<sup>7</sup> A claimant seeking

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<sup>6</sup> Tort law is overwhelmingly state-based common law. This means that even the most basic of its black-letter doctrine is susceptible to articulation and organization in different—sometimes quite different—ways. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM. § 26 cmt. a, Reporters' Notes cmt. a (AM. L. INST. 2010). As such, the prima facie case for negligence is set forth by different courts and different commentators in various ways, though there is a high level of agreement on its essential components. For example, the Restatement (Third) of Torts has rejected the Restatement (Second) of Torts' use of the term "proximate cause" and places the same basic concept entirely outside of causation, creating an independent element of the prima facie case that it calls "Limitations on Liability for Tortious Conduct." *Id.* at § 29. In so doing, Restatement (Third) finesses long-standing differences among courts in conceiving of foreseeability limitations on negligence liability as properly being part of the duty analysis, or the causation analysis, or both, by pulling the concept out of both duty and causation requirements and establishing it as a wholly separate element. See *infra* notes 248–52 and accompanying text.

For the purposes of the analysis offered herein, it makes no significant difference if what I call "proximate cause" is organized as a second required aspect of the causation requirement, as a means by which legal duty is formally limited, or both. Similarly, it makes no significant difference for these purposes if what I call "proximate cause" is referred to by that term or another, or if the black-letter doctrine is articulated in terms of requiring reasonable foreseeability or some version of a limitation based on the harm that occurred being among the understood risks of the defendant's careless behavior. While such differences in organization and articulation of the relevant doctrine may be important (and well worthy of analysis and debate), the underlying policy that best rationalizes what I call here the "proximate cause" requirement, and the fuller understanding of the requirement that follows from that, remains essentially the same under all of these organizational and terminological variations.

I choose to use the specific organization of, and terminology for, the prima facie case for negligence that I do because one stable version is required to anchor the explanation and analysis presented herein. Also, because it is my sense (having taught the subject for more than thirty years) that it is among the standard and conventional ways in which the negligence tort is set forth, if not the current dominant approach among courts and casebooks. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 Reporters' Note, cmt. a (AM. L. INST. 2010) ("Factual cause (or cause in fact) and proximate cause remain in widespread use . . ."); 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 20.2, at 97–98 n.1 (3d ed. 2007) ("The division of the cause problem, made here, into questions of cause in fact and of proximate cause . . . represents the prevailing pattern of American legal thought.").

to establish negligence liability against another must, at a minimum, prove that: (1) the defendant under an actual prior set of circumstances owed to the plaintiff a legal duty to act with a minimum level of care towards the plaintiff and his or her property; (2) the defendant acted less carefully than the applicable legal duty required; (3) the defendant's behavior that fell below the applicable legal standard was the cause of harm; and (4) actual harm to the plaintiff.<sup>8</sup>

The third of these four required elements—causation—is conventionally understood to consist of two parts, each of which the plaintiff must independently establish.<sup>9</sup> One part is known as actual

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<sup>7</sup> *Hayes v. D.C.I. Props.-D KY, LLC*, 563 S.W.3d 619, 622 (Ky. 2018) (“In any negligence case, a plaintiff must prove the existence of a duty, breach of that duty, causation between the breach of duty and the plaintiff’s injury and damages.”); *R.I. Res. Recovery Corp. v. Restivo Monacelli LLP.*, 189 A.3d 539, 546 (R.I. 2018) (“[T]o maintain a cause of action for negligence, the plaintiff must establish four elements: (1) a legally cognizable duty owed by defendant to plaintiff; (2) breach of that duty; (3) that the conduct proximately caused the injury; and (4) actual loss or damage.”); *Finazzo v. Fire Equip. Co.*, 918 N.W.2d 200, 210 (Mich. Ct. App. 2018) (“To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.”); *Lewis v. Renner*, 905 N.W.2d 540, 548 (Neb. 2018) (“To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages”).

<sup>8</sup> *Cunis v. Brennan*, 308 N.E.2d 617, 618 (Ill. 1974), citing *Mieher v. Brown*, 301 N.E.2d 307, 308 (Ill. 1973) (“A complaint for negligence must set out: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty and an injury proximately resulting from the breach.”); *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 606 (Mont. 2008) (“To maintain an action in negligence, the plaintiff must prove four essential elements: duty, breach, causation, and damages.”).

<sup>9</sup> *See, e.g., PV Holding Co. v. Poe*, 861 S.E.2d 265, 267 (Ga. Ct. App. 2021) (“To prove causation in a negligence case, the plaintiff must show that the wrongdoing is both a cause in fact and a proximate cause of the injuries alleged.”); *Ray v. Swager*, 903 N.W.2d 366, 371 (Mich. 2017) (“Proximate cause is distinct from cause in fact, also known as factual causation . . . Courts must not conflate these two concepts.”); *Tung v. Chi. Title Co.*, 278 Cal. Rptr. 3d 182, 189 (Cal. Ct. App. 2021) (“The causation analysis involved two elements. ‘One is cause in fact.’ . . . The second element is proximate cause.” (emphasis omitted) (citations omitted)); *Waste Mgmt., Inc. of Tenn. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997) (“Causation in fact and legal cause are very different concepts . . . and distinguishing between them has been hailed by some as one of the most helpful of the recent breakthroughs in negligence jurisprudence.” (citations omitted)); *Roberts v. Benoit*, 605 So. 2d 1032, 1052 (La. 1991) (“[Proximate



cause, actual causation, or cause-in-fact.<sup>10</sup> It requires the plaintiff to prove the chain of actual, physical causation extended from the defendant's breaching behavior to the harm suffered by the plaintiff, for which the plaintiff is seeking compensation from the defendant by means of the negligence claim.<sup>11</sup> In other words, the plaintiff establishes actual causation by showing that the defendant physically caused the harm suffered by the plaintiff.<sup>12</sup>

This is typically accomplished by the plaintiff satisfying what is known as the "but-for" test of actual causation.<sup>13</sup> This test is satisfied when the plaintiff can prove that but-for the defendant's breaching behavior (the behavior of the defendant used by the plaintiff to establish the second element of the prima facie case for negligence—the breach element), the plaintiff would not have experienced the

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cause] is not to be mistaken for cause-in-fact, as the two elements satisfy entirely different functions in the negligence analysis.”).

<sup>10</sup> *Towe v. Sacagawea, Inc.*, 347 P.3d 766, 775 (Or. 2015) (“[T]he plaintiff in a negligence action must also prove an actual cause link between the defendant’s conduct and the plaintiff’s harm—that is, the plaintiff must prove ‘cause in fact.’” (citations omitted)); *Harper v. Rsr. Life Ins. Co.*, 499 So. 2d 986, 987 (La. Ct. App. 1986) (“It is well settled that an integral requirement of a tort claim is that the alleged negligence was a cause in fact of the damage.” (citations omitted)).

<sup>11</sup> *Hetzel v. Parks*, 971 P.2d 115, 120 (Wash. Ct. App. 1999) (“Cause in fact, also known as actual causation, is the ‘but for’ consequence of an act. It connects the act to the injury. It is a matter of what has in fact occurred.”); *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n.6 (Tenn. 1997) (“Cause in fact refers to the cause and effect relationship between the defendant’s tortious conduct and the plaintiff’s injury or loss.”).

<sup>12</sup> *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007) (“In all tort cases, the plaintiff must prove that each defendant’s conduct was an actual cause, also known as cause-in-fact, of the plaintiff’s injury . . . .”); *Drouhard-Nordhus v. Rosenquist*, 345 P.3d 281, 286 (Kan. 2015) (“To establish causation in fact, a plaintiff must prove a cause-and-effect relationship between a defendant’s conduct and the plaintiff’s loss by presenting sufficient evidence from which a jury can conclude that more likely than not, but for defendant’s conduct, the plaintiff’s injuries would not have occurred.”).

<sup>13</sup> See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* §26 Reporters’ Note cmt. b (AM. L. INST. 2010) (“Courts and scholars routinely acknowledge that the but-for test is central to determining factual cause.”).

harm for which the plaintiff is seeking compensation from the defendant.<sup>14</sup> Put slightly differently, the but-for test for actual causation is satisfied in circumstances in which hypothetical elimination of the defendant's breaching behavior would result in an absence of harm experienced by the plaintiff.<sup>15</sup> Only when the breaching behavior of the defendant was physically necessary in order for harm to be experienced by the plaintiff is the actual cause prong of the causation requirement satisfied.<sup>16</sup>

In addition to actual cause, a plaintiff bringing a negligence claim must also establish what is conventionally known as proximate cause.<sup>17</sup> Proximate cause in this context is established by showing that a reasonable person in the position of the defendant, in similar circumstances, would have foreseen that his or her breaching behavior would result in the kind of harm experienced by the plaintiff.<sup>18</sup> In other words, proximate cause is satisfied when the plaintiff shows that under the specific circumstances of the case, the harm suffered by the plaintiff was reasonably foreseeable given the unreasonably careless actions of the defendant.<sup>19</sup>

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<sup>14</sup> *Deines v. Atlas Energy Servs., LLC*, 484 P.3d 798, 801 (Colo. App. 2021) (“To prove causation, the plaintiff must show, first, that, but for the alleged negligence, the harm would not have occurred.”).

<sup>15</sup> *Vincent v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851 (Alaska 1993) (“The ‘but for’ test is the appropriate test for actual causation in the majority of circumstances. The ‘but for’ test has been described as follows: ‘The defendant’s conduct is a cause of the event if the event would not have occurred . . . without it.’” (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* 266 (5th ed. 1984))).

<sup>16</sup> *Wells v. Whitaker*, 151 S.E.2d 422, 428 (Va. 1966) (“To impose liability upon one person for damages incurred by another, it must be shown that the negligent conduct was a necessary physical antecedent of the damages.”).

<sup>17</sup> *Smith v. Herbin*, 785 S.E.2d 743, 745 (N.C. Ct. App. 2016) (“Proximate cause is an essential element of a negligence claim.” (citation omitted)).

<sup>18</sup> *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 3 cmt. g (AM. L. INST. 2010) (“To establish the actor’s negligence, it is not enough that there be a likelihood of harm; the likelihood must be foreseeable to the actor at the time of conduct.”).

<sup>19</sup> *See id.* at § 3, Reporters’ Note cmt. g (“Determinations of negligence are commonly based on findings as to which harms are foreseeable.”); *Browning v. Browning*, 890 S.W.2d 273, 275 (Ark. 1995) (“We have made it clear in Arkansas that the failure to guard against an occurrence that is not reasonable to anticipate is not negligence.” (citations omitted)).

At the first level of black letter doctrine, the existence of a causation element in the prima facie case of negligence requires the plaintiff to establish that the unreasonably careless behavior of the defendant both actually (physically) caused the harm for which the plaintiff seeks compensation in the negligence action, and that such harm was also a reasonably foreseeable consequence of that unreasonably careless behavior under the specific circumstances of the case.<sup>20</sup>

## II. A NEGLIGENCE BASED COMPENSATION SYSTEM WITHOUT A CAUSATION REQUIREMENT

While other social purposes are cited as being served by tort law,<sup>21</sup> there are two generally undisputed, dominant social purposes, or policies, advanced by a properly functioning law of torts, including the negligence tort: (1) to provide an additional source of monetary compensation to injured individuals for recovery and rehabilitation (a compensation goal or policy); and (2) to discourage some harm producing activities by imposing an involuntary and legally enforced obligation on some harm producers to personally provide that compensation to successful plaintiffs (a deterrence goal or policy).<sup>22</sup> Large swaths of black letter tort doctrine have been rationalized by courts and commentators on the basis that tort law furthers

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<sup>20</sup> *In re Walmart, Inc.*, 620 S.W.3d 851, 861 (Tex. App. 2021) (“Causation includes two elements: cause in fact and foreseeability.”).

<sup>21</sup> *See generally* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (surveying dominant theoretical approaches to tort law in the U.S. in the twentieth century); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 186 (2021) (“Tort law, on this view [a theory-skeptical social welfare approach], is a messy business through which courts deliver some compensation, provide some deterrence, dispense some justice, and do some other stuff such that, if all goes well, they will impose liability in a manner that contributes to social welfare, broadly understood.”).

<sup>22</sup> *See Fu v. Fu*, 733 A.2d 1133, 1141 (N.J. 1999) (“The interests underlying the field of tort law require courts to consider the degree to which deterrence and compensation, the fundamental goals to tort law, would be furthered by the application of a state’s local law.” (emphasis omitted)); *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 347 (Minn. 2013) (“[T]he fundamental aims of tort law includ[e] compensation for victims . . . and the deterrence of unsafe conduct . . .”).

a social policy of appropriate compensation, a social policy of appropriate deterrence, or both.<sup>23</sup>

So pervasive is the understanding that tort law is dominantly about the business of advancing appropriate compensation and appropriate deterrence that it is easy to presume that every standard element of well-established tort law claims, like negligence, have been crafted over time, and are fundamentally rationalized, on this basis.<sup>24</sup>

Part of what makes causation in tort law such a persistently difficult and vexing requirement—to understand, rationalize, and implement—is that it does not conform to this otherwise pervasive attribute of the law of torts.<sup>25</sup> The presence of a causation requirement in negligence cannot be satisfactorily understood or adequately explained by reference to the way in which it advances either a compensation objective or a deterrence objective.<sup>26</sup> In fact, it can be persuasively argued that the presence of a causation requirement in the prima facie case for negligence actually operates to retard the potential for the claim to more robustly advance both compensation and deterrence.<sup>27</sup>

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<sup>23</sup> See Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1167 (1992) (noting that the American Law Institute Study preceding the Restatement (Third) of Torts evaluates existing tort law and its alternatives primarily in terms of: “(1) how well they channel human behavior in socially desirable ways, and (2) how well they provide accident victims appropriate compensation.”).

<sup>24</sup> *Greenwalt v. Ram Rest. Corp. of Wyo.*, 71 P.3d 717, 723–24 (Wyo. 2003) (“As a leading authority of tort law instructs, ‘[t]he most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior.’” (quoting DAN B. DOBBS, *THE LAW OF TORTS* 12 (2000))); *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 46 (E.D.N.Y. 2001) (noting “tort law system’s twin aims of compensating those injured by others and deterring tortfeasors by requiring them to pay for the harm they cause.”).

<sup>25</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 228 (1987).

<sup>26</sup> Much law & economics analysis of negligence, focused as it is on the maximizing of collective benefits from an overall societal perspective, has had difficulty rationalizing the causation requirement, and some commentators working from a law & economics perspective have suggested that it be eliminated. See, e.g., LANDES & POSNER, *supra* note 25, at 229 (“[T]he idea of causation can largely be dispensed with in an economic analysis of torts . . .”).

<sup>27</sup> See Goldberg & Zipursky, *supra* note 21, at 191.

Imagine, for example, a social system based on negligence that does not include any causation requirement.<sup>28</sup> Such a system might offer injured individuals monetary payments calculated to compensate them for certain recognized injuries so long as these claimants could produce adequate proof of their own lack, or relative lack, of culpability in the infliction of the harm for which they are seeking compensation, and also adequate proof of the unreasonably careless behavior of another person in the relevant jurisdiction during a specified period. In such a system, the prima facie application for the receipt of compensation might be: (1) proof of the suffering by the applicant/plaintiff of harm of the right sort (not loss of economic advantage only, not modest and purely emotional distress, not familial or spiritual injury, etc., just like existing tort law); (2) proof that the applicant/plaintiff was not more than a specified percentage personally responsible for the infliction of that injury (similar to contributory negligence and partial comparative negligence systems), or imposition of a reduction in the compensation awarded based on the applicant's own culpability in the infliction of the harm (similar to pure comparative negligence); and (3) proof that a specified individual (the defendant) acted in an unreasonably careless manner with respect to the kind of harms recognized by the system during some specified period.

Such a system could assess a fine and thus impose legal liability against those defendants who were shown by plaintiffs to have acted unreasonably carelessly; much as modern criminal law systems routinely assess monetary fines against defendants shown to have acted in a proscribed manner irrespective of whether the proscribed behavior in fact resulted in actual harm.<sup>29</sup> These fines would serve as the basic source of funding for the compensatory payments made by the system to successful applicants.

For instance, if a given jurisdiction decided to segregate all, or part, of the money that it collected during a given period as a result

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<sup>28</sup> Jules Coleman imagines a similar system. *See generally* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349 (1992).

<sup>29</sup> Luz Lazo, *Speed-Camera Tickets Made \$62 Million for Maryland Last Year*, *WASH. POST* (Feb. 6, 2018, 7:00 AM), <http://www.washingtonpost.com/news/dr-gridlock/wp/2018/02/06/speed-camera-tickets-made-62-million-for-maryland-last-year/> (“Maryland jurisdictions issued more than 1.5 million tickets for speed-camera violations last fiscal year . . . which generated \$62.2 million in revenue . . .”).

of its passive enforcement of traffic laws (speed and red light cameras, for example) and made that money available as compensation exclusively to those injured on the roads of that same jurisdiction during that same period, such a system would operate in a similar fashion to the one suggested, substituting the state in place of the injured individual as the party establishing the liability of defendants.<sup>30</sup>

Such a hypothetical system would further the compensation goal of tort law by offering appropriate resources to injured individuals and would further the deterrence goal by imposing liability on those who have been shown to have acted with unreasonable carelessness, all without any recourse to a requirement that there be any causative link between the specific plaintiff's harm and the unreasonably careless behavior of the defendant.

In fact, such a system would very likely be a more powerful provider of compensation and a more robust generator of deterrence than the traditional negligence tort. Why?

This system would offer compensation to plaintiffs who were injured by ways and means that did not involve any unreasonably careless behavior by another, and also to plaintiffs who were injured by unreasonably careless persons who are not as a practical matter effectively responsive to negligence liability, such as defendants without assets or insurance.<sup>31</sup> These are two classes of innocently

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<sup>30</sup> Dedication of revenue raised in a specific way toward identified uses is common among the states, as is reluctance of state legislatures to make good on such promises. See, e.g., *Texas Lawmakers Sit on Red-Light Revenue Dedicated to Trauma Centers*, DALLAS MORNING NEWS (Jan. 7, 2012, 8:58 PM), <http://dallasnews.com/news/texas/2012/01/08/texas-lawmakers-sit-on-red-light-revenue-dedicated-to-trauma-centers/>; Kevin P. Brady & John C. Pijanowski, *Maximizing State Lottery Dollars for Public Education: An Analysis of Current State Lottery Models*, 7 J. EDUC. RSCH & POL'Y STUD. 20, 20 (2007) ("State sponsored lotteries are an increasingly popular, non-traditional revenue stream for public education. There is in many cases, however, a gap between their promoted benefit to public K-12 schools and the actual fiscal support they provide.").

<sup>31</sup> Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 408 (1987) ("From the standpoint of the injured party, it matters little whether the harm was negligently caused. The inquiry into the culpability of the injurer diverts attention from the palpable loss that has been inflicted. The occurrence of injury, so it might be thought, makes the differentiation between its negligent and its innocent cause . . . a fortuity . . .").

injured individuals who are currently excluded from the compensatory benefits of negligence, and who may represent a large number—both absolutely and relatively—of all injured persons in a jurisdiction.<sup>32</sup>

Such a system would generate a far more robust deterrence to engage in unreasonably careless behavior than does negligence because the deterrent effect of such a system would potentially extend to all persons within its jurisdiction who engage in unreasonably careless behavior, not just those persons whose unreasonably careless behavior actually resulted in tangible harm to another.<sup>33</sup> Like those injured in the absence of someone else's unreasonable carelessness, those who engage in unreasonably careless behavior in a specific circumstance and do not cause harm to another as a result, may represent a large number—both absolutely and relatively—of all persons in a jurisdiction who engage in unreasonably careless behavior.<sup>34</sup>

Note that both the compensatory and the deterrence features of this imagined system are not novel.<sup>35</sup> Many compensation systems that respond to injured or otherwise ailing individuals, like medical care insurance and workers compensation, offer compensatory benefits to such individuals without regard to the specific mechanism or

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<sup>32</sup> See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 605–06 (2006); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 45 (1986).

<sup>33</sup> Strong law-and-economics analysis of tort law has had difficulty rationalizing the existence of the causation requirement in tort law generally, and in the negligence tort in particular. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 113 (1987); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 29 Reporters' Note cmt. e (AM. L. INST. 2010) ("For negligence-based torts, scope-of-liability limitations are difficult to justify from a pure deterrence standpoint. Once a determination of negligence is made, the defendant's behavior has already been found to pose excessive risks, and imposing liability, regardless of the connection to the harm, can only improve deterrence.").

<sup>34</sup> See Gilles, *supra* note 32, at 605–06.

<sup>35</sup> See Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 950 (2006).

cause of the harm.<sup>36</sup> Criminal law has long included the so-called inchoate crimes: behavior that does not result in actual injury to another but that, nevertheless, triggers criminal liability.<sup>37</sup> In fact, the modern development of passive traffic enforcement mechanisms, and the many millions of dollars in criminal fines that they generate, represent an explosive growth in the societal deterrence of unreasonably careless behavior that does not result in any actual injury.<sup>38</sup>

A social system could feasibly be designed to achieve the attractive benefits of compensation and deterrence provided by negligence without including any requirement that the unreasonably careless behavior of the defendant be shown to have, in any way, been the cause of the plaintiff's harm.<sup>39</sup> Such a system would far more powerfully generate and achieve both compensation and deterrence than does our current negligence tort system.<sup>40</sup> This means that not only can the presence of a causation requirement in negligence not be properly understood and rationalized by means of its contribution to compensation and deterrence, but that the presence of a causation requirement in negligence should also be understood to be at the expense of greater compensation and deterrence. In other words, the causation requirement comes at a cost, namely, the cost of negligence pursuing its two dominant social purposes—compensation and deterrence—less effectively.<sup>41</sup>

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<sup>36</sup> *Id.* (“Unlike traditional tort law, the principles governing workers’ compensation do not require the claimant to prove causation in any meaningful sense.”).

<sup>37</sup> Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 161 n.47 (1995).

<sup>38</sup> Peter Jamison, *Speed Camera Tickets Doubled Last Year in D.C., New Data Show*, WASH. POST (July 19, 2017), [https://www.washingtonpost.com/local/dc-politics/speed-camera-tickets-doubled-last-year-in-dc-new-data-show/2017/07/19/6e67dda2-6cbd-11e7-b9e2-2056e768a7e5\\_story.html](https://www.washingtonpost.com/local/dc-politics/speed-camera-tickets-doubled-last-year-in-dc-new-data-show/2017/07/19/6e67dda2-6cbd-11e7-b9e2-2056e768a7e5_story.html) (“The District issued almost a million speed-camera tickets last year . . . which led to \$99.2 million in revenue for the city. . . . There were nearly 2.2 million speed-camera tickets issued [in 2016] in the D.C. Metro area, up from 1.8 million in 2015.”); Andy Medici, *District Sees Soaring Revenue from Speed Cameras*, WASH. BUS. J. (Dec. 4, 2017), [www.bizjournals.com/washington/news/2017/12/04/district-sees-soaring-revenue-from-speed-cameras-a.html](http://www.bizjournals.com/washington/news/2017/12/04/district-sees-soaring-revenue-from-speed-cameras-a.html) (“More than \$100 million in revenue came from 10 speed cameras alone . . .”).

<sup>39</sup> See Shavell, *supra* note 32, at 107–09.

<sup>40</sup> See *id.* at 107–10.

<sup>41</sup> See *id.*



### III. THE UNDERLYING PURPOSE OF A CAUSATION REQUIREMENT IN NEGLIGENCE

If the presence of a causation requirement in negligence cannot be accurately understood by recourse to its contribution to either compensation or deterrence, and if in fact the existence of a causation requirement meaningfully limits the compensation and deterrence that is achieved by the negligence tort, then what might satisfactorily explain its existence? Putting aside the more descriptive possibilities of legal custom, specific common law history, and path dependence, what might account, normatively, for the continued presence of a causation requirement in negligence and to some extent its existence more generally in the law of tort? What value or values are advanced by a causation requirement that justifies the burden it imposes on the dominant goals of compensation and deterrence?

I suggest the answer to these questions is that the presence of a causation requirement in negligence, and to a large extent more generally in tort law, is necessary in order to ensure the existence of a certain, specific kind of fault by the defendant in every instance in which negligence liability is imposed.<sup>42</sup> The causation requirement functions to ensure that the liability generated by the negligence claim is confined to those defendants who are what I will call “genuinely socially responsible” for the plaintiff’s harm.<sup>43</sup> Thus, the inclusion of a causation requirement will result in the negligence tort imposing legal liability for the forced compensation of a victim only on those defendants who are found to be at fault for the plaintiff’s harm in all of three distinct ways: (1) the defendant is at fault for having engaged in unreasonably careless behavior; (2) the defendant

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<sup>42</sup> See Coleman, *supra* note 28, at 351 (“Fault is central both to the institution of tort law and, in my view, to its ultimate moral defensibility.”).

<sup>43</sup> This claim, while not necessarily a part of the corrective justice account of tort law, is at least consistent with it. See Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1249 (1988) (“To the extent tort law is a forum for vindicating claims to repair, the victim’s connection to his injurer is fundamental and analytic, not tenuous or contingent. That his injurer acted towards him in a way that gives rise to a legitimate claim in justice to compensation is the heart of the victim’s assertion.”); see also *id.* at 1251 (“[I]n torts a victim seeks to show that the loss he has suffered is a wrongful one, one which requires recompense as a matter of right, not utility. And central to that claim is showing that the loss results from the mischief of the defendant.”).

is at fault for having actually caused the plaintiff's harm as a result of that unreasonably careless behavior; and (3) the defendant is at fault for being genuinely socially responsible—for being morally blameworthy—for the harm suffered by the plaintiff.<sup>44</sup> These three kinds of fault are not the same, and the social consequences of conditioning negligence liability on some without the others are potentially profound.<sup>45</sup>

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<sup>44</sup> See Coleman, *supra* note 28, at 350–51.

<sup>45</sup> Recognition that fault is an integral attribute of negligence is hardly new. However, discussion of the fault requirement in negligence typically focuses on the duty and breach elements of the prima facie case, where it is most manifest. See *Coleman v. LA Terre Physical Therapy, Inc.*, 36 So.3d 325, 328 (La. Ct. App. 2010) (“Fault is determined by a legal duty to guard against a certain risk and breach of that duty . . . .”); *Coste v. Riverside Motors, Inc.*, 585 A.2d 1263, 1265 (Conn. App. Ct. 1991) (“The elements of duty and breach require that a defendant’s conduct constitutes fault in the performance of a duty owed to a plaintiff.”); Heidi Li Feldman, *Blending Fields: Tort Law, Philosophy, and Legal Theory*, 49 S.C. L. REV. 167, 172 (1997) (“Traditionally, the general duty of care constitutes the liability standard in a tort’s negligence regime . . . . If we breach this duty, then we are at fault and may owe damages to those injured because of our breach.”); Michael Koty Newman, *The Elephant Not in the Room: Apportionment to Nonparties in Georgia*, 50 GA. L. REV. 669, 696 (2016) (“Since there was absolutely no evidence presented establishing a breach of duty on the part of the [defendants], fault could not rationally be apportioned to them . . . .”). Far less common is the recognition that the causation requirement of negligence is not just about, but all about, ensuring that all defendants held liable for negligence are to blame in a particular and specific way for the plaintiff’s harm. See *id.* at 674, 681.

Much of the published analysis of the causation requirement, and especially its various exceptions, talk in terms of the existence of the requirement, and the need to craft various exceptions to its basic tests, being a matter of common sense, or being in conformance with conventional intuition. See John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1125–33 (2007). Almost always, this is meant to refer to common sense or conventional intuition regarding what was or was not a physical cause of a given injury. See *id.* Rarely is it recognized that the black-letter tests for the requirement, and the need to create certain exceptions to them, are driven less by an underlying interest in physical causation per se than by a concern for employing such tests, and then needing such exceptions, to most accurately identify the presence of genuine social responsibility by the defendant. See *id.* The causation requirement in negligence is a surrogate measure for the existence of genuine social responsibility. See *id.* A full understanding of the causation requirement, and the most effective design of its tests and exceptions, is contingent upon recognition that the only real purpose of the requirement in the negligence tort—the only important social policy advanced by its existence and operation—is the limiting of the imposition

Consider a typical, casual playground pick-up basketball game. Anyone having much experience with this activity knows the standard of play with regard to the calling of rule violations is “no harm, no foul.”<sup>46</sup> That is, no rule violation is to be called unless, at a minimum, the violation had a meaningful negative effect on the other team.<sup>47</sup> If it did not make a significant difference, then it is to be ignored and forgotten, and play should proceed uninterrupted.<sup>48</sup>

The policy underlying such a standard in this activity is fairly straight-forward: the primary purpose of the activity is the pleasure of the play itself, including its competitive aspect.<sup>49</sup> The participants are there to play ball—not to engage in a test of rule knowledge and compliance. If an otherwise clear and unambiguous rule violation does not seriously impair the pleasure or the competitive fairness of

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of liability generated by the tort to only those individuals who are at social and moral fault for the plaintiff’s harm. *See id.*

<sup>46</sup> Daniels v. Aldridge Pite Haan, LLP, No. 5:20-cv-00089-TES, 2020 WL 3866649, at \*1 (M.D. Ga. July 8, 2020) (“‘No harm. No foul.’ For years, players in pickup basketball games all over playgrounds, church gyms, and driveway courts have followed this simple phrase. Although one team may have technically violated a rule, the other team wasn’t hurt or put at a disadvantage, so the refs (or more likely, the players themselves) just let it go as there was no need to slow down the game with silly, hypertechnical, ticky-tack fouls.”); Aquidneck Ave. Assocs. v. Aquidneck Court Assocs. (*In re DiMartino*), 108 B.R. 394, 403 (D.R.I. 1989) (“The no-harm-no-foul rule of the basketball court should be applied in this law court.”); Nabors Drilling USA v. Davis, 857 So. 2d 407, 416 n.4 (La. 2003) (“Essentially, the legislature adopted the playground basketball adage: ‘no harm, no foul.’”).

<sup>47</sup> Att’y Grievance Comm’n of Md. v. Singh, 212 A.3d 888, 891 (Md. 2019) (“The phrase ‘no harm, no foul’ derives from the idea that, if a foul committed in a basketball game does not affect the outcome, the referee should not call the foul.”); Snider v. Danfoss, LLC, No. 15 CV 4748, 2017 WL 2973464, at \*1 (N.D. Ill. July 12, 2017) (“Federal Rule of Civil Procedure 37(e) incorporates the long-standing legal principle embodied in the phrase used on basketball courts every-day across the country: ‘No harm; no foul.’”).

<sup>48</sup> *See The Proverbial Game: ‘The Dictionary of Modern Proverbs’ Uncovers the Origins of Sporting Terms*, YALE BOOKS BLOG (June 8, 2012), <https://yalebooksblog.co.uk/2012/06/08/the-proverbial-game-the-dictionary-of-modern-proverbs-uncovers-the-origins-of-sporting-terms/>.

<sup>49</sup> *See* Ryan Wood, *Take Your Skills to the Street*, USA BASKETBALL (Mar. 21, 2011), <https://www.usab.com/youth/news/2011/03/take-your-skills-to-the-street.aspx>.

the ongoing game, then, while no less a violation of the rules, it is not to be enforced.<sup>50</sup> No harm, no foul.

Within such a regulatory framework, there can be said to be two kinds, or levels, of faulty behavior by players. One kind of fault is the violation of an established rule.<sup>51</sup> Thus, a player on offense who stands in the lane for more than three seconds consecutively is at fault for violating a rule of the game.<sup>52</sup> This behavior is, within the context of the game, more blameworthy, and thus the violator is more at fault, than a player who fully conforms to the rules. This kind of fault can be called “behavioral fault.”<sup>53</sup> It is, without more, a violation but no harm.<sup>54</sup>

This kind of fault is importantly different, however, especially in the context of a pick-up game, from the kind of fault that attaches to a player who stands in the lane close to the basket for more than three seconds consecutively and then receives a pass, turns, and makes a short shot for a score. This kind of second-level fault can be called “consequential fault.”<sup>55</sup> It is a violation resulting in competitive harm, and it therefore represents a fair opportunity for calling a rule violation during the pick-up game under the no harm, no foul principle.<sup>56</sup>

Without a causation requirement, the negligence tort would still require behavioral fault of liable defendants.<sup>57</sup> It does this through the breach element of the prima facie case.<sup>58</sup> One of the purposes of

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<sup>50</sup> See *No Harm No Foul*, GRAMMARIST, <http://grammarist.com/phrase/no-harm-no-foul/> (last visited Sept. 27, 2022).

<sup>51</sup> See *supra* notes 47–48 and accompanying text.

<sup>52</sup> More specifically, a basketball “player shall not remain in the opponents’ restricted area for more than three consecutive seconds while his team is in control of a live ball in the frontcourt and the game clock is running.” *2020 Official Basketball Rules: Basketball Rules*, INT’L BASKETBALL FED’N 31 (Oct. 1, 2020), <http://fiba.basketball/documents/official-basketball-rules/2020.pdf> [hereinafter *2020 Official Basketball Rules*].

<sup>53</sup> See Coleman, *supra* note 28, at 351, 370.

<sup>54</sup> See *id.*

<sup>55</sup> See *2020 Official Basketball Rules*, *supra* note 52, at 41.

<sup>56</sup> See *id.*

<sup>57</sup> Marc S. Stauch, *Causation Issues in Medical Malpractice: A United Kingdom Perspective*, 5 ANNALS OF HEALTH L. 247, 249 (1996) (“This element, the need to show causation, constitutes the link between the defendant’s fault—the breach of duty—and the harm suffered by the plaintiff.”).

<sup>58</sup> *Grigsby v. Coastal Marine Serv. of Tex., Inc.*, 235 F. Supp. 97, 108 (W.D. La. 1964) (“A review of the Louisiana jurisprudence convinces this Court that

the causation requirement in negligence is the addition of a consequential fault requirement to a behavioral fault requirement.<sup>59</sup> In this way, negligence embraces the same no harm, no foul principle as the pick-up basketball game.<sup>60</sup>

In contrast to the no harm, no foul commitment of tort law, criminal law will impose formal liability on persons who possess only behavioral fault and not consequential fault.<sup>61</sup> Inchoate crimes like the various versions of conspiracy, attempt, and solicitation threaten potentially severe criminal sanctions in response to behavior that is deemed antisocial, but that has not in fact resulted in any actual harm.<sup>62</sup>

Why might tort law adopt such a strikingly different posture than does criminal law with respect to the matter of imposing formal liability in response to only behavioral fault? Why does tort law adhere so closely to a no harm, no foul principle of liability when criminal law so clearly, and so increasingly, does not?

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‘fault’ . . . may be succinctly defined as a breach of duty or a want of that degree of care required in a given case.”); *Reed v. Weber*, No. 2014-CA-002030-MR, 2016 WL 3661909, at \*1 (Ky. Ct. App. July 1, 2016) (“For fault to be placed on either party, a party must have breached his duty . . . .” (emphasis omitted)); Marc S. Firestone, *Problems in the Resolution of Disputes Concerning Damage Caused in Outer Space*, 59 TUL. L. REV. 747, 768 (1985) (“Since the industrial revolution, common-law theories of fault-based liability have changed, but one notion has remained constant: fault-based liability does not exist in the absence of some breach of duty on the part of the defendant.”).

<sup>59</sup> See *supra* note 58 and accompanying text.

<sup>60</sup> *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 971 (1st Cir. 1991) (“A person can act negligently . . . and yet escape liability if his negligent act fortuitously does not cause injury to another.”).

<sup>61</sup> *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008) (“In tort law, unsuccessful attempts do not give rise to liability . . . . The criminal law . . . takes a different approach. A person who demonstrates by his conduct that he has the intention and capability of committing a crime is punishable even if his plan was thwarted.”).

<sup>62</sup> See Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pts. 1 & 2), 61 COLUM. L. REV. 571, 571–72, 575–76, 957 (1961); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. LEGIS. 1, 1 (1989) (“American criminal law treats the inchoate crimes of attempt, conspiracy, and solicitation as substantive offenses punishable by criminal sanctions. The legal system criminalizes the types of behavior that constitute these offenses to intervene before an actor completes the intended illegal act.”).

One approach to these questions is to consider in more detail the nature of life in a community in which a negligence-based compensation system without a causation requirement of the sort imagined above has been established and is in operation. Persons who have experienced harm not due to their own fault under such a regime would create a significant demand for evidence of unreasonably careless conduct by another of the sort that would qualify them for compensatory benefits.<sup>63</sup> It would likely not take long before a cottage industry developed that would satisfy this demand.<sup>64</sup> In this way, an extensive network of private surveillance and evidence collection would begin to permeate the affected community.<sup>65</sup> Private citizens, either directly or through organized third-parties, would have a strong incentive to aggressively monitor the observable behavior of their fellow citizens for admissible evidence of unreasonably careless behavior.<sup>66</sup>

Is such a scenario entirely speculative and imagined? Hardly.<sup>67</sup>

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<sup>63</sup> See *infra* notes 64–67 and accompanying text.

<sup>64</sup> Such business opportunities have developed in areas where the law has created incentives for private citizens to pursue fellow private citizens concerning legal matters on behalf of the government. Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 200–04 (2009) (describing that bounty hunting by private citizens is common in the United States and has been part of the American criminal justice landscape since the eighteenth century).

<sup>65</sup> Emily Michael Stout, *Bounty Hunters as Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment When Working with the Police?*, 65 U. CIN. L. REV. 665, 666 (1997) (“As the number of people arrested continues to grow, bounty hunting has become a growth industry in the United States.”).

<sup>66</sup> One area of law in which there is a long history of private, for-profit, organized third-party surveillance and evidence gathering against individuals in pursuit of an economic advantage in a legal action is divorce. See Kitty Hailey, *Private Investigators in Divorce Cases: An Investigator’s Viewpoint*, 12 DIVORCE LITIG. 38, 38 (2000) (“The role of a trained and licensed private investigator as a nonpartial, objective gatherer of evidence is immensely valuable in the field of divorce litigation.”).

<sup>67</sup> Choe Sang-Hun, *Help Wanted: Busybodies with Cameras*, N.Y. TIMES (Sept. 28, 2011), <https://www.nytimes.com/2011/09/29/world/asia/in-south-korea-where-digital-tattling-is-a-growth-industry.html>. In South Korea, the government in recent years has established various programs that offer private citizens financial bounties for providing to the government evidence of the commission of mainly minor crimes by their fellow citizens, “some as minor as a motorist tossing a cigarette butt out the window.” *Id.* As a result, “snitching for pay has become

Under the negligence-based compensation system considered above, this citizen-on-citizen monitoring and surveillance activity would be motivated by the prospect of the receipt of compensatory benefits—a sometimes substantial financial incentive.<sup>68</sup> In addition, each instance of successful evidence collection and submission would result in the imposition of legal liability, sometimes substantial, on the actor so ensnared.<sup>69</sup>

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especially popular” and resulted in large numbers of South Koreans who, encouraged by news reports of individuals who earn tens of thousands of dollars a year reporting crimes, “roam cities secretly videotaping fellow citizens breaking the law, deliver the evidence to government officials and collect the rewards.” *Id.* Reportedly, “the phenomenon is large enough that it has spawned a new industry: schools set up to train aspiring paparazzi [as these bounty hunters are typically called].” *Id.*

Only imaginable in countries outside of the United States? Again, hardly. See Michael Wilson, *\$87.50 for 3 Minutes: Inside the Hot Market for Videos of Idling Trucks*, N.Y. TIMES (Mar. 19, 2022) <https://www.nytimes.com/2022/03/19/nyregion/clean-air-idle-car.html> (reporting on New York City’s “Citizens Air Complaint Program, a public health campaign that invites — and pays — people to report trucks that are parked and idling for more than three minutes, one minute if outside a school. Those who report collect 25 percent of any fine against a truck by submitting a video just over 3 minutes in length that shows the engine is running and the name of the company on the door. The program has vastly increased the number of complaints of idling trucks sent to the city, from just a handful before its creation in 2018 to more than 12,000 last year.”).

<sup>68</sup> The impulse of some individuals to engage in private surveillance and evidence gathering against fellow citizens does not always require a prospective financial incentive to be activated. Monica R. Shah, *The Case for a Statutory Suppression Remedy to Regulate Illegal Private Party Searches in Cyberspace*, 105 COLUM. L. REV. 250, 250 (2005) (“In a recent bout of vigilantism, private parties have independently pursued investigations of suspected criminals through searches on the internet . . . . In several cases, courts have admitted the fruits of intrusive, and probably illegal, private party searches of computers belonging to suspected criminals.”).

<sup>69</sup> See Fisher, *supra* note 64, at 204–05 n.38 (“[T]he common law is clear that a surety on a bail bond, or his appointed deputy, may take his principal into custody wherever he may be found, without process, in order to delivery him the proper authority so that the surety may avoid liability on the bond. So long as the bounds of reasonable means needed to effect the apprehension are not transgressed, and the purpose of the recapture is proper in the light of the surety’s undertaking, sureties will not be liable . . . .” (citations omitted)).

Given these likely consequences, it could be argued that tort law has embraced, and continues to embrace, a no harm, no foul principle of liability out of concern that normal life in the absence of such a limitation on civil liability would become intolerable.<sup>70</sup> Much like the pick-up basketball game, the primary goal is to live (to play), not to enforce the rules and norms of communal life (the game). Monitoring and enforcement of behavioral rules and standards should serve the purposes of enhancing the quality of life in the relevant community; the quality of life should not suffer in service to more aggressive and thorough monitoring and enforcement of those rules and standards.<sup>71</sup>

If this analysis is sound, then why would criminal law not join tort law in embracing and internalizing a no harm, no foul principle of liability? Recently, one might argue that the development of relatively inexpensive systems of enforcement, like passive speed and red light cameras, have introduced a powerful revenue motive for governments to pursue criminal liability in response to citizen behavior that demonstrates behavioral fault, but not consequential fault.<sup>72</sup> However, the existence of inchoate crimes, such as conspiracy, attempt, and solicitation, long predate the modern era of highly profitable enforcement of undesirable behavior that in fact causes no concrete harm.<sup>73</sup>

One possible answer to the existence of these contrasting approaches lies in the difference between the plaintiffs—the moving

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<sup>70</sup> Steven A. Glazer, *Those Speed Cameras are Everywhere: Automated Speed Monitoring Law, Enforcement, and Physics in Maryland*, 7 J. BUS. & TECH. L. 1, 2 (2012) (“[S]peed camera violations now clog the district courts of Maryland and normally prudent and reasonable drivers feel preyed upon by the ubiquitous traps.”).

<sup>71</sup> See *id.*

<sup>72</sup> See Jamison, *supra* note 38; Medici, *supra* note 38; see also Joel O. Christensen, *Wrong on Red: The Constitutional Case Against Red-Light Cameras*, 32 WASH. U. J. L. & POL’Y 443, 443 (2010) (“Though the marriage of surveillance technology and law enforcement hardly is a new phenomenon, the twentieth-century has proven to be a brave new world in this realm.”).

<sup>73</sup> See generally Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L. J. 789, 790–812 (1940) (discussing the history of inchoate crimes, especially attempt); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922) (discussing the history of conspiracy laws); JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 82–83 n.6–39 (1979) (collecting sources discussing the history of solicitation laws).



parties seeking liability—in the two systems.<sup>74</sup> In tort law, the plaintiff is overwhelmingly a private citizen who is pursuing a tort claim that will potentially generate a personal monetary benefit for that individual.<sup>75</sup> When considering the prospect of seeking tort liability against possible defendants, such an injured individual is not required, and is generally not expected, to take into account larger societal interests and values, such as whether greater overall deterrence for behavior like the defendant's is at the present time socially beneficial, or whether the likely amount of eventual liability imposed on the defendant is reasonably and fairly proportionate to the larger societal culpability of that behavior.<sup>76</sup> A given plaintiff's analysis of whether to bring a tort claim, what specific tort claim to bring, and how aggressively to pursue the claim will almost always be economic and individual in nature.<sup>77</sup>

In contrast, the criminal law system has a structural element of public prosecutorial discretion.<sup>78</sup> Overwhelmingly, actual criminal prosecution of behaviorally blameworthy conduct does not commence, or continue, until a public official has reviewed the matter and made an affirmative decision that criminal prosecution is in the best interests of the community.<sup>79</sup> Moreover, enforcement activity in the realm of criminal law typically involves significant triage,

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<sup>74</sup> Coleman, *supra* note 43, at 1249.

<sup>75</sup> *See id.*

<sup>76</sup> *See* Weinrib, *supra* note 31, at 408 (“From the standpoint of the injured party, it matters little whether the harm was negligently caused [or pursuing a negligence action serves a social function].”).

<sup>77</sup> *See* Shavell, *supra* note 32, at 113.

<sup>78</sup> Rebecca Krauss, Note, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 2 (2009) (“Prosecutorial discretion is a central component of the federal criminal justice system.”); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490 (2017) (“Prosecutorial discretion is most commonly conceived of in the criminal context, wherein prosecutors routinely make determinations about which cases to bring, how vigorously to pursue them, and if and when to abandon a prosecution.”).

<sup>79</sup> WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.9(c) (3d ed. 2007) (“There is universal agreement in the modern commentary as to the central role of discretionary authority in the administration of the criminal justice process.”); Nancy C. McCurley, *Prosecutorial Discretion*, 71 GEO. L. J. 449, 449 (1982) (“The prosecutor has broad authority to decide what charges to bring, when to bring them, and whether to prosecute.”).

whereby limited enforcement resources are allocated on the basis of perceived larger societal interests.<sup>80</sup>

It is the near omnipresence in the criminal law system of processes by which both enforcement and prosecution resources and activities are deployed on the basis of larger societal interests that makes tolerable the presence of criminal law liability in response to behavior that is antisocial but does not in fact cause harm.<sup>81</sup> Tort law, lacking any such mechanism or filter, has developed its doctrine in a way that excludes civil liability for such behavior.

How does the analysis thus far help in determining the social purpose underlying the causation requirement in negligence?

It allows us to say with some meaning that the causation requirement in negligence exists to ensure that all defendants who are held liable for negligence possessed not just behavioral fault under the circumstances, but also possessed more specific consequential fault for the harm suffered by the plaintiff.<sup>82</sup> In order to be liable for negligence when negligence requires causation, the defendant must at least have acted in a faulty manner (satisfying the breach element) and that breaching behavior must have resulted in actual harm to the plaintiff (satisfying the actual cause requirement).<sup>83</sup> The defendant must have been, in a sense, at least doubly at fault, not just at first-level behavioral fault.<sup>84</sup> In other words, the causation requirement includes in the basic design of the negligence tort a no harm, no foul principle, much like the pick-up basketball game.<sup>85</sup>

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<sup>80</sup> F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 330–31 (2021) (“Prosecutors must make decisions about which cases to pursue based on the strength of available evidence. They also must make choices because they do not have enough resources to enforce the law every time it is violated. These resource constraints may lead law enforcement to prioritize one type of crime over another.”).

<sup>81</sup> *See id.*

<sup>82</sup> *See Coleman, supra* note 28, at 370.

<sup>83</sup> *See Houston v. Frog’s Rest., LLC*, 513 F. Supp. 3d 235, 242 (D.P.R. 2021) (“Once a plaintiff has demonstrated that the defendant was negligent (breached the duty of care), he or she must then demonstrate that the defendant’s negligence actually caused her injuries . . .”).

<sup>84</sup> *See id.*

<sup>85</sup> *See Daniels v. Aldridge Pite Haan*, No. 5:20-cv-0089-TES, 2020 WL 3866649, at \*1 (M.D. Ga. Jul. 8, 2020).

Causation in negligence does more, however.<sup>86</sup> The causation requirement not only limits legal liability to those defendants who both fouled and harmed, it further limits liability to only those defendants who are thought to be genuinely socially responsible—morally and socially to blame—for the plaintiff being burdened with the harm for which he or she seeks forced compensation by way of the negligence tort.<sup>87</sup>

Requiring genuine social responsibility is not necessary for the feasible operation of a negligence-based compensation system, no more than is requiring causation at all.<sup>88</sup> It is a normative choice, a value judgment. It is the consequence of a decision not to impose the power of the state to force an involuntary transfer of assets from one individual to another through the civil action of negligence unless the target of that power, the defendant, is found to have been genuinely socially responsible for the recipient's, the plaintiff's, harm.<sup>89</sup> It is the consequence of a larger social judgment to apply a notion of just deserts to the formal imposition of negligence liability.<sup>90</sup>

Whether or not such a requirement ever was warranted, and whether it still is, can be the subject of legitimate and rich debate.<sup>91</sup> My claim here is not that negligence must include such a requirement or that society and the individuals within it are better off when negligence does include such a requirement. Instead, my claim is

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<sup>86</sup> See Coleman, *supra* note 28, at 370.

<sup>87</sup> See *id.*

<sup>88</sup> See *supra* notes 28–36 and accompanying text.

<sup>89</sup> Jules L. Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 549–50 (2012) (“From the normative point of view, the successful tort suit renders the defendant vulnerable to the plaintiff’s power to impose an evil upon him. . . . This means that the elements of the tort [of negligence] align insofar as, taken together, they warrant the conferral of a power to impose an evil (a liability) on the defendant.”).

<sup>90</sup> See *United States v. Vue*, 865 F. Supp. 1353, 1360 (D. Neb. 1994) (“[T]he [United States Sentencing Commission] Guidelines attempt to implement the principle of ‘just deserts’; that is, punishment should be scaled to the offender’s culpability and the resulting harm.”).

<sup>91</sup> This debate, in more recent times, has been most productively and notoriously between law and economic and corrective justice theorists. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); SHAVELL, *supra* note 33; LANDES & POSNER, *supra* note 25; COLEMAN, *supra* note 4; ERNEST WEINRIB, *THE IDEA OF A PRIVATE LAW* (1995); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999).

that the existence of the causation requirement that in fact exists in negligence (and to some extent more generally in tort law) is best explained and understood as serving the purpose of requiring of all liable defendants genuine social responsibility for the plaintiff's harm.<sup>92</sup> In other words, causation, as that doctrine is currently configured, exists in negligence in order to restrict liability generated by that tort to only those defendants who are properly thought to be blamed for the plaintiff's injury, who are genuinely and fully responsible for it.<sup>93</sup>

One test for the likely validity of this claim is the degree to which it explains and gives useful meaning to long-standing, and still current, causation doctrine.<sup>94</sup> To what extent does the law of causation in negligence conform to the purposes of advancing this underlying social value? To the extent that the claim appears valid, it then offers a useful and powerful way to understand, to rationalize, and to implement causation doctrine moving forward.<sup>95</sup>

#### IV. THE WAYS IN WHICH CAUSATION DOCTRINE CONFORMS TO AN UNDERLYING POLICY OF LIMITING NEGLIGENCE LIABILITY TO THOSE DEFENDANTS WHO ARE GENUINELY SOCIALLY RESPONSIBLE FOR THE PLAINTIFF'S HARM

From the perspective of pursuing the goal of restricting negligence liability to only those genuinely socially at fault for the plaintiff's harm—to those who are appropriately morally blameworthy—the design of causation doctrine can be seen as akin to an attempt to hit and to completely cover a specified target, like the old boardwalk arcade booths at which a patron tries to completely shoot out a star

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<sup>92</sup> COLEMAN, *supra* note 4, at 381 (“[The tort victim’s] claim is valid only if (in most cases) he can show that his loss is the result of the injurer’s fault or is otherwise the injurer’s responsibility. The victim brings an action against his injurer because his (the victim’s) claim to compensation as a matter of justice is based on his claims about what the injurer *did* to him . . .”).

<sup>93</sup> *Id.* at 374 (“[T]he [tort] victim is usually required to show that the person he seeks to have held liable to him is responsible in the relevant way for his loss. Therefore, in a typical tort suit in which the victim has a legitimate claim to repair in justice, her loss is imposed on the individual responsible for the loss.”).

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

target with pellets from a BB gun.<sup>96</sup> In this case, the ammunition is the legal liability generated by the negligence tort and the target is those defendants, and only those defendants, who are genuinely socially responsible for the plaintiff's harm.<sup>97</sup> Black letter causation doctrine can be said to be better designed to the extent that the pattern of liability it helps to generate conforms to the intended target, and it can be said to be worse to the extent that the pattern of liability it helps to generate is either overinclusive or underinclusive of that target.<sup>98</sup>

Without the causation requirement, the prima facie case of negligence requires only "behavioral fault."<sup>99</sup> Behavioral fault involves the defendant having acted in a way that violates an existing behavioral norm or rule.<sup>100</sup> The existence of behavioral fault by the defendant in a negligence case is ensured by satisfaction of the breach element of the prima facie case.<sup>101</sup> There can be no fault by, and no appropriate moral blaming of, the defendant for the harm experienced by the plaintiff if the defendant's behavior, no matter how much it might have been the physical cause of the plaintiff's harm, was itself not blameworthy.<sup>102</sup>

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<sup>96</sup> See *Shoot Out the Star*, PALADIN AMUSEMENTS, <http://www.paladinamusements.com/shoot-out-the-star> (last visited Sept. 28, 2022). Another analogy might be a combination of Venn diagram ovals in which the merger of duty, breach, actual cause and proximate cause overlap to as closely as possible coincide with genuine social responsibility. See *Stewart v. Federated Dept. Stores, Inc.*, 662 A.2d 753, 758 (Conn. 1995) ("In other words, legal cause can be portrayed pictorially as a Venn diagram, with the circle representing cause in fact completely subsuming the smaller circle representing proximate cause, which specifically focuses on that which we define as legal causation."); see also *State v. Turay*, 493 P.3d 1058, 1063–65 (Or. Ct. App. 2021) (analyzing the existence of constitutional probable cause as the overlap of three Venn diagram circles representing crime, evidence, and location). Such an analogy, however, would lack the boardwalk ambiance of the shoot-out-the-star carnival game. Moreover, I have no fond childhood memories of Venn diagrams.

<sup>97</sup> *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 971 (1st Cir. 1991) ("A person can act negligently . . . and yet escape liability if his negligent act fortuitously does not cause injury to another.").

<sup>98</sup> See *Doull v. Foster*, 163 N.E.3d 976, 991 (Mass. 2021).

<sup>99</sup> See *supra* notes 52–57 and accompanying text.

<sup>100</sup> See *Coleman*, *supra* note 28, at 370.

<sup>101</sup> See *supra* note 58 and accompanying text.

<sup>102</sup> See *Coleman*, *supra* note 28, at 370.

So, causation doctrine operates within negligence in an environment in which one aspect of genuine social responsibility—behavioral fault—is already accounted for, and causation doctrine need not therefore cover that contingency.<sup>103</sup>

What remains to be done? At the very least, causation doctrine needs to ensure the existence in every case of what I have called “consequential fault.”<sup>104</sup> As discussed above, both behavioral fault (norm violating behavior by the defendant) and consequential fault (that behavior actually causing harm) are required in order to appropriately trigger liability in a system that embraces a no harm, no foul principle.<sup>105</sup>

Ensuring the existence of consequential fault is the primary work of the actual cause prong of the causation requirement.<sup>106</sup> That work is primarily done by the but-for test of causation, requiring the plaintiff to establish that the defendant’s breaching behavior was part of the chain of actual, physical causation that extended from that breaching behavior to the harm suffered by the plaintiff and for which the plaintiff is seeking compensation from the defendant by means of the negligence claim.<sup>107</sup>

## V. THE UNDERINCLUSIVE PROBLEM OF ACTUAL CAUSE

The but-for test of actual cause performs exceptionally well in terms of it including within negligence liability all defendants who are properly thought to be genuinely socially responsible for the

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<sup>103</sup> *See id.*

<sup>104</sup> *See supra* notes 52–55 and accompanying text.

<sup>105</sup> A person’s tortious conduct need only be a cause of the plaintiff’s harm and not the sole cause. *Peterson v. Gray*, 628 A.2d 244, 246 (N.H. 1993) (“[A] plaintiff does not have to show that a defendant’s negligence was the sole cause of his or her injuries.”); *Holmes v. Levine*, 639 S.E.2d 235, 239 (Va. 2007) (confirming that “more than one proximate cause” can exist.).

<sup>106</sup> *See* Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 *YALE L.J.* 1353, 1353–55, 1373–76 (1981) (asserting that causation is a distinct aspect from harm and damages).

<sup>107</sup> David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 *TENN. L. REV.* 1127, 1129 (1999) (“Courts generally use the ‘but-for’ test to determine what harm was caused by an injury.”); Michael S. Moore, *Causation and Responsibility*, 16 *SOC. PHIL. & POL’Y* 1, 8 n.34 (1999) (but-for is the “dominant test for cause-in-fact”).

plaintiff's harm.<sup>108</sup> It is, in this respect, one of the great products of the common law.<sup>109</sup> Using a straight-forward, elegant formulation that is relatively easy for laypersons on juries to understand and employ, the but-for test effectively captures nearly all instances of negligence defendants who would be generally regarded as being socially responsible, and therefore at fault for, the plaintiff's injuries.<sup>110</sup> From the perspective of avoiding mistakes of under inclusiveness, the but-for test should be credited with being excellent.<sup>111</sup>

Excellent, but not perfect. There are two well-known exceptions to the but-for test as the means of determining whether or not actual cause can be established in a negligence action.<sup>112</sup> Both respond to relatively rare instances of under inclusiveness.<sup>113</sup>

### A. Concurrent Cause

The more common of the two exceptions is generally known as concurrent cause.<sup>114</sup> It arises in cases in which there existed more

<sup>108</sup> See Moore, *supra* note 107, at 8.

<sup>109</sup> See generally *id.* at 8, n.34.

<sup>110</sup> See Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 626 (1992) (“[T]he concept of causation . . . seems to be intuitively comprehended and applied to particular situations in a fairly consistent fashion, without any explicit elaboration of the precise content of the concept.”); David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1010 (2009) (“In defining factual causation as but-for causation, tort law exhibits the conspicuous virtue of cleaving to the views of its constituency. And demonstrably judges and jurors use the but-for test on a daily basis to do good routine work.” (footnotes omitted)).

<sup>111</sup> PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 95 (5th ed. 1993) (“In the great majority of cases, this requirement of ‘but-for’ or ‘factual causation’ gives rise to no practical difficulties.”).

<sup>112</sup> STEVEN L. EMANUEL, *TORTS* Ch. 6, § I.C–D (10th ed. 2015).

<sup>113</sup> See *id.*

<sup>114</sup> Restatement (Third) of Torts chooses to call this doctrine “multiple sufficient causes,” though it remains widely known as the concurrent cause doctrine. See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 27 (AM. L. INST. 2010); *Stahl v. Metro. Dade Cnty.*, 438 So. 2d 14, 18 (Fla. Dist. Ct. App. 1983) (“In these so-called ‘concurrent cause’ cases [where each of the concurrent causes alone could have produced-in-fact the plaintiff’s injury], the Florida courts have abandoned *sub silentio* the ‘but for’ test and have employed instead a ‘substantial factor’ test for the obvious reason that adherence to the ‘but for’ test in this limited type of case leads to anomalous and unacceptable results.”) (alteration in original); see also EMANUEL, *supra* note 112, at Ch. 6, § I.B. See

than one sufficient actual cause for the plaintiff's harm.<sup>115</sup> In such cases, the but-for test is overwhelmed by multiple sufficient actual causes and, as a result, excludes as a legal actual cause of the plaintiff's harm, the actions of a defendant who is without much question genuinely socially responsible for that harm.<sup>116</sup>

For example, suppose that the plaintiff owns a remote cabin in a forest. Defendant 1 unreasonably carelessly starts a fire in that same forest north of the plaintiff's cabin and the fire burns toward the south. Defendant 2, independently, unreasonably carelessly starts a fire in the same forest just west of the plaintiff's cabin and that fire burns toward the east. The two separate and independent fires converge at the site of the plaintiff's cabin, and it is burned to the ground.<sup>117</sup>

In such a scenario, without some exception or alteration to the but-for test, the plaintiff would be left with no possibility of recovery

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generally Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 942 (1935).

<sup>115</sup> *Paroline v. United States*, 572 U.S. 434, 451 (2014) (“[T]he ‘most common’ exception to the but-for causation requirement is applied where ‘multiple sufficient causes independently . . . produce a result.’” (quoting *Burrage v. United States*, 571 U.S. 204, 214 (2014))); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 Reporters’ Note, cmt. a (AM. L. INST. 2010) (“There is near universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist.” (citations omitted)).

<sup>116</sup> Sometimes this phenomenon is described by saying that the plaintiff's harm was overdetermined. *See Wright, supra* note 4, at 1775 (defining overdetermined causation as “cases in which a factor other than the specified act would have been sufficient to produce the injury in the absence of the specified act, but its effect either (1) were preempted by the more immediately operative effects of the specified act or (2) combined with or duplicated those of the specified act to jointly produce the injury.”); L.E. Loeb, *Causal Theories and Causal Overdetermination*, 71 J. PHIL. 525, 533 (1974) (“[I]n cases of causal overdetermination more than one minimal sufficient condition for an event is present or actually occurs.”); *see also* J.L. Mackie, *THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION* 43–47, 164–165 (1974).

<sup>117</sup> *See Kingston v. Chi. & Nw. Ry. Co.*, 211 N.W. 913, 914 (Wis. 1927) (describing the facts of two fires combining to create one); *Anderson v. Minneapolis, St. Paul & S.S. M. Ry.*, 179 N.W. 45 (Minn. 1920) (describing the facts of two fires combining to create one).



through a negligence claim.<sup>118</sup> The plaintiff would be unable, factually, to establish that the actions of either Defendant 1 or Defendant 2 were, separately and independently, a but-for actual cause of the harm.<sup>119</sup> This is the case because in the complete absence of Defendant 1's carelessness, the plaintiff would have nevertheless suffered the same harm, thus excluding Defendant 1's carelessness as a but-for cause of the harm.<sup>120</sup> The same analysis and conclusion apply to Defendant 2's carelessness in this situation. There being no such thing in law under these circumstances as "Defendant 1 and Defendant 2" together, treated as a single, unified entity against whom the but-for test could be established,<sup>121</sup> the plaintiff is left without a successful negligence claim against either one alone, meaning that the plaintiff is left with no successful negligence claim at all.<sup>122</sup>

In such, and similar, circumstances, courts have labeled the unreasonably careless actions of both Defendant 1 and Defendant 2 as "concurrent causes" and have altered the actual causation instruction provided to the jury from the but-for test to a question of whether the individual defendant's breaching behavior was a "substantial

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<sup>118</sup> See *Doull v. Foster*, 163 N.E.3d 976, 991 (Mass. 2021) ("Therefore, in the rare case presenting the problem of multiple sufficient causes, the jury should receive additional instructions on factual causation [in addition to the but-for test]. Such instructions should begin with the illustration from the Restatement (Third) of the twin fires example so that the complicated concept can be more easily understood by the jury. After the illustration, the jury should be instructed, 'A defendant whose tortious act was fully capable of causing the plaintiff's harm should not escape liability merely because of the happenstance of another sufficient cause, like the second fire, operating at the same time.'" (footnote omitted)).

<sup>119</sup> See *Maxwell v. KPMG LLP*, 520 F.3d 713, 716 (7th Cir. 2008) ("There are also cases in which a condition that is not necessary, but is sufficient, is deemed the cause of an injury, as when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself and so was not a necessary condition; yet each of the firemakers (if negligent) is liable to the plaintiff for having 'caused' the injury." (citations omitted)).

<sup>120</sup> See *Doull*, 163 N.E.3d at 985.

<sup>121</sup> See *id.*

<sup>122</sup> *DOBBS*, *supra* note 24, at 414–15 (2000) ("When each of two or more causes would be sufficient, standing alone, to cause the plaintiff's harm, a literal and simple version of the but-for test holds that neither defendant's act is a cause of the harm. . . . [A] court that applied the unvarnished but-for test here would effectively bar the victim from any recovery from either of the two negligent defendants.").

factor,” or, in some jurisdictions, a “material element,” in the physical infliction of harm on the plaintiff.<sup>123</sup> Such an alteration of the legal test for actual cause would, in a situation such as the one described above, permit a jury to find that either or both of the Defendants were an actual cause of the harm to the plaintiff’s cabin, even though the actions of each Defendant, separately, clearly do not satisfy the usual but-for test of actual cause.<sup>124</sup>

Why would courts over a long period of time recognize these concurrent cause cases as requiring some alteration to the usual but-for test for actual cause? What is unacceptably wrong with the result dictated by the use of the usual but-for test of actual causation in these cases?<sup>125</sup>

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<sup>123</sup> *Vecchione v. Carlin*, 111 Cal. App. 3d 351, 359 (Cal. Ct. App. 1980) (“In those few situations, where there are concurrent causes, our law provides one cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it. The proper rule for such situations is that the defendant’s conduct is a cause of the event because it is a material element and a substantial factor in bringing it about.” (citations omitted)); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 Reporters’ Note, cmt. j (AM. L. INST. 2010) (“In the instance of multiple sufficient causes, however, the substantial factor test can be useful because it substitutes for the but-for test in a situation in which the but-for test fails to accomplish what the law demands. Many courts reserve its use for that specific situation.”); *Verdicchio v. Ricca*, 843 A.2d 1042, 1056 (N.J. 2004) (employing the substantial-factor test and justifying its use based on necessity when there are multiple sufficient causes in a case).

<sup>124</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j (AM. L. INST. 2010) (“[S]ome courts have accepted the proposition that, although the plaintiff cannot show the defendant’s tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm.”).

<sup>125</sup> Though acknowledgment and description of concurrent cause cases and the exception that they represent to the but-for test for actual cause is prevalent in the negligence literature, there is a striking lack of satisfying explanation for this phenomenon. Often, the policy challenge that these kind of cases pose to the but-for test is assumed, or simply stated as if self-evident. *See infra* note 139 and accompanying text; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM. § 27 cmt. c (AM. L. INST. 2010). Uncomplicated application of the but-for test to the facts presented in these cases results clearly and unambiguously in a conclusion that none of the defendants are a but-for cause of the harm suffered by the plaintiff and would mean that the plaintiff could hold none of them liable. Why, exactly, is this an unacceptable result?

The answer suggested by the understanding of the causation requirement offered herein is that the unaltered use of the usual but-for test in these cases results in an inappropriate resolution of the negligence claims in as much as it dictates a lack of liability for one or more defendants who are genuinely socially responsible for the plaintiff's harm.<sup>126</sup> In these circumstances, both Defendant 1 and Defendant 2 possess both behavioral fault and consequential fault with respect to the harm suffered by the plaintiff, and as such they are appropriate targets of liability under a no harm, no foul principle.<sup>127</sup> They are arguably genuinely socially responsible for the harm to the plaintiff's cabin.<sup>128</sup> The existence of another, independent and sufficient cause of the harm (the other fire) is not relevant to the blameworthiness of either Defendant.<sup>129</sup> The presence of another independent and sufficient cause is a coincidence in these situations that in itself does not relieve either actor from full moral and social responsibility for the harm.<sup>130</sup> In other words, each Defendant is as much at fault (at every level) for this injury despite the other actor's existence and actions.<sup>131</sup>

The fundamental purpose of the causation requirement is the limiting of negligence liability to only those defendants who are genuinely socially responsible for the harm to the plaintiff.<sup>132</sup> One is not genuinely socially responsible if one did not actually cause the harm to occur.<sup>133</sup> In the overwhelming percentage of circumstances, whether a person actually caused harm to another can be determined by asking whether the harm would have nevertheless been experienced by the plaintiff even in the absence of the defendant's behavior.<sup>134</sup> In relatively unusual circumstances, however, the but-for test is overwhelmed by multiple sufficient causes of the plaintiff's

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<sup>126</sup> See *Verdicchio*, 843 A.2d at 1056.

<sup>127</sup> See Moore, *supra* note 107, at 10; see also *Daniels v. Aldridge Pite Haan, LLP*, No. 5:20-cv-00089-TES, 2020 WL 3866649, at \*1 (M.D. Ga. July 8, 2020).

<sup>128</sup> See *Kingston v. Chi. & Nw. Ry. Co.*, 211 N.W. 913, 914 (Wis. 1927).

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See Moore, *supra* note 107, at 1.

<sup>133</sup> See *id.*

<sup>134</sup> See *Kingston*, 211 N.W. at 915.

harm.<sup>135</sup> In these cases, the but-for test comes out wrong in terms of its fundamental purpose as it identifies certain behavior as not being a legal actual cause of the harm when a jury might well reasonably conclude that the person who engaged in that behavior was genuinely socially responsible for it.<sup>136</sup> In such circumstances, the but-for test, seen through the lens of its underlying function in the negligence tort, is underinclusive, and therefore not performing its policy function appropriately.<sup>137</sup>

The alternative to the but-for test for actual cause used by courts in cases of concurrent cause—that the defendant’s unreasonably careless behavior was a substantial factor, or a material element, in the infliction of harm upon the plaintiff—provides the jury an opportunity to find the defendant liable to the plaintiff for negligence if they believe that the defendant was genuinely socially responsible for the plaintiff’s experience of harm, an opportunity not reasonably available to them if they are required to use the but-for test to determine actual cause.<sup>138</sup>

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<sup>135</sup> *United States v. Monzel*, 746 F. Supp. 2d 76, 86 (D.D.C. 2010) (“In cases such as these where there are ‘multiple sufficient causes’ of the injury, courts generally regard but-for or factual causation as inappropriate.” (citations omitted)).

<sup>136</sup> Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1128–29 (1934) (emphasizing that the application of the substantial factor test to all cases of multiple causation leads to troublesome outcomes).

<sup>137</sup> The critical advantage of either the substantial factor or the material element test for actual cause as a substitute for the but-for test is that they are less fixed and determined and far more factually vague, thus more flexible. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. c (AM. L. INST. 2010). In concurrent cause cases, for example, no one can reasonably say that one cause alone (and thus any one defendant) was a but-for cause of the harm. *See id.* at § 27 cmt. a. Such a conclusion by the trier of fact should not survive scrutiny by the trier of law. *See id.* In contrast, it is far more difficult to say with similar confidence that no one cause alone was not a substantial factor, or a material element, in the infliction of the harm on the plaintiff. *See id.* at § 27(c). Thus, the alternative tests permit an actual cause decision in favor of the plaintiff that can survive scrutiny by the trier of law when the but-for test does not. *See Monzel*, 746 F. Supp. 2d at 86. It is this very flexibility of result that recommends both substantial factor and material element as substitute tests for actual cause in concurrent cause cases rather than any technical advantage that they enjoy in accurately identifying actual causation in fact. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. c (AM. L. INST. 2010).

<sup>138</sup> This practical consequence of the concurrent cause doctrine is recognized, and then decried, by Robert J. Peaslee. Peaslee, *supra* note 136, at 1128–29

Recognizing that the concurrent cause doctrine and its alternative tests for actual cause function in this manner and for these purposes lead the way to the formulation of an appropriate test, or threshold, to be used by courts in deciding whether or not to declare a given set of circumstances a concurrent cause situation. At present, such a test is strikingly absent in the cases and the academic literature on concurrent cause.<sup>139</sup> A court should determine that a given negligence case is a concurrent cause case, and should provide the jury with an alternative test for actual cause, whenever in the court's judgment: (1) a reasonable application of the but-for test to the facts of the case should result in a determination of no actual cause; and (2) a reasonable juror could nevertheless conclude based on the facts that the defendant was genuinely socially responsible for the plaintiff's harm.

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(“Even though the defendant’s act was not a necessary factor and the same result would have ensued without it, the jury are to decide whether or not it was a substantial factor, and fix liability or non-liability accordingly. What is it that the jury are to consider in such a situation? The defendant’s dereliction is conceded, and there seems to be but one test for the jury to apply. If they think that on the whole he ought to pay they will find against him, and *vice versa*.” (footnote omitted)).

<sup>139</sup> Rationales traditionally offered for the existence of the concurrent cause doctrine tend to be vague and couched in the abstract language of unfairness or common sense. For example, Restatement (Third) offers the following as a rationale for the doctrine: “Multiple sufficient causes are also factual causes because we recognize them as such in our common understanding of causation, even if the but-for test does not. Thus, the standard for causation in this Section comports with deep-seated intuitions about causation and fairness in attributing responsibility.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. c (AM. L. INST. 2010). Subsequently, in the Reporters’ Notes section to this same section 27 comment c, there is provided an illustrative series of attempts by scholars to provide a satisfying rationale for the doctrine, which includes: “Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 968 (2001) (upholding the ‘dignity of the law’ requires modifying the but-for standard)” and “March v. E & MH Stramare Pty Ltd. (1991) 171 C.L.R. 506, 516 (Austl.) (‘The cases demonstrate the lesson of experience, namely that the [but-for] test, applied as an exclusive criterion of causation, yields unacceptable results . . .’).” It also includes that “Professors Hart and Honoré do not even attempt a justification, merely observing: ‘It is perfectly intelligible that in these circumstances a legal system should treat each as the cause rather than neither, as the *sine qua non* test would require.’” *Id.* at § 27, Reporters’ Note, cmt. c.

### B. Summers v. Tice

A second instance of courts permitting negligence liability to be imposed on a defendant despite the plaintiff's clear inability to satisfy the but-for test of actual cause is illustrated by the famous case of *Summers v. Tice*.<sup>140</sup> In this case, three hunters together went out with shotguns into an open range to hunt quail.<sup>141</sup> At some point during the adventure, one hunter (eventually the plaintiff) became separated and stood uphill from the other two.<sup>142</sup> Sometime thereafter, a quail was flushed and flew between the plaintiff and the two defendants.<sup>143</sup> Both of the defendants shot in the direction of the quail, which was also in the direction of the plaintiff. One shotgun pellet struck the plaintiff in the upper lip and another stuck him in the eye, though it was the injury to the eye that was the dominant cause of harm.<sup>144</sup> There was, at that time, no means of determining from which of the two shotguns the seriously damaging pellet came, and thus no way of determining which of the defendants was the actual cause of the plaintiff's legally meaningful injuries.<sup>145</sup> The trial court found, and the Supreme Court affirmed, that the defendants acted with unreasonable carelessness in shooting as they did, and that the plaintiff was not contributorily negligent for his own injury.<sup>146</sup>

*Summers v. Tice* presents a situation in which two parties (two possible defendants) act in an unreasonably careless manner toward the plaintiff.<sup>147</sup> One of the two parties actually causes meaningful harm to the plaintiff, the other does not, and no one, including the plaintiff and the two possible defendants, will ever know who as between the two defendants is the actual harm-producer.<sup>148</sup>

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<sup>140</sup> *Summers v. Tice*, 199 P.2d 1, 1 (Cal. 1948). The doctrine illustrated by this well-known case is sometimes referred to as "alternative liability." See also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. f (AM. L. INST. 2010).

<sup>141</sup> *Summers*, 199 P.2d at 2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See id.* at 3.

<sup>146</sup> *Id.* at 2, 5.

<sup>147</sup> *See id.* at 3–4.

<sup>148</sup> *See id.* at 4.

Similar to concurrent cause cases, though in a different way, *Summers v. Tice* presents the injured plaintiff with a fatal obstacle to establishing the actual cause prong of the causation requirement, and thus prevents the plaintiff from satisfying the prima facie case for negligence. In a case like *Summers v. Tice*, the probability of either defendant having actually caused the harm to the plaintiff is exactly 50%.<sup>149</sup> The plaintiff bears the burden of establishing every element of the negligence prima facie case to a preponderance of the evidence, which, absent whatever else it might require, requires that the plaintiff establish each element as being *at least more likely than not*—a threshold which, by definition, a 50% probability cannot meet.<sup>150</sup>

Also similar to concurrent cause cases, *Summers v. Tice* presents a situation wherein a plaintiff cannot establish the actual cause requirement against at least one defendant who is genuinely socially responsible for the plaintiff's injury.<sup>151</sup> In this way, both kinds of cases feature a malfunction of the proper purpose underlying the causation requirement in which its normal operation results in the impossibility of liability being imposed on a party who has acted with unreasonable carelessness and in so doing caused the plaintiff harm for which the defendant was genuinely socially responsible.<sup>152</sup>

Unlike concurrent cause cases, however, the situation illustrated by *Summers v. Tice* cannot be satisfactorily handled by offering the jury an alternative test for actual cause, such as substantial factor or material element.<sup>153</sup> The problem posed by *Summers v. Tice* is, in a sense, more difficult than that. The plaintiff in a case like *Summers v. Tice* simply cannot establish that either defendant was any part of

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<sup>149</sup> See *id.* at 2, 3.

<sup>150</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. 1 (AM. L. INST. 2010) (“The burden of proof in civil actions requires proof by a preponderance of the evidence. . . . [A] plaintiff must prove that it is more likely than not that, if the defendant had not acted tortiously, the plaintiff's harm would not have occurred. . . . So long as the defendant's tortious conduct was more likely than not a factual cause of the harm, the plaintiff has established the element of factual cause.”); *Stinson v. England*, 633 N.E.2d 532, 537 (Ohio 1994) (“[A]n event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue.” (citations omitted)).

<sup>151</sup> See *Summers*, 199 P.2d. at 4.

<sup>152</sup> See EMANUEL, *supra* note 112, at Ch. 6, § I.C–D.

<sup>153</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. 1 (AM. L. INST. 2010).

the actual chain of events that resulted in the plaintiff's injury—any part of actual cause—by more than a 50% probability, which, as noted above, is too little to meet the preponderance of the evidence standard.<sup>154</sup> Neither defendant can be shown to have been more than 50% likely to have been the but-for actual cause of the plaintiff's injury, a substantial factor in the infliction of that injury, a material element in the actual cause of that injury, or having had any part whatsoever to play in the actual infliction of the harm.<sup>155</sup>

As such, an alteration of the but-for test for actual cause will not suffice.<sup>156</sup> A court can only provide the plaintiff relief from a situation like *Summers v. Tice* by granting the plaintiff a presumption of the satisfaction of the actual cause prong of the causation requirement, or provide the plaintiff no relief at all.<sup>157</sup> While extreme on its face, this alternative is strong remedial relief in as much as it operates as an exception to the basic legal requirement that the plaintiff bear the burden of proof for every element of the prima facie case, including the actual cause requirement.<sup>158</sup>

The analysis of the causation requirement in negligence offered herein provides a sophisticated and powerful understanding of the traditional willingness of courts in cases like *Summers v. Tice* and its progeny to provide plaintiffs with this extraordinary remedy, and the long-standing decision of the Restatements to endorse those decisions.<sup>159</sup>

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<sup>154</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. i (AM. L. INST. 2010) (“In these circumstances [such as *Summers v. Tice*], no reasonable inference could be drawn that *more likely than not* any one of the defendants' tortious conduct was a cause of the plaintiff's harm.” (emphasis in original)).

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. g (AM. L. INST. 2010).

<sup>158</sup> *See Joe W. Sanders, The Anatomy of Proof in Civil Actions*, 28 LA. L. REV. 297, 306 (1968) (“The plaintiff has the burden of proving the casual link by a preponderance of the evidence. This means the evidence should convince the trier of fact that more probably than not defendant's conduct was . . . [an actual cause of] . . . plaintiff's harm.”).

<sup>159</sup> The rationales for the doctrine offered by Restatement (Second) and Restatement (Third) are rather thin, most especially for a rule that serves as a stark exception to the usual foundational requirement that the plaintiff affirmatively establish actual causation. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. g (AM. L. INST. 2010) (“The rationale



To begin, what is the argument forwarded by defendants in cases like *Summers v. Tice* to urge courts not to create an exception to the normal operation of the actual cause doctrine, and to thereby allow that normal operation to prevent the plaintiff from satisfying the prima facie case for negligence against either defendant? The basic thrust of this argument is that allowing the plaintiff to hold these defendants liable under these circumstances would represent an exception to, and thus in a sense a violation and compromise of, the policies underlying the long-standing rule that imposes on the plaintiff the burden of proof to establish every required element of the prima facie case of negligence, including the prima facie requirement of actual cause.<sup>160</sup> There are important policies and values that support the placement of the burden of proof on the plaintiff, and there should exist important countervailing policies and values that are served whenever an exception to that rule is recognized and implemented.<sup>161</sup>

Moreover, providing the plaintiff in cases like *Summers v. Tice* an opportunity to satisfy the actual cause requirement when it cannot be done under the normal operation of the doctrine will result in both

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for shifting the burden of proof to defendants whose tortious conduct exposed the plaintiff to a risk of harm is that, as between two culpable defendants and an innocent plaintiff, it is preferable to put the risk of error on the culpable defendants.”); RESTATEMENT (SECOND) OF TORTS § 433B(3) cmt. f (AM. L. INST. 1965) (“[T]he reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.”). Neither rationale connects the exception to established tort policy, provides much of any guidance as to when the exception should and should not be allowed by courts, nor meaningfully distinguishes it from *res ipsa loquitor*.

<sup>160</sup> *Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, 514 F. Supp. 3d 369, 374 (D. Mass. 2021) (“Because causation is an essential element of a negligence claim, a plaintiff cannot prevail if evidence of causation is unavailable. . . . [A] plaintiff cannot avoid summary judgment if it is unable to show that there is greater probability than not that the accident resulted from the defendant’s negligence.” (internal citations omitted)).

<sup>161</sup> See RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 21 (1992) (recognizing a presumption of non-liability of civil defendants); Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. L. & PUB. POL’Y 647, 660–61 (1994) (arguing that a fundamental asymmetry in overall exposure, risk of error, and nature of consequence between the defendant and the plaintiff in a tort action justifies placing burdens of proof on the plaintiff).

defendants being held liable.<sup>162</sup> This means that with respect to one of the two defendants, the case will unquestionably come out wrong; one defendant will be held liable when he or she did not in fact cause the harm in question to the plaintiff.<sup>163</sup> Such a result violates the basic no harm, no foul principle embedded in the causation requirement, and thus in the negligence tort, with respect to that defendant.<sup>164</sup> It is an obvious, fully foreseeable, and unjust consequence of providing the plaintiff with an exception to the normal burden of proving actual cause to a preponderance of the evidence.<sup>165</sup>

How can plaintiffs in these cases possibly justify this kind of outcome: the intentional, cold-eyed imposition of negligence liability on a party who is known not to have caused the plaintiff the harm for which that party is being held liable (even if no one knows which party that is)? Such an outcome not only carves out for the plaintiff an exception to the usual rules regarding burden of proof, but it also carves out an exception to the requirement that negligence liability (and to a large extent tort law liability generally) be contingent upon the defendant having actually caused the harm to the plaintiff for which the defendant is being held liable.<sup>166</sup> This is not an instance of traditional strict liability—liability with causation but without fault—and is instead liability with fault but without causation.<sup>167</sup> How can this be justified?

As with the presentation by defendants, the argument by the plaintiffs in support of an extraordinary remedy in these circumstances begins by stressing that the failure to impose such an exception will also result in the foreseeable, and thus intentional, and equally cold-eyed resolution of the negligence claim against one of

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<sup>162</sup> Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation "Riddles,"* 43 TORT TRIAL & INS. PRAC. L.J. 1, 6 (2007) ("In order to solve this dilemma, the *Summers v. Tice* court shifted the burden on proof to require that defendants prove that they were not the cause of plaintiff's injury; and if defendants were unable to exculpate themselves, then both defendants would be found liable as joint tortfeasors.").

<sup>163</sup> *See id.*

<sup>164</sup> *See supra* notes 46–47 and accompanying text.

<sup>165</sup> Sanders, *supra* note 158, at 306.

<sup>166</sup> *See supra* note 150 and accompanying text.

<sup>167</sup> *See Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, 514 F. Supp. 3d 369, 374 (D. Mass. 2021).

the defendants in the wrong way.<sup>168</sup> One of these defendants did in fact act in an unreasonably careless manner and as a result actually caused tangible harm to the plaintiff.<sup>169</sup> Every purpose and policy of tort law dictates the imposition of liability upon that defendant to the compensatory benefit of the plaintiff.<sup>170</sup> In other words, there is more than one kind of mistake that can be made in the resolution of these cases: (1) the imposition of liability when it is not appropriately justified; and (2) the failure to impose liability when it is fully justified.<sup>171</sup> Part of what makes situations like *Summers v. Tice* so endlessly interesting to students and scholars of tort law is that they present a circumstance in which either one or the other of the mistakes must be made.

Given the inevitability of at least one bad outcome no matter how courts choose to resolve the issue of actual cause in this class of cases, are there reasons to prefer one kind of mistake over the other? Plaintiffs could argue that there are.

What are the more specific tort law policy costs and benefits attached to each possible resolution of these kinds of cases? If the plaintiff is granted relief by the court from the actual cause dilemma, then both defendants will be held liable.<sup>172</sup> This outcome will, with respect to one of the two defendants, violate the no harm, no foul principle of actual cause (and negligence), and thereby violate the norm that negligence liability should only be imposed when the defendant was genuinely socially responsible for the harm inflicted upon the plaintiff.<sup>173</sup> However, while one of the two defendants did not possess consequential fault for the plaintiff's injuries, he did possess behavioral fault in as much as he acted in an unreasonably careless manner.<sup>174</sup> Thus, this resolution of the claim, while in violation of the no harm, no foul principle, does result in deterrence of the defendant's unreasonably careless behavior.<sup>175</sup> It also serves the

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<sup>168</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. b (AM. L. INST. 2010).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* at § 29 cmt. e.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

basic compensation goal of tort law by providing the plaintiff with an additional source of assets for recovery and rehabilitation.<sup>176</sup>

Put differently, it could be argued that by granting the plaintiff in these kind of cases a presumption of the satisfaction of the actual cause requirement of the prima facie case, courts can advance, even with respect to the defendant who did not in fact cause any harm, both an appropriate deterrence objective and an appropriate compensation objective. However, achieving such objectives will come at the cost of violating the no harm, no foul principle of negligence liability.<sup>177</sup> In addition, the court gets it entirely correct with respect to the defendant who did in fact cause the plaintiff injury by his unreasonably careless act.<sup>178</sup>

What is the contrasting account of costs and benefits if the court instead denies the plaintiff any relief on the actual cause requirement and neither defendant is held liable? With respect to the defendant who did in fact cause the harm, the court gets it entirely wrong and thereby forgoes an appropriate opportunity for deterrence and compensation. Additionally, the outcome also violates, in the negative, the no harm, no foul principle.<sup>179</sup> With respect to the defendant who did not cause harm, an appropriate opportunity for deterrence and compensation is missed, though the no harm, no foul principle is appropriately honored.<sup>180</sup>

Given the choice set forth in these terms, it seems less surprising, and less extraordinary, that courts in the *Summers v. Tice* line of authority have chosen to grant plaintiffs the necessary relief with respect to actual cause.<sup>181</sup>

This way of analyzing and understanding the actual cause requirement of negligence offers courts confronting similar *Summers*

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<sup>176</sup> *Id.*

<sup>177</sup> See *supra* notes 46–47 and accompanying text.

<sup>178</sup> See *supra* note 158 and accompanying text.

<sup>179</sup> See *supra* notes 46–47 and accompanying text.

<sup>180</sup> See *supra* notes 46–47 and accompanying text.

<sup>181</sup> Courts and cases following the precedent established by *Summers v. Tice* include: *Wysocki v. Reed*, 583 N.E.2d 1139 (Ill. App. Ct. 1991) (two manufacturers of a defective drug); *McMillan v. Mahoney*, 393 S.E.2d 298 (N.C. 1990) (two boys firing air rifles); *Minnich v. Ashland Oil Co., Inc.*, 473 N.E.2d 1199 (Ohio 1984) (two suppliers of an explosive compound).

*v. Tice* type problems in the future at least two kinds of guidance.<sup>182</sup> One is that the extraordinary relief granted in *Summers v. Tice* is harder to justify if both of the defendants who are held liable as a result have not engaged in unreasonably careless behavior (i.e., do not possess behavioral fault).<sup>183</sup> In such circumstances, holding the defendant liable who did not actually cause the harm serves no appropriate deterrence purpose whatsoever.<sup>184</sup> Holding that defendant liable thereby shifts from providing a partial deterrence benefit (in the *Summers v. Tice* situation) to providing no deterrence benefit at all, and thus, must be viewed as involving pure cost (or error) from a deterrence perspective.<sup>185</sup>

Secondly, the extraordinary relief granted in *Summers v. Tice* is harder to justify if there are more than two defendants involved and still just one possible source of actual harm.<sup>186</sup> This is the case because in such circumstances, the benefit of resolving the case correctly with respect to one of the defendants comes at the cost of getting it wrong with respect to more than just one of the others.<sup>187</sup> The more defendants there are who could not have actually caused the harm compared with the number of sources of possible harm, the less attractive relief for the plaintiff becomes.<sup>188</sup>

This understanding of the *Summers v. Tice* line of cases would, correctly as it has turned out thus far, have been helpful in dampening unwarranted optimism for the long-term prospects of market

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<sup>182</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 (AM. L. INST. 2010).

<sup>183</sup> Restatement (Third) of Torts adopts an even more forceful version of this admonition. *Id.* at § 28 cmt. i (“Unless all of the actors who may have harmed the plaintiff acted tortiously, the rationale for invoking alternative liability is absent. Courts continue, without exception, to turn away plaintiffs who are unable to establish this element.”).

<sup>184</sup> See *id.* at § 29, Reporters’ Notes cmt. e.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at § 28 cmt. f.

<sup>187</sup> See *id.*

<sup>188</sup> Restatement (Third) of Torts agrees, but only to a point. While acknowledging that “[t]here is a stronger intuitive appeal to alternative liability when there are only two defendants, and each is equally likely to have been the factual cause of another’s harm . . . ,” it concludes that “[n]evertheless, the rationale for alternative liability . . . applies as well when there are more than two such culpable parties.” *Id.* at § 28 cmt. k.

share liability when it emerged in the 1980s.<sup>189</sup> A variation on both the basic facts and the result in *Summers v. Tice*,<sup>190</sup> market share liability cases often involve at least one of the attributes identified in the above analysis as being problematic to the granting of special relief to the plaintiff: more defendants (often many more) than possible sources of actual harm.<sup>191</sup>

The understanding of actual causation offered herein would also counsel caution regarding attempts to refine or recast the but-for test of actual cause in ways that significantly complicate the matter without providing sufficient corresponding benefits in terms of improving or refining the ability of the test to accurately identify genuine social responsibility by the defendant.<sup>192</sup> Complication is a real and quite tangible cost in this context, one that is tempting to ignore or to discount from an academic perspective.<sup>193</sup> A doctrine like actual cause and a test like but-for causation must be used by lay persons serving on juries and it is simply impractical (and unrealistic) to expect that courts will provide jury members with a separate training

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<sup>189</sup> See *id.* at § 28 cmt. p; see also James A. Henderson & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay in Proximate Causation*, 88 GEO. L. J. 659, 660 (2000) (“The market-share experiment now is generally perceived to have been an interesting idea that simply doesn’t work. Like Michelangelo’s horse, it doesn’t fly.” (footnote omitted)); *Senn v. Merrell-Dow Pharms., Inc.* 751 P.2d 215, 223 (Or. 1988) (“We conclude that adoption of any theory of alternative liability requires a profound change in fundamental tort principles of causation, an adjustment rife with public policy ramifications. The legislature may study and adopt one or another such theory, but we cannot pretend that any such theory is consistent with common law principles of tort liability.”).

<sup>190</sup> See generally Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447 (2006) (exploring the “doctrinal unity” between market-share liability and alternative liability through evidential grouping).

<sup>191</sup> In the founding case of *Sindell v. Abbott Laboratories*, the Supreme Court of California states, “There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury inducing drug.” 607 P.2d 924, 930–31 (Cal. 1980).

<sup>192</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. e (AM. L. INST. 2010).

<sup>193</sup> See *id.*

session or seminar so that they might understand a complicated approach to the actual cause requirement of the negligence claim.<sup>194</sup> Moreover, it is often the goal of such efforts to improve the actual cause test from a scientific or a philosophical perspective; this misses the primary function of that test in the context of the negligence tort, which is to provide a first-level measure of the defendant's genuine social responsibility for the harm inflicted upon the plaintiff.<sup>195</sup>

#### VI. THE OVERINCLUSIVE PROBLEM OF ACTUAL CAUSE AND THE NEED FOR A PROXIMATE CAUSE REQUIREMENT

While the but-for test for actual cause does a generally excellent job of including within negligence liability all of those defendants who are genuinely socially responsible for the harm experienced by the plaintiff, it performs far less well in terms of its over inclusiveness.<sup>196</sup> If taken literally, which is what the jury instruction typically charges triers of fact to do, the but-for test for actual cause includes within its scope a great many possible defendants who may have engaged in unreasonably careless behavior, but who would not be

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<sup>194</sup> Chantelle M. Baguley et al., *Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions*, 41 LAW & HUM. BEHAV. 284, 285 (2017) ("Empirical research consistently shows that jurors have difficulty comprehending the key principles outlined in standardized instructions, including the legal concepts and the procedural rules that underlie the decision process. . . . This is problematic because, if jurors cannot understand the instructions, they will rely on factors other than the instructions to decide their verdict."); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 891 (1981) ("As modern life has grown more complicated, so has modern litigation. It is not at all clear that the abilities of juries have kept pace. A number of federal courts, faced with complex cases on their civil dockets, have concluded that some such cases may be beyond the capabilities of the ordinary jury.").

<sup>195</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d (AM. L. INST. 2010).

<sup>196</sup> Wright, *supra* note 110, at 682 ("If outcome responsibility makes us normatively responsible for all the consequences of our volitional acts and omissions, then, once again, all of us are responsible for everything.").

considered genuinely socially responsible for the plaintiff's injuries.<sup>197</sup>

One classic statement of this circumstance appears in the famous case of *Palsgraf v. Long Island Railroad Company*:<sup>198</sup>

A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered for all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same.<sup>199</sup>

A virtually endless number of prior behaviors by others are literally but-for required in order for the defendant in a particular negligence case to even have physically been at a specific place, at a specific time so that his or her unreasonably careless behavior would result in harm to the plaintiff.<sup>200</sup> Without some additional formal limitation in the prima facie case, all of these persons who engaged

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<sup>197</sup> *Mackin & Assocs. v. Harris*, 672 A.2d 1110, 1113 (Md. 1996) (“The ‘but for’ test has some value in the determination of causation. If a set of facts cannot pass the ‘but for’ test, causation in fact is ruled out. The converse is not true—if a fact situation passes the ‘but for’ test, the requisite causation is not necessarily established. That is so because the literal application of the ‘but for’ test may fail to exclude causation links that are metaphysically conceivable but practically and legally absurd.”); Michael Keeley et al., *Insuring Agreement (E)—Revisited*, 17 FIDELITY L.J. 203, 247–48 (2011) (“The cause in fact or ‘but for’ test of causation, carried to its logical extreme, has been likened to the expansive chain of causation that Winston Churchill constructed in his history of the First World War. ‘[Churchill] began by referring to the fact that in 1920 King Alexander died by blood poisoning, having been bitten by a pet monkey. This event was followed by plebiscite, then a new king, and finally a bloody war with the Turks. Churchill wrote, ‘A quarter of a million persons died of that monkey’s bite.’” (alteration in original)).

<sup>198</sup> *Palsgraf v Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>199</sup> *Id.* at 103.

<sup>200</sup> ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 12 (1961) (“Our assumption, then, simply is that any particular event has a host of causes, an unlimited number . . .”).



in behavior that could be characterized as being in some way unreasonably careless would be potentially subject to liability to the plaintiff for negligence.<sup>201</sup>

Imagine, for example, a very simple negligence case in which the plaintiff claims that the defendant carelessly failed to apply the brakes of his or her car in time and, as a result, collided into the rear of the plaintiff's car while the plaintiff was legally stopped at a red light. Without much doubt, the plaintiff could establish actual cause against the defendant (Defendant 1) in these circumstances.<sup>202</sup> Assume, however, that Defendant 1 is without assets or adequate insurance coverage or is otherwise not responsive to suit or judgment.

Plaintiff then develops evidence establishing that a different person (Defendant 2) was, on that same day, driving carelessly on a different road on which Defendant 1 also drove before turning onto the road on which the collision with the plaintiff occurred. Defendant 2's unreasonably careless driving created a disturbance among drivers on that road, which in turn caused traffic to dramatically slow in front of Defendant 1. But for Defendant 2's careless driving, Defendant 1 would not have been situated behind the plaintiff's car at all, and thus no collision with the plaintiff's car would have taken place, and no harm would have been experienced by the plaintiff.

Rather clearly, Defendant 2's unreasonably careless driving is literally a but-for cause of the injury to the plaintiff, and it also satisfies the duty and breach elements of the prima facie case for negligence.<sup>203</sup> Equally clearly, Defendant 2 should not be held liable to the plaintiff under any system of liability that preconditions the imposition of liability on the defendant having been genuinely socially

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<sup>201</sup> The difficulty, both conceptual and practical, of the proximate cause requirement is legend. *See, e.g.*, Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950) ("Having no integrated meaning of its own, [the] chameleon quality [of proximate cause] permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the work of Aladdin's lamp."); Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 762 (1951) ("The result [of the development and analysis of the proximate cause doctrine thus far] has been a widely recognized confusion, and as luxuriant a crop of legal literature as is to be had in any branch of tort law.").

<sup>202</sup> *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (AM. L. INST. 2010).

<sup>203</sup> *Id.*

responsible for the plaintiff's harm.<sup>204</sup> While Defendant 2's unreasonably careless behavior was literally and physically necessary in order for the plaintiff to have been harmed in this particular way, no one would seriously assert that Defendant 2 was genuinely socially responsible—was morally at fault—for the specific injuries suffered by the plaintiff.<sup>205</sup> Moreover, behavior of persons in a community, including highly productive behavior, might well be paralyzed if a system existed that imposed formal legal liability on them for careless behavior that somehow resulted in harm to another that far down the line of actual cause.<sup>206</sup>

Note that the preceding example includes behavior by Defendant 2 that is still relatively close in time and not far on a chain of physical causation from the infliction of injury on the plaintiff.<sup>207</sup> The same analysis, however, would apply if Defendant 2 were a neighbor of Defendant 1 who, coming home late and inebriated the night before, unreasonably carelessly parked his car blocking Defendant 1's driveway. The next morning, Defendant 1 is forced to rouse Defendant 2 and request that he move his car before Defendant 1 can drive to work. This makes Defendant 1 late, frustrated, perhaps preoccupied, and physically places him behind the plaintiff that morning when he otherwise would not have been. Again, Defendant 2 is a clear but-for cause and yet, just as clearly, few would seriously assert that Defendant 2 is genuinely socially responsible

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<sup>204</sup> See *supra* note 45 and accompanying text.

<sup>205</sup> See *supra* note 46 and accompanying text.

<sup>206</sup> See Yuval Sinai & Benjamin Shmueli, *Calabresi's and Maimonides's Tort Law Theories—A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories*, 26 YALE J.L. & HUMAN. 59, 65 (2014) (“[E]xcessive deterrence may lead to the interruption of essential activity . . . .”); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 799–800 (1985) (“In determining which activity generated the injury and therefore should internalize its costs, one must be careful to avoid excessive deterrence that may unduly restrict a useful, but risky activity.”); Israel Gilead & Michael D. Green, *Positive Externalities and the Economics of Proximate Cause*, 74 WASH. & LEE L. REV. 1517, 1529 (2017) (“More realistic and contemporary economic models . . . recognize that over-internalization through excessive tort liability may lead to over-deterrence, not only in the form of inefficiently reduced levels of activity, but also in the form of inefficiently increased levels of care—too many or inadequate precautions.”).

<sup>207</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 (AM. L. INST. 2010).

for the plaintiff's injuries.<sup>208</sup> Examples could be offered that extend Defendant 2's behavior even further away in time and further back in the chain of actual cause from the plaintiff's injury.

A system that requires genuine social responsibility for the imposition of formal negligence liability cannot, as a design matter, leave unaltered a prima facie case for negligence that requires only duty, breach, actual cause, and harm.<sup>209</sup> Such a system would generate liability that includes very large numbers of defendants who were not arguably morally at fault for the plaintiff's specific harm—the harm for which the defendant is required by law to compensate the plaintiff.<sup>210</sup> Such a system would, in other words, be massively overinclusive.<sup>211</sup>

The specific function of the proximate cause prong of the causation requirement in negligence is to limit, or to tailor, the scope of liability ultimately generated by the negligence tort so that only those defendants who are genuinely socially responsible for the plaintiff's harm are held liable.<sup>212</sup> It has no other function, and its

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<sup>208</sup> *Id.* at § 6 cmt. b.

<sup>209</sup> *See id.*

<sup>210</sup> At some point, a negligence system that imposed liability on defendants and included an actual cause requirement but no proximate cause requirement would create a social and legal environment very much like the previously imagined negligence system that included no causation requirement. *See supra* notes 26–34 and accompanying text. Liability would be threatened in such a large number of circumstances in which the actual cause connection between the defendant's unreasonably careless behavior and the plaintiff's harm was excessively remote, that from potential defendants' perspective it would be experienced much like a system requiring no causation requirement at all. *See supra* notes 26–34 and accompanying text. Arguably, negligence with actual cause but no proximate cause would be markedly worse in as much as defendants' liability would be measured by the actual harm experienced by the plaintiff rather than by some independent measure of the defendants' degree of carelessness. *See supra* notes 26–34 and accompanying text.

<sup>211</sup> *See supra* notes 26–34 and accompanying text.

<sup>212</sup> As noted in *supra* note 6, there has been long-standing debate about use of the term “proximate cause” to identify and label this requirement of the prima facie case of negligence. The latest Restatement of Tort (Third) very consciously abandons the term in favor of a prima facie requirement it calls “Limitations on Liability for Tortious Conduct.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (AM. L. INST. 2010), and the lengthy justification for this decision offered. *Id.* at § 29, Reporters' Notes cmt. a.

long-time presence in the prima facie case of negligence can be satisfactorily explained in no other way.<sup>213</sup>

While the design and policy purpose of the proximate cause requirement can be accurately identified, the practical task remains difficult.<sup>214</sup>

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I use the term “proximate cause” for this requirement, position it as a second, separate aspect of the causation requirement of the prima facie case, and define it in terms of reasonable foreseeability because it is my sense that, regardless of the merits of the Restatement (Third)’s (and others’) different choices, this way of articulating and organizing the doctrine is among the most standard and conventional ways of doing so. *See e.g.*, *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955) (“[T]he courts continue generally to use ‘proximate cause,’ and it is pretty well-understood what is meant”); *DOBBS*, *supra* note 24, at 448 (“For greater clarity, some thinkers would prefer to drop the term proximate cause because the term wrongly suggests that the issue is about causation. . . . Pervasive professional usage, however, makes it difficult to drop the term entirely.”); Patrick J. Kelly, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49, 49 (“In negligence cases, our courts require the plaintiff to prove that the defendant’s negligence was a ‘proximate cause’ of the plaintiff’s injury.”); Richard L. Cupp, Jr., *Proximate Cause, the Proposed Basic Principles Restatement, and Products Liability*, 53 S.C. L. REV. 1085, 1088 (2002) (“Third Restatement is succinct and to the point, but it seeks to lead courts to language they do not, for the most part, presently use. At present, courts typically employ unadorned foreseeability language rather than result-within-the-risk language when analyzing proximate cause. Also, of course, most courts continue to use the phrase ‘proximate cause,’ which the proposed Restatement relegates to a chapter heading parenthetical.”).

Moreover, and more importantly, the understanding of proximate cause offered herein, and the central role that the genuine social responsibility and fault of the defendant plays in its purpose and design, remains the same across a variety of different approaches to the surface labelling and articulation of what is essentially the same concept, including the one adopted by Restatement (Third). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29, Reporters’ Notes cmt. d (AM. L. INST. 2010) (“[T]he foreseeability test many courts employ in negligence cases for proximate cause is quite compatible with the standard in [Section 29].”); *see also* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 356 (11th ed. 2005); KEETON ET AL., *supra* note 15, at 281; HARPER ET AL., *supra* note 6, at 177–78.

<sup>213</sup> *See James & Perry*, *supra* note 201, at 784 (“It should be noted at this point that many courts and legal writers have stressed the fact that policy considerations underlie the doctrine of proximate cause. Of course they do, but the policies actually involved often fail to get explicit treatment.”).

<sup>214</sup> *See id.* (“Another policy consideration which pervades all the cases [regarding proximate cause] is the need to work out rules which are feasible to administer, and yield a workable degree of certainty.”).

At a black letter, doctrinal level, the key concept employed by proximate cause doctrine is foreseeability.<sup>215</sup> The central notion is that a person is not genuinely socially responsible for a given consequence—is not morally at fault for that result—if the result could not be reasonably foreseen by the actor under the circumstances at the time the triggering behavior was engaged in.<sup>216</sup> One cannot be fairly blamed for having caused a result if that result was not reasonably foreseeable to the actor, even if the actor was one of the actual causes of the harm.<sup>217</sup> This is, as a general matter, a rather impressive attempt to capture the essence of our collective, consensus sense of moral responsibility in a single, simple concept usable by laypersons who serve on juries.<sup>218</sup>

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<sup>215</sup> *Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 786 (Or. 1970) (“The specific question before us is, then, whether plaintiff’s injury and the manner of its occurrence was so highly unusual that we can say as a matter of law that a reasonable man, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur. Stated in another way, the question is whether the circumstances are out of the range within which a jury could determine that the injury was reasonably foreseeable.”).

<sup>216</sup> *See Neering v. Ill. Cent. R.R. Co.*, 50 N.E.2d 497, 503 (Ill. 1943) (“What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence . . .”).

<sup>217</sup> *Doe v. Garcia*, 895 P.2d 1229, 1234 (Idaho Ct. App. 1995) (“Thus, [while] a negligent act may meet the ‘but for’ or ‘substantial factor’ test, so as to be a cause in fact, the defendant may not be liable because it was not reasonably foreseeable that defendant’s act would lead to the harm suffered by the plaintiff.”).

<sup>218</sup> One possible objection to the decision made by Restatement (Third) to recast the proximate cause requirement away from reasonable foreseeability and toward a test based on whether the harm that resulted was among the risks that made the defendant’s conduct unreasonably careless is that such a move takes focus away from the fault status—the moral status—of the particular defendant in that specific negligence case. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33 cmt. a (AM. L. INST. 2010). Compared to reasonable foreseeability, the harm-within-the-risk test embraced by Restatement (Third) frames the inquiry as being somehow apart, or distanced, from the specific defendant’s set of considerations and choices faced under the particular circumstances of the case. It thereby shifts, at least subtly, the fact-finder’s attention away from the issue of that one defendant’s moral status. *See id.* As a result, fact finder focus is also shifted away from the underlying policy question of whether that defendant’s choice to act as he or she did caused the defendant to be genuinely

For example, imagine two friends deciding together where to go out for dinner. Person 1 prefers a certain restaurant while the other, Person 2, prefers another establishment. Ultimately, after some debate, the two friends drive to the restaurant preferred by Person 1. When they return to the car in the parking lot after the meal, they find it badly damaged, with no witnesses or messages present to explain how or why. While Person 1 is clearly a but-for actual cause of this unhappy consequence, in that it would not have occurred had the friends not gone to the restaurant he or she preferred, Person 1 cannot reasonably be said to be genuinely at fault for the harm to the car because he or she could not have reasonably foreseen that going to that restaurant might result in such damage.<sup>219</sup>

Unless the risk of the harm that actually occurred is reasonably part of the calculus concerning the actor's (the defendant's in a negligence claim) judgment and behavior, the actor cannot appropriately be blamed, socially or morally, for that resultant harm, even if the resultant harm would not have occurred but for the actor's behavior.<sup>220</sup> Harm in such circumstances is, in common parlance, a pure accident, implying that no one is to blame for it.<sup>221</sup>

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socially responsible for the resulting harm. In addition, the shift from reasonable foreseeability to harm-within-the-risk arguably burdens the jury with a more abstract test without any corresponding benefit in terms of greater accuracy in identifying genuine social fault. *See supra* note 194 and accompanying text.

<sup>219</sup> *Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 786 (Or. 1970) (“Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen.”); *Di Ponzio v. Riordan*, 679 N.E.2d 616, 618 (N.Y. 1997) (“Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated.”).

<sup>220</sup> *Noon v. Knavel*, 339 A.2d 545, 549 (Pa. Super. Ct. 1975) (“It is well settled that the appellant ‘could be properly liable only with respect to those harms which proceeded from a risk or hazard the foreseeability of which rendered its conduct negligent.’” (quoting *Metts v. Griglak*, 264 A.2d 684, 687 (Pa. 1970))); *Maltman v. Sauer*, 530 P.2d 254, 258 (Wash. 1975) (“The hazard that brought about or assisted bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant’s conduct was negligent.” (emphasis omitted)).

<sup>221</sup> This is in contrast to the ordinary language use of the concept of coincidence, which implies both no fault and no actual cause. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 Reporters’

Like the but-for test and actual cause, foreseeability as a measure of proximate cause is elegant, in that it is simple and can be quickly and well understood by persons serving on juries.<sup>222</sup> Unlike the but-for test, however, which yields largely determinate results, reasonable foreseeability when applied to a range of normal, common circumstances often yields uncertain and indeterminate results.<sup>223</sup> It is, in fact, among the most uncertain, unpredictable, and indeterminate doctrines in all of tort law.<sup>224</sup>

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Notes cmt. d (AM. L. INST. 2010) (“Many scholars agree that accidental tortfeasors should not be held liable for harm that is outside the scope of the risk that made the act tortious . . .”).

<sup>222</sup> Which is not to say that the reasonable foreseeability test yields confident and consistent results when applied by jurors to the facts of specific cases. It is one thing for a test itself to be simple and easily understood and a different thing altogether for that test to be determinate and definite when implemented.

<sup>223</sup> See *Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986) (“[The foreseeability] test is so vague that it has little practical value.”); Jeffrey A. Ehrlich, *Negligent Infliction of Emotional Distress: A Case for an Independent Duty Rule in Minnesota*, 37 WM. MITCHELL L. REV. 1402, 1429–30 (2011) (“Many courts from other jurisdictions have also soundly criticized the foreseeability approach for its vagueness, unpredictability, and subjectivity.”); Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 91 (2012) (“[T]he basic indeterminacy of doctrinal proximate cause, which bedevils judges, academics, and law students to this day, was fully articulated over eighty years ago.”).

<sup>224</sup> One of the reasons for the widely observed indeterminacy of proximate cause is that the doctrine, whether articulated in terms of reasonable foreseeability or harm-within-the-risk, is necessarily structured as a matching test, requiring that a match be determined to exist between the dangerous attributes of the defendant’s behavior and the harm actually suffered by the plaintiff. See *supra* note 220 and accompanying text. Given this, the likelihood of a match being found to exist will in significant part be a function of how narrowly or how generically both the risk and the harm is characterized. See *supra* note 220 and accompanying text.

For example, imagine a situation in which the defendant is driving and at the same time staring intently at his phone. While distracted in this way, he drives his car off the side of a city avenue and strikes at moderate speed a pole supporting traffic lights hanging over the approaching intersection. This impact causes the traffic lights to fall to the ground. When they do, a person who at the time was walking lawfully in a crosswalk in the intersection sees the traffic lights beginning to fall and, without turning, runs backwards in the intersection as fast as he can. In doing so, this person runs hard into the plaintiff, physically injuring him.

The defendant is clearly an actual cause of the plaintiff’s harm. Is he also a proximate cause? The answer leans toward the negative if the question is framed as being whether one of the reasonably foreseeable consequences of staring at one’s phone while driving is striking a support for traffic lights that in turn causes

For example, consider the hypothetical situation described above, in which Defendant 1 fails to apply the brakes on his car in time and, as a result, collides with the car directly in front of him at a red light, a car owned by the plaintiff. There is little doubt that the collision with the plaintiff's car, the one right in front, is a reasonably foreseeable consequence of failing to apply the brakes. What if the collision with that car causes it to move forward and collide with a third car, a car directly in front of plaintiff's car? Is such harm reasonably foreseeable to the defendant? What if the third car, when struck, moves forward into the intersection and is struck by a car moving on the cross street? Is that harm reasonably foreseeable to the defendant? What if the driver in the third car, when struck, reflexively activates the horn on the car, which in turn startles a driver on the intersecting road who swerves into an adjacent lane and thereby strikes yet another car? And on and on. While easy agreement and consensus is likely achievable in obvious cases on both ends of the spectrum, there are a very large number of conventional circumstances in which juries can be expected to be uncertain, and

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the lights to begin to fall, which in turn causes a pedestrian to flee in fear, which in turn causes the plaintiff to be struck by that person and injured. It leans toward the positive if the proximate cause question is framed as being whether unreasonably dangerous driving reasonably foreseeably results in physical injury to a nearby pedestrian walking on the same road.

While this specific-generic dimension of the factual characterization of the proximate cause test will in a given case inevitably play a large role in influencing the judgment of the trier of fact, especially when that trier of fact is a jury of laypersons, the choice of a more specific or more generic framing of the test is completely unrelated to the underlying purpose of the proximate cause requirement, and thus there is no principled way in which to choose among varying possible degrees of specific or generic characterization.

*See* *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955) (“[The test for proximate cause] does not furnish a formula which automatically decides each of an infinite variety of cases. Flexibility is still preserved by the further need of defining the risk, or risks, either narrowly, or more broadly, as seems appropriate and just in the special type of case.”); CLARENCE MORRIS & C. ROBERT MORRIS, JR., *MORRIS ON TORTS* 163–67 (2d ed. 1980); *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 29 cmt. i (AM. L. INST. 2010) (“No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section.”).



perhaps in disagreement, regarding the question of reasonable foreseeability.<sup>225</sup>

Apart from the frequent indeterminacy of reasonable foreseeability itself, the underlying concept of genuine social responsibility—genuine social fault—is likely a subtle and multi-factor judgment that is only loosely captured by a simple reasonable foreseeability test, and it likely shifts and changes over time and across different jurisdictions.<sup>226</sup> For instance, it is probably the case that many persons' sense of a given defendant's genuine social responsibility for particular harm that was actually caused by the defendant's conduct is to some extent a function of the degree of blameworthiness, or unreasonableness, of the defendant's harm-producing conduct.<sup>227</sup> In the example above, it is more likely that Defendant 1 will be deemed to be genuinely socially responsible for some of the more remote harm (e.g., the collisions involving the third car) if the reason for Defendant 1's failure to apply the brakes was a high level of voluntary inebriation as contrasted with a sudden distraction from a nearby vehicle, even though the foreseeability of harm is the same in both instances.<sup>228</sup> One's sense of another's blameworthiness for subsequent harm most likely expands and contracts with the degree of blameworthiness of the other's harm-producing behavior, though this factor is not captured by the black letter approach to proximate cause nor the conventional proximate cause jury instruction, both of which focus only on reasonable foreseeability.<sup>229</sup>

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<sup>225</sup> *Camper v. Minor*, 915 S.W.2d 437, 443 (Tenn. 1996) (“The foreseeability approach . . . provides little, if any, concrete guidelines for trial courts and juries to use in deciding how each case should be resolved.”); Eric A. Johnson, *Dividing Risks: Toward a Determinate Test of Proximate Cause*, 2021 U. ILL. L. REV. 925, 927 (2021) (“In practice, though, the foreseeability test proves hopelessly indeterminate.”).

<sup>226</sup> See *supra* note 218 and accompanying text; see also *supra* note 223 and accompanying text; see also *infra* note 227 and accompanying text.

<sup>227</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33(b) (AM. L. INST. 2010) (“In general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care.”).

<sup>228</sup> See *id.*

<sup>229</sup> It must be admitted that the understanding of the causation requirement offered herein does not promise much greater specificity or much less vagueness

Understanding that the function of a proximate cause requirement in negligence is the limiting of negligence liability to only those defendants who are genuinely socially responsible for the plaintiff's harm provides a powerful perspective from which to make sense of the traditional instances in which courts take the proximate cause judgment away from juries and instead decide the issue as a matter of law.<sup>230</sup> These are particular circumstances in which the proximate cause issue is determined by a preexisting rule of law and not by the discretion of jurors.<sup>231</sup>

From the perspective of the account of the causation requirement offered herein, one would expect that taking away discretion from the trier of fact and resolving the proximate cause issue by preexisting rule would make sense in circumstances in which there is a substantial risk that the outcome of a literal, empirically focused foreseeability test will fail to accurately identify genuine social responsibility by the defendant.<sup>232</sup> In the same way that the concurrent cause and *Summers v. Tice* exceptions to the but-for test for actual

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in actual application. A proximate cause requirement properly understood to be all about identifying genuine social responsibility might, however, help to explain that persistent lack of determinism in as much as its target and its goal—genuine social responsibility—is itself an inherently vague and value-laden notion that changes over time and regions, especially in an increasingly diverse society. Moreover, this perspective might encourage pause, and perhaps some skepticism, when encountering attempts to recast or to redesign the proximate cause requirement in ways that cause it to generate more definite and predictable results. This is the case because, given the intended target of the requirement, more definite and predictable tests are likely to generate more inaccurate results and underlying errors of both over and under inclusion. *See id.* at § 29 Reporters' Notes cmt. e (“There is, in short, much play in the proximate-cause joints. The appropriate scope of liability and responsibility is inherently a subject resistant to any rigorous formulation, and it is a mistake to expect any more precision than a subject will bear.”).

<sup>230</sup> Steven F. Friedell, *Nobody's Perfect: Proximate Cause in American and Jewish Law*, 25 HASTINGS INT'L & COMP. L. REV. 111, 118 (2002) (“[T]he courts have established categorical rules that deprive the jury of any say in resolving many proximate cause issues.”); *see, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 31–32 (AM. L. INST. 2010).

<sup>231</sup> *Stamas v. Fanning*, 185 N.E.2d 751, 753 (Mass. 1962) (“There are situations where it can be said, as a matter of law, that a cause is remote rather than proximate.”); Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1385 n.257 (1994) (“[T]here is no shortage of cases deciding the issue of proximate cause as a matter of law.”).

<sup>232</sup> *See* Tidmarsh, *supra* note 231, at 1385 n.257.

cause are needed to respond to instances of under inclusiveness, exceptions to the usual practice of having foreseeability determined by the trier of fact are needed to respond to instances of under inclusiveness of the reasonable foreseeability test for proximate cause.<sup>233</sup>

One such instance applies to cases in which the defendant's unreasonably careless behavior results in the plaintiff being the later victim of subsequent medical malpractice.<sup>234</sup> The relevant issue in these cases is whether the defendant's unreasonably careless behavior is a proximate cause of the additional harm suffered by the plaintiff as a result of the subsequent medical malpractice.<sup>235</sup> Understandably, many courts confronted with this issue express the view that the defendant is genuinely socially responsible—is fully morally at fault—for the subsequent harm suffered by a plaintiff from medical malpractice to which the plaintiff was subjected only as a result of the defendant's unreasonably careless behavior.<sup>236</sup> And yet from an empirical perspective, in the overwhelming percentage of cases, the likelihood of a given person (a victim of prior negligence or not) experiencing unreasonably careless medical treatment is far lower than 50%, especially since this rule applies without exception to malpractice engaged in by established medical providers, like hospitals.<sup>237</sup> From an empirical perspective, it is difficult-to-impossible

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<sup>233</sup> *See id.*

<sup>234</sup> *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 35 (AM. L. INST. 2010) (“An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other’s injury, so long as the enhanced harm arises from a risk that inheres in the effort to render aid.”). The Restatement (Third) observes that this rule enjoys “virtually unanimous acceptance” and that “[n]egligence in medical treatment of a tortiously caused injury is the most common invocation of the rule.” *Id.*

<sup>235</sup> *See id.* at § 35 cmt. b.

<sup>236</sup> *See, e.g.,* *Benoit v. United States*, No. 98-858X, 2000 WL 1134472, at \*7 (Fed. Cl. July 28, 2000) (“[I]t is an established general principle of American law, however, that the original tortfeasor is liable for any aggravation of injuries subsequently caused by the negligence of others, including physicians.”); *Weber v. Charity Hosp. of La.*, 475 So. 2d 1047, 1050 (La. 1985) (“[A] tortfeasor may be liable not only for the injuries he directly causes to the tort victim, but also for the tort victim’s additional suffering caused by inappropriate treatment by the doctor, nurse or hospital staff member who treats the injuries directly caused by the tortfeasor.” (citations omitted)).

<sup>237</sup> The Harvard Medical Practice Study, published in 1991, concluded that adverse events, defined as “an injury that was caused by medical management

for a decision maker to reasonably conclude that the occurrence of an event far, far less than 50% likely to happen was reasonably foreseeable by the defendant.<sup>238</sup>

The dissonance in these cases between the likely outcome of the conventional treatment of proximate cause by way of the reasonable foreseeability test—a conclusion of no proximate cause—and the existence of genuine social responsibility by the defendant mandates that in order to align the outcome of the negligence claim with the underlying policy that socially justifies the doctrine, courts must apply an exception that removes discretion from the jury and dictates a finding that the defendant was a proximate cause of the harm suffered by the plaintiff as a result of subsequent medical malpractice.<sup>239</sup> A similar analysis makes policy sense of, and thus rationalizes, the other recognized instances of proximate cause as a matter of law.<sup>240</sup>

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(rather than underlying disease) and that prolonged the hospitalization, produced a disability at the time of discharge, or both,” occurred in 3.7% of hospitalizations. Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients – Results of the Harvard Medical Practice Study I*, 324 *NEW ENG. J. MED.* 370, 370–71 (1991). The Utah-Colorado Medical Practice Study found an adverse event rate of 2.9%. Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 *MED. CARE* 261, 265 (2000). See generally Maxine M. Harrington, *Revisiting Medical Error: Five Years After the IOM Report, Have Reporting Systems Made a Measurable Difference?*, 15 *HEALTH MATRIX* 329, 332 (2005) (discussing the difficulty in estimating the incidence of medical error); Kathryn Zeiler & Gregory Hardy, *Law, Technology, and Patient Safety*, 68 *DEPAUL L. REV.* 459, 460 (2019) (examining possible methods of improving medical adverse event count accuracy).

<sup>238</sup> See *supra* note 237 and accompanying text.

<sup>239</sup> *Montgomery v. S. Cnty. Radiologists, Inc.*, 168 S.W.3d 685, 690 (Mo. Ct. App. 2005) (“A party who commits an act of negligence is liable for all damages caused by the act of negligence, including later medical malpractice caused by a second party.”); *Rucks v. Pushman*, 541 So. 2d 673, 675 (Fla. Dist. Ct. App. 1989), *reh’g. denied*, 549 So. 2d 1014 (Fla. 1989) (“When a tortfeasor negligently or intentionally injures a victim and the victim, in obtaining necessary treatment for those injuries, is further injured (or her existing injuries are aggravated) by the negligence of the health care providers, the law is now clear that the original (initial or primary) tortfeasor is liable to the victim not only for the original injuries received as a result of the initial tort, but also for the additional (or aggravated) injuries resulting from the subsequent negligence of the health care providers.”).

<sup>240</sup> See, e.g., *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* §§ 31–32 (AM. L. INST. 2010).

One implication of the above analysis is that judges should bring to bear the above understanding of proximate cause as a doctrinal mechanism for limiting negligence liability to those defendants who are deemed to be genuinely socially responsible for the plaintiff's harm when making decisions on what evidence and arguments should be made available to jurors in negligence cases.<sup>241</sup> Issues of materiality, relevance, competency, and ultimate admissibility of evidence regarding proximate cause should be considered in light of an awareness that the fundamental task in the resolution of proximate cause is a determination of the defendant's genuine social responsibility and not a literal, empirical analysis of the reasonable foreseeability of the defendant under the specific factual circumstances of the case.<sup>242</sup>

A second implication of the above analysis is that judges should bring to bear the above understanding of proximate cause when deciding motions that require a trier of law to determine what a reasonable trier of fact could or could not decide on the issue of proximate cause. Though recognized exceptions have been created and exist in response to some instances of dissonance between empirical reasonable foreseeability and genuine social responsibility, such exceptions are unlikely to adequately cover all such instances that may arise in the wide range of factual circumstances that confront courts in negligence cases.<sup>243</sup> Judges should be sensitive to the possibility of the existence of such dissonance and should decide motions for summary judgment and directed verdict in such cases accordingly.<sup>244</sup>

Third, it may improve the accuracy of jury judgments in close cases of proximate cause to include in model jury instructions on the issue, more explicit explanation that the ultimate purpose of applying a reasonable foreseeability test to the facts of the case is to identify the existence, or lack, of genuine social responsibility by the defendant for the plaintiff's harm.<sup>245</sup> Jury instructions that only set forth the reasonable foreseeability test without broader context, as most do, invite jurors to adopt an overtly literal, overly empirical

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<sup>241</sup> See *supra* note 237 and accompanying text.

<sup>242</sup> See *supra* note 237 and accompanying text.

<sup>243</sup> See *supra* note 237 and accompanying text.

<sup>244</sup> See *supra* note 237 and accompanying text.

<sup>245</sup> COLEMAN, *supra* note 4, at 381.

approach to the proximate cause requirement and thereby insufficiently recognize that the black letter reasonable foreseeability test is less the sought after objective itself than it is an imperfect, surrogate measure of genuine social responsibility.<sup>246</sup>

Finally, the understanding of the underlying policy and function of the proximate cause requirement offered herein may be relevant to the long-standing lack of broad consensus on the proper doctrinal placement of the reasonable foreseeability requirement in the prima facie case for negligence.<sup>247</sup> As illustrated and most often first encountered by law students in the classic case of *Palsgraf v. Long Island Railroad*,<sup>248</sup> there exists long-standing disagreement over whether the reasonable foreseeability requirement of negligence should be considered a part of the duty element of the prima facie case of negligence, the causation element, or both.<sup>249</sup> While a full

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<sup>246</sup> See, e.g., MISS. PRAC. MODEL JURY INSTR. CIV. § 14:3, Westlaw (2d ed. Oct. update 2021) (“An element or test of proximate cause is that an ordinarily prudent person should reasonably have foreseen that some injury might probably occur as a result of [his/her/its] negligence. It is not necessary to foresee the particular injury, the particular manner of the injury, or the extent of the injury.”) (emphasis and brackets in original).

<sup>247</sup> See *infra* note 249 and accompanying text.

<sup>248</sup> See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

<sup>249</sup> See *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 133–40 (Mont. 1996) (“[F]rom an early point in American jurisprudence there was disagreement among knowledgeable scholars regarding the role of foreseeability in the formulation of negligence law. The conviction, as expressed by Cardozo, was that without foreseeability there was no duty, and without duty there could be no liability. The view as expressed by Andrews was that foreseeability was an element of proximate cause and reflected the practical political judgment of whether effect of cause on result was too attenuated.”); *Sabina v. Yavapai Cnty. Flood Control Dist.*, 993 P.2d 1130, 1134 (Ariz. Ct. App. 1999) (“More substantial is the question whether summary judgment for the District may be sustained for lack of duty or proximate cause. As Prosser tells us, these categories often intersect. . . . This case brings us precisely to the intersection of duty and proximate cause”); DOBBS, *supra* note 24, at 449 (“In fact, some courts will use the language of proximate cause to resolve some cases that other courts might resolve in the language of duty.”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 Reporters’ Notes cmt. f (AM. L. INST. 2010) (“The Restatement Second of Torts is ambiguous about whether the requirement that the harm be within the scope of the risk is a duty requirement or a proximate-cause requirement.”); see also *supra* note 6 and accompanying text. See generally Kelly, *supra* note 212, at 53–54, 97–98 (discussing the origin and historical development of the lack

consideration of this aspect of tort law resides outside the scope of this Article, it should be noted that except in circumstances where an empirical approach to reasonable foreseeability might result in a conclusion different from one based on the defendant's genuine social responsibility, the resolution of proximate cause in negligence, based ultimately on the issue of genuine social responsibility, is fundamentally an appreciation and application of current social notions of fault, blameworthiness, and moral responsibility.<sup>250</sup> Such considerations are, by their nature, heavily value-laden, culturally-contingent, and are most appropriately deliberated and resolved collectively by members of a jury rather than by a single judicial decision maker.<sup>251</sup> As between the two, a group of layperson jurors can be argued to far better bring to the case a current and accurately varied sense of community attitudes toward social responsibility than can a single jurist.<sup>252</sup> Thus, as much as possible, the reasonable foreseeability requirement that is an uncontested part of the prima facie case

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of consensus on conceptualizing the proximate cause limitation on liability as being part of the duty requirement or the causation requirement of negligence).

<sup>250</sup> Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 17 n.91 (1984) ("Proximate cause imports notions of legal and moral responsibility for injury that transcend mere physical location in a causal chain."); David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1295 (2009) ("[F]oreseeability is the most salient outer boundary defining the 'scope' of moral responsibility for risks of harm.").

<sup>251</sup> *Am. Pfauter, Ltd. v. Freeman Decorating Co.*, 796 F. Supp. 347, 352 (N.D. Ill. 1992) ("Application of the concept of 'proximate cause' to the circumstances of this case involves a value-laden determination properly left to the judgment of the trier of fact."); Linda C. Fentiman, *Are Mothers Hazardous to their Children's Health?: Law, Culture, and the Framing of Risk*, 21 VA. J. SOC. POL'Y & L. 295, 330 (2014) ("[M]odern tort scholars recognize that the determination of both actual and proximate cause is inevitably value-laden, reflecting cultural attitudes about individual and corporate responsibility . . .").

<sup>252</sup> *See Marshall v. Nugent*, 222 F.2d 604, 611 (1st Cir. 1955) ("When an issue of proximate cause arises in a borderline case, as not infrequently happens, we leave it to the jury with appropriate instructions. We do this because it is deemed wise to obtain the judgment of the jury, reflecting as it does the earthy viewpoint of the common man—the prevalent sense of the community—as to whether the causal relation between the negligent act and the plaintiff's harm which in fact was a consequence of the tortious act is sufficiently close to make it just and expedient to hold the defendant answerable in damages. That is what the courts have in mind when they say the question of proximate cause is one of fact for the jury."); *see also* KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT*

for negligence should be more specifically conceived as being an element of the causation requirement. In other words, the requirement should be viewed and treated as an issue of fact in the case, rather than serving as a formal limit defining the legal duty of care as an issue of law.<sup>253</sup>

### CONCLUSION

The requirement that a plaintiff prove that the defendant personally caused the harm for which the plaintiff is seeking redress is fundamental to tort law, including the tort of negligence.<sup>254</sup> This causation requirement has been the subject of long and intense interest among legal scholars, and courts have long struggled with it, in part because of its larger role in tort theory and doctrine, and because of the complexity that lies in its more challenging issues.<sup>255</sup> Recently, the centrality of the causation requirement in areas beyond torts has attracted the attention of the United States Supreme Court.<sup>256</sup>

This Article seeks to contribute to this ongoing discussion by highlighting the value of appreciating the critical role that fault plays in the causation requirement. It makes the case that one critical role of causation in the tort of negligence is to limit the ultimate liability generated by the tort to only those defendants who are thought in light of contemporary values and standards to be genuinely socially

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LAW 142–43 (3d ed. 2007) (“In the jury room, the commonsense principle underlying proximate cause—that negligent defendants should not always bear liability to all the people or for all the harm they have caused, because at some point liability must stop—can be put into practice.”).

<sup>253</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (AM. L. INST. 2010) (“The first element [of negligence], duty, is a question of law for the court to determine”); see also *id.* at § 29 Reporters’ Note, cmt. e (AM. L. INST. 2010) (“Thus, the best that courts can do is to employ the most attractive available framework for setting limits on liability, to decide the cases whose outcome is clear and about which reasonable persons could not disagree, and to rely on the judgment of juries in those cases where application of the standard yields an uncertain result.”); *Di Ponzio v. Riordan*, 679 N.E.2d 616, 618 (N.Y. 1997) (“The existence and scope of an alleged tortfeasor’s duty is, in the first instance, a legal question for determination by the court.”).

<sup>254</sup> Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 1 (1987) (observing that the requirement of causation is so critical that it is the “fundamental building block of all tort law”).

<sup>255</sup> See *supra* notes 3, 4, 6 and accompanying text.

<sup>256</sup> See *supra* note 2 and accompanying text.



responsible for the plaintiff's harm. Appreciation of the causation requirement as a doctrinal mechanism for ensuring that this kind of fault is possessed by all liable defendants offers a powerful way of understanding the separate functions of actual cause and proximate cause, and their respective tests, as well as the purpose and proper contours of the various exceptions that courts have recognized to those causation elements.<sup>257</sup> Moreover, it offers valuable guidance in approaching the development and implementation of causation doctrine moving forward.<sup>258</sup>

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<sup>257</sup> See *supra* Sections V–VI.

<sup>258</sup> See *supra* note 229.