PROXIMATE CAUSE UNTANGLED

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ABSTRACT

The many facets of tort liability are filtered through the requirement of proximate cause, which has made the element confusing and the source of considerable controversy. Is proximate cause properly determined by the directness test or the foreseeability test, each of which has been both widely adopted and roundly criticized? Is there any defensible conception of a direct cause? Is foreseeability an adequately determinate method for limiting liability? If so, is foreseeability relevant to duty, to proximate cause, or to both elements? Disagreement about all these matters stems from the failure to fully untangle the role of proximate cause across all elements of the tort claim.

In a negligence case, for example, duty determines the risks that factor into the duty to exercise reasonable care. This property implies that the duty must be limited to the risks of foreseeable harm in order for the standard of reasonable care to govern only those harms. Foreseeability for this purpose is defined by the general zones of danger or reference classes that the reasonable person would consider when estimating the likelihood of accidental harm, reducing foreseeability to a behavioral concept that is adequately determinate for resolving the issue of breach. The element of proximate cause then provides a case-specific requirement that the plaintiff's injury must be within a general category of foreseeable harms encompassed by both the tort duty and its breach—a necessary predicate for liability. The prima facie case accordingly requires the foreseeability test to establish proximate cause for the breach of a duty that is limited to the risks of foreseeable harm.

Once liability has been established, the damages phase of the case requires a further inquiry to fix the full extent of compensable harm proximately caused by the tortious conduct. The foreseeability test produces inequities in the determination of damages that the directness test

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fairly resolves. This inquiry is structured by the uniformly adopted rule that permits full recovery for an unforeseeably large harm, such as a crushed skull, that was directly caused by a tortious force that would normally cause minor injury, such as a bump on the head. This rationale also explains why the intentional torts exclusively rely on the directness test, eliminating culpability as a confounding factor in the analysis of proximate cause. Instead of being competing formulations, the directness and foreseeability tests each address different components of a tort claim, explaining why each one is both widely adopted and yet roundly criticized when employed as the only method for determining proximate cause.

INTRODUCTION

Like any other form of behavior, tortious conduct can have repercussions extending far into the future. Due to the ongoing ripple effects of factual causation, courts have adopted further causal restrictions on the scope of liability: Unless the plaintiff's injury was proximately caused by the defendant's tortious conduct, the plaintiff cannot recover.[1]

Courts have disagreed about the policy rationales for this limitation of liability. "There is perhaps nothing in the entire field of law which has

1. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 (5th ed. 1984) ("In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.").

called forth more disagreement, or upon which the opinions are in such a welter of confusion."[2]

The difficulty originated within the medieval writ system, which relied on causal concepts to define the appropriate writ for the legal actions that now form the core of modern tort law.[3] After the writ system was abolished in the mid-nineteenth century, courts used the language of proximate cause to limit liability for policy reasons unrelated to relationships of cause and effect. "The result 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."[4]

Today, the noncausal policy issues that justify categorical limitations of liability are addressed by the element of duty. This refinement of proximate cause, however, has only made a "little headway . . . in dispelling the confusion and taking some of the workload off this weary concept."[5] The disarray in the case law and associated commentary led the U.S. Supreme Court to observe, "[t]he best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."[6]

The element of proximate cause in negligence and other tort cases is confusing largely because courts evaluate the issue in two ways. One approach defines proximate cause in terms of the risks foreseeably created by the defendant at the time of the tortious conduct, a forward-looking inquiry fundamentally different from the alternative that asks whether the plaintiff's injury can be directly traced back to the defendant's tortious conduct.[7] The two tests reach different outcomes for direct, unforeseeable harms, with commentators disagreeing about which one represents the

2. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 45, at 311 (1st ed.1941). *See also, e.g.*, Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 49–50 (1991) ("Modern tort theorists have lavished seemingly boundless attention on the problem of explaining proximate cause, but the consensus of law students and others is that proximate cause remains a hopeless riddle.").

3. *See* S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 316–52 (1969) (tracing the development of modern tort law from the writ of trespass, which applied to directly caused harms, and from the writ of trespass on the case, which applied to indirectly caused harms).

4. FOWLING V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 20.1 (3d. ed. 2006-2007 & 2020 update) [hereinafter HARPER, JAMES & GRAY ON TORTS].

5. *Id*.

6. Exxon Co. v. Sofec, Inc., 517 U.S. 830, 839 (1996) (quoting 1 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906)).

7. *See* W. PAGE KEETON ET AL., *supra* note 1, at 274, 280–96.

majority rule.[8] Each test has widespread support in the case law: "Foreseeability does play a large part in limiting liability. . . . On the other hand, there may be liability for unforeseeable consequences" under the directness test.[9] Consistent with this case law, the *Restatement (Third) of Torts* effectively recognizes both tests for proximate cause without reconciling their differences.

Concluding that "the term 'proximate cause' is a poor one to describe limits on the scope of liability," the *Restatement (Third)* instead limits liability "to those harms that result from the risks that made the actor's conduct tortious."[10] This risk standard, "[w]hen properly understood and framed," is "congruent with" the foreseeability standard that has been adopted by "virtually all jurisdictions . . . for some range of scope-of-liability issues in negligence cases."[11]

The risk standard would seem to rule out the direct-consequences test, which permits recovery for directly caused "harm that is beyond the scope of the risk in negligence actions, including harm that is unforeseeable."[12] Nevertheless, the *Restatement (Third)* recognizes that "[i]f the type of harm that occurs is within the scope of the [tortious] risk," then "the fact that the actor neither foresaw nor should have foreseen the extent of harm caused by the tortious conduct does not affect the actor's liability for the harm."[13] The causal rule in these cases conforms to the directness test.[14] Consequently, the *Restatement (Third)* concedes that the rule is "difficult to reconcile" with the foreseeability test embodied in the risk standard.[15] The *Restatement (Third)* nevertheless justifies this application of the directness test on the grounds that such cases "rarely arise" and it is "administrative[ly] convenien[t]" to avoid "the sometimes uncertain and

8. *Compare* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 203 (2d ed. 2011 & 2020 update) ("It is very doubtful that liability unlimited by foreseeability has much contemporary support."), *with* RICHARD A. EPSTEIN, TORTS 271–72 (1999) (concluding that the "foresight limitation has not met with a generally favorable response in American courts," whereas "a majority of states use the directness test").

9. HARPER, JAMES & GRAY ON TORTS, *supra* note 4, at § 20.5.

10. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (AM. L. INST. 2010).

11. *Id*. cmt. e.

12. *Id*.

13. *Id*. cmt. p.

14. *See In re* Kinsman Transit Co., 338 F.2d 708, 724 (2d Cir. 1964) ("The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked.").

15. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. p (AM. L. INST. 2010).

indeterminate inquiry into whether the extent of the harm was unforeseeable."[16]

These varied rules and their rationales are puzzling, resting on distinctions like direct causes and foreseeable harms that do not obviously clarify matters. As I will argue, the confusion surrounding proximate cause can be eliminated by clearly identifying the different roles the inquiry and its concepts play within a tort claim.

Proximate cause serves two different purposes in any tort claim. In addition to establishing liability in the first instance, proximate cause also applies to the damages phase of the case—the plaintiff is entitled to recover damages only for the compensable harms proximately caused by the tortious conduct. Unlike the liability phase of the case, causal questions for determining the extent of damages turn on a different set of normative considerations. This difference in the two causal inquiries justifies the two tests for proximate cause, with each one addressing different elements of the tort claim. The foreseeability and directness tests are each valid within their appropriate domains, which is why the long-running debate about the single best test has been inconclusive.

The argument proceeds in three parts. Part I further describes how the development of proximate cause has produced two apparently incompatible tests that have not been adequately reconciled. Part II explains why the foreseeability test necessarily governs the prima facie case, even within jurisdictions that purportedly use the directness test. In reaching this conclusion, the analysis addresses an ongoing controversy involving the role of foreseeability across the elements, demonstrating why proximate cause can provide a case-specific limitation of liability to foreseeable harms only if the tort duty is categorically limited to foreseeable harms. Foreseeability for this purpose is a behavioral conception defined by the risks contemplated by the reasonable person when making the safety decision in question, an inquiry that is adequately structured for resolution by the jury. Part III then shows why the directness test is the appropriate method for determining proximate cause in the damages phase of the case, even within jurisdictions that purportedly use the foreseeability test. This rationale also explains why the rule of proximate cause for the intentional torts differs from the rules governing accidental harms, eliminating culpability as a potentially confounding factor in the analysis of proximate cause. The appropriate formulation of proximate cause only becomes evident once the interrelationships between that inquiry and other elements of the tort claim have been fully untangled.

16. *Id.*

I. ONE ELEMENT, MULTIPLE ISSUES

Throughout the history of proximate cause, courts have used the element to resolve a multitude of issues. "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."[17] To fully understand proximate cause, we must first understand the various issues that the element has addressed.

A. Untangling Duty from Proximate Cause

The abolition of the writ system in the latter half of the nineteenth century was intended to be no more than a procedural innovation. Freed from the formalistic pleading requirements of that system, courts were supposed to rely on the substantive bases of liability that had been implicit in the various writs.[18] During this period, torts emerged as one of the recognized substantive fields of law. "The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874."[19]

The development of torts as a substantive field of the common law centered on the negligence cause of action. Courts and commentators of this era recognized that disparate legal actions within the writ system could be unified by the concept of a legal duty to exercise reasonable care.[20] "The growth of negligence from the omission of a preexisting, specific duty owed to a limited class of persons to the violation of a generalized standard of care owed to all ensured the emergence of Torts as an independent branch of law."[21]

The meaning of a generalized standard of care, however, required further elaboration. Is the standard generalized in the sense that it involves a duty universally owed to the entire world, in which case anyone injured by a breach of the duty can potentially recover? Or is the standard of care

17. Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471–72 (1950).

18. *See generally* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001) (explaining how courts formulated the substantive fields of the common law following abolition of the writ system).

19. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980) (citations omitted).

20. *See id.* at 301–08 (identifying duty as the first element to appear in the historical development of modern negligence law, largely because the "concept of duty provided an analytical and linguistic framework for reconciling the cases").

21. *Id.* at 18.

instead only defined in a generalized or abstract manner, so that when applied to the facts of a specific case it crystallizes into a concrete tort duty limited to those individuals foreseeably threatened by the risky behavior in question? Each conception had ample support in the case law and commentary when the court confronted the issue in the landmark case *Palsgraf v. Long Island Railroad Co*.[22]

In his famous dissenting opinion, Judge Andrews defined the tort duty as a universal obligation "imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."[23] A universal duty would permit anyone who was injured by a breach of the duty to recover, a potentially limitless form of liability given the never-ending factual consequences that can flow from any form of behavior. Recognizing that some limitation of liability is warranted, Judge Andrews argued that courts can limit the scope of proximate cause for reasons of public policy:

> What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad[.] He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy.[24]

Judge Andrews could have bolstered this argument with a variety of other rules. For example, the common law had long denied recovery for stand-alone emotional harms and pure economic losses on the ground that such harms were too "remote" and therefore not proximately caused by the defendant's negligence.[25] The rationale for doing so was based on policy reasons, not causal reasons—a formulation of proximate cause that is

22. 162 N.E. 99 (N.Y. 1928).

23. *Id.* at 102 (Andrews, J., dissenting).

24. *Id.* at 103–04.

25. *See, e.g.*, Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141, 146 (1902) (stating that the first "principal" reason for denying recovery for stand-alone emotional harms is that "it is too remote" and then criticizing this ground for the denial of recovery). Courts adopted this same rationale to limit recovery for pure economic loss. *See, e.g.*, JOHN G. FLEMING, THE LAW OF TORTS 170 n.50 (5th ed. 1977) ("The principled denial of liability for economic loss used to be put on grounds of remoteness" under the English common law").

currently employed by civilian jurisdictions in Europe.[26] As these rules illustrate, courts can infuse the element of proximate cause with the type of policy-based reasons discussed by Judge Andrews in order to categorically limit liability under a duty of care universally owed to everyone in the world.

Palsgraf is a pivotal case because the majority opinion, written by Chief Judge Benjamin Cardozo, rejected the universal duty. The rationale for limiting duty to the risks of foreseeable harm had already been forcefully articulated by Oliver Wendell Holmes, who also maintained that the duty of reasonable care is universally owed to the entire world.[27] But as Cardozo recognized in *Palsgraf*, the requirement of foreseeability limits the duty to those who are foreseeably threatened by the risky conduct, and so a plaintiff can recover only by showing that the defendant's breach of duty constitutes "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial."[28] The breach of a duty universally owed to the entire world is "unsocial," but courts in the vast majority of states now follow *Palsgraf* and require the defendant to breach a relational duty owed to a plaintiff who was foreseeably injured by the defendant's tortious conduct.[29]

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26. *See* 2 CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS 487 (2000) (observing that in cases of "pure economic loss . . . the courts' willingness to reject claims for want of causation is at its greatest all over Europe"); *id*. at 169 (explaining that the "legal problem" of whether non-economic damage is recoverable in Europe depends on "questions of attributability, particularly in the field of causality"); Jaap Spier & Olav A. Haazen, *Comparative Conclusions on Causation*, *in* UNIFICATION OF TORT LAW: CAUSATION 127, 133–37 (Jaap Spier ed., 2000); *see also* EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law*, *in* RESEARCH UNIT FOR EUROPEAN TORT LAW, EUROPEAN CENTRE OF TORT AND INSURANCE LAW, UNIFICATION OF TORT LAW: FAULT 369, 372 (Pierre Widmer ed., 2005) (listing the elements required for negligence liability without mentioning duty).

27. *Compare* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 95 (1881) ("The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen."), *with* Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 660–63 (1873) (discussing tort liabilities in terms of "duties of all the world to all the world" while recognizing limited exceptions, like assault, that "cannot satisfactorily be resolved into duties of all to all, but they are discerned to tend in the same direction").

28. *Palsgraf*, 162 N.E. at 100.

29. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf: *Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1890–92 (2011) ("When faced with the issue, thirty-three (of fifty-one) courts hold with fair consistency that whether the plaintiff was a foreseeable victim is a question to be decided in the duty context. Only four jurisdictions clearly follow Judge Andrews in holding that plaintiff-foreseeability is properly and solely a matter for proximate cause."). Of course, much turns on how one interprets the requirement of foreseeability. *Compare id.* at 1893 (concluding that "[i]n the remaining fourteen jurisdictions, the proper doctrinal home for plaintiff-foreseeability remains unclear," in part because "courts conceptualize *Palsgraf*-like scenarios in terms of harm-foreseeability rather than plaintiff-foreseeability"), *with* DOBBS ET AL., *supra* note

This relational duty of reasonable care does not revert the legal obligation back to the crabbed, narrowly defined relations of status and the like required by the writ system; it is a general standard of conduct potentially owed to anyone at any time, depending on the risky conduct in question. For example, as you drive up the street, the other drivers, pedestrians, and nearby property owners to whom you owe a duty are continually changing. When you get out of the car and engage in some other type of risky behavior, the categories of foreseeable victims change again. The tort duty can govern any form of affirmative conduct creating a risk of foreseeable harm to others even though "the identity of the harmed person or harmed interest is unknown," and so in this essential respect "everyone has a duty of care to the whole world."[30]

Because the relational duty is limited by the policy reasons that justify the requirement of foreseeability, courts can rely on other substantively compatible policy reasons to place further limits on the duty.[31] As the *Restatement (Third) of Torts* explains, "in some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability."[32] Limiting the scope of duty for reasons of principle or policy is perhaps the most important legacy of *Palsgraf*, yet this aspect of the case is ignored by the ongoing debate over its specification of relational duties.[33]

8, § 202 ("The great majority of cases hold negligent defendants liable only for harm of the same general kind that they should have reasonably foreseen and should have acted to avoid. The same principle holds defendants liable only to plaintiffs who are in the same general class of people who were at risk from his negligence.") (footnote omitted). The ambiguity is further enhanced by cases in which courts limit duty without expressly mentioning foreseeability. *See, e.g.*, Dep't of Lab. v. McConnell, 828 S.E.2d 352, 358 (Ga. 2019) (disapproving the holding in a prior case "to the extent that it created a general legal duty 'to all the world not to subject [others] to an unreasonable risk of harm'" (quoting Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982) (alteration in original)).

30. Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 238 (Wis. 1998) (quoting Rockweit v. Senecal, 541 N.W.2d 742 (1995) (discussing a defendant's tort duty that is "established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone") (internal citations omitted)).

31. *See generally* Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 901 (2009) [hereinafter Geistfeld, *Policy-Based Limitations of Duty*] (explaining why duty can be limited by policy reasons relevant to the entire category of cases governed by the duty, not merely those policies implicated by the case at hand) .

32. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010).

33. "The elements of the debate are canonical: (1) What is the nature of duty—is it relational or act-centered? (2) Is plaintiff-foreseeability a duty inquiry or an aspect of proximate cause? and (3) Is court or jury the proper arbiter of foreseeability?" Cardi, *supra* note 29, at 1874. The limitation of duty for reasons of principle or policy, however, has other significant implications.

By definition, a universal duty is unlimited within the class of individuals injured by the breach, leaving proximate cause as the only element capable of placing additional categorical limits on liability for policy reasons—the approach defended by Judge Andrews. When used in this manner, proximate cause is confusing in part because it depends on policy considerations having little to do with "cause and effect" relationships.[34] For example, a defendant who negligently killed someone undoubtedly caused foreseeable emotional distress to family members and friends. By denying recovery for these stand-alone emotional harms on the ground that they were unforeseeably remote, courts imbued foreseeability with policy considerations unrelated to causality.

Today, courts deny recovery for stand-alone emotional harms and pure economic losses on the ground that there is no duty with respect to such harms, not because the injuries are unforeseeable or too remote as a matter of proximate cause.[35] This development of relational duties has reduced the role of proximate cause to a consideration of cause-and-effect relationships, thereby limiting the meaning of terms like foreseeability and remoteness to those causal concerns.

This reduced role for proximate cause, however, has not fully solved the problem of vagueness. In developing the more limited causal dimension of the inquiry, courts and commentators have disagreed about the appropriate conception, yielding different tests for determining proximate cause.

B. Competing Conceptions of Proximate Cause

Like the element of duty, the element of proximate cause fully emerged only after courts began to develop negligence as a substantive

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For example, it renders implausible the interpretation that tort liability is formulated to further the objective of allocative efficiency. *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 173–80 (2011) [hereinafter Geistfeld, *Misalignment*].

34. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 39–40 (1927) (summarizing analysis of a wide range of cases in which courts limited liability for policy reasons not accurately described in terms of causation).

35. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. d (AM. L. INST. 2012) (observing that "in the area of emotional harm, a court may decide that an identified and articulated policy is weighty enough to require the withdrawal of liability" under a "no-duty ruling"); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 1(1) (AM. L. INST. 2020) ("An actor has no general duty to avoid the unintentional infliction of economic loss on another").

cause of action in the nineteenth century.[36] However, "[t]he courts in these early proximate cause cases did not adopt a uniform test of proximate cause."[37]

At this time, the "developing substantive law of damages" had already recognized "a general principle . . . that only proximate consequential damages could be recovered, and not remote consequential damages."[38] For example, the damages recoverable for breach of contract were limited by a requirement of proximate cause, and courts "borrowed heavily" from this and related "areas in applying proximate cause limitations in negligence actions."[39] The first torts treatise, published in 1860, cited "primarily to special damage cases" to support the proposition that proximate cause is a general limitation of tort liability.[40]

The concept of proximate cause subsequently developed into a thicket of competing rationales and tests for liability. "While the treatise writers were unanimous in recognizing the proximate cause limitation on negligence liability, they presented a diverse set of justifications for the rule."[41] The justifications were not limited to damage questions but also encompassed the imposition of liability in the first instance.[42] And although courts were all purportedly applying the same rule of proximate cause—whether the plaintiff's injury was a natural, ordinary consequence of the defendant's wrongful conduct—the early case law revealed "two potentially divergent approaches" for resolving the issue.[43] In some cases, courts focused on "the causal sequence" traced backwards from the injury to the defendant's tortious conduct as per the directness test; in others, they applied a forward-looking inquiry that "emphasized the expected, foreseeable consequences of defendant's conduct as the test of proximate causation."[44]

36. Kelley, *supra* note 2, at 68 ("It was only in the 1840s, when a more coherent idea of a substantive law of negligent torts had developed, that proximate cause became firmly established as an element in negligence law.").

37. *Id.*

38. *Id.* at 70 & n.90.

39. *Id.* at 70–71, 70 n.91 (observing also that courts at this time relied on proximate cause to determine the scope of coverage under maritime insurance policies).

40. *Id.* at 72 (discussing C.G. ADDISON, WRONGS AND THEIR REMEDIES, BEING A TREATISE ON THE LAW OF TORTS 4–5 (1860)).

41. *Id.* at 73.

42. For example, Frederick Pollock justified proximate cause as a limitation of the defendant's liability to the foreseeable risks of harm created by the breach of duty. FREDERICK POLLOCK, THE LAW OF TORTS 21–45 (1887). Pollock, in turn, was influenced by the views of Oliver Wendell Holmes, who argued that foreseeable harm is "the touchstone of liability in tort in general and negligence in particular." Kelley, *supra* note 2, at 80.

43. Kelley, *supra* note 2, at 74.

44. *Id.* at 75.

In negligence cases, the foreseeability test is easily justified: The duty to exercise reasonable care is limited to the risks of foreseeable harm, so a negligent defendant's liability should be limited to those foreseeable harms caused by the risks that rendered the conduct unreasonably dangerous.[45] For this same reason, however, the foreseeability test can be criticized: "It is also clear that if this analysis of the duty problem is accepted, no good, but only confusion, can result from repeating the same inquiries as to foreseeability under the cause issue as were asked and answered (or should have been) under the duty issue."[46]

Another problem with the test is that the concept of foreseeability can be unduly indeterminate. As the California Supreme Court memorably put it, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery."[47]

The foreseeability test is further undermined by "the great weight of authority in this country" that applies the directness test

> where the defendant has been negligent toward the plaintiff or his property (even under the restrictive [foreseeability] view of the scope of duty) and where injury has come through the very hazard that made the conduct negligent, but where because the stage is set for it the *extent* of the injury passes all bounds of reasonable anticipation. A milk deliverer, for instance, negligently leaves a bottle with a chipped lip, and this scratches a housewife's hand as she takes it in. All this is easily within the range of foresight. This particular housewife, however, has a blood condition so that what to most women would be a trivial scratch leads to blood poisoning and death. . . . In these and like cases of what well may be called direct consequences, the courts generally hold the defendant liable for the full extent of the injury without regard to foreseeability.[48]

The directness test can be traced back to the writ system. The writ of trespass let the plaintiff recover for physical harms directly caused by the defendant, whereas the writ of trespass on the case provided recovery for physical harms indirectly caused by the defendant based on the specific circumstances of the case.[49] The combined logic of the two writs suggests

45. *See, e.g.*, Joseph Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 16, 35 (1909) ("Why should a defendant be responsible for occurrences entirely extraneous to the purposes of his duty? To hold him responsible would be . . . an arbitrary penalty beyond compensation for his wrong in the form of involuntary insurance.").

46. HARPER, JAMES & GRAY ON TORTS, *supra* note 4, § 20.5.

47. Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989).

48. HARPER, JAMES & GRAY ON TORTS, *supra* note 4, § 20.5.

49. *See* MILSOM, *supra* note 3, at 316–52.

that a defendant is liable for all physical harms directly caused by the tortious misconduct, and can also incur liability for having indirectly caused harms in specific circumstances, most notably, when the defendant could reasonably anticipate or foresee that such harms would occur. A direct cause is always proximate, and an indirect cause is proximate only when it foreseeably brings about the harm—the formulation embodied in the directness test.

For purposes of this inquiry, an injury is not directly caused by the defendant's tortious behavior when a force intervenes between the misconduct and the ensuing harm:

> By and large external forces will be regarded as intervening if they appear on the scene after the defendant had acted unless perhaps their pending inevitability at the time of the defendant's negligent act or omission is made crystal clear. And when a new force (for which the defendant is not responsible) "intervenes" in this crude sense to bring about a result that the defendant's negligence would not otherwise have produced, the defendant is generally held [liable] for that result only where the intervening force was foreseeable. As many cases put it, a new and unforeseeable force breaks the causal chain.[50]

An unforeseeable intervening force is a superseding cause that "breaks the causal chain" between the defendant's negligence and the plaintiff's harm, thereby making the negligence a remote cause not subject to liability.[51] If, for example, the defendant negligently started a fire that smoldered for a few days and was then spread to the plaintiff's property by unforeseeably high winds accompanying a storm, the timing of the storm determines proximate cause. If the storm occurred after the fire was negligently started, the unforeseeable wind is a new causal force that supersedes the defendant's prior negligent conduct and cuts off liability for the ensuing harms. But if that same unforeseeable storm had already been approaching when the defendant first set the fire, it would not have intervened following the negligence, making the fire a direct, proximate cause of the ensuing damage. The timing of a causal force determines whether it intervenes between the defendant's negligence and the occurrence of injury, and an intervening force must be foreseeable for the negligence to be a proximate cause.

This example also shows why so many courts and commentators reject the directness test. The storm would be an intervening cause only if its force came into existence after the negligent conduct. How can the court

50. HARPER, JAMES & GRAY ON TORTS, *supra* note 4, § 20.5.

51. *Id.* n.35.

make such a determination? As chaos theory shows, the movement of a butterfly in Africa can set in motion forces that ultimately cause a hurricane to cross the Atlantic Ocean. The "force" of such a storm can be in place long before the negligent defendant's conduct occurred, even if the storm apparently entered the scene after the defendant had acted negligently. The timing of the causal forces is all that matters for distinguishing between direct and intervening causes, yet there is no good way to determine reliably when a force was initiated. Why not when the earth was first formed? None of these questions have any apparent connection to the underlying policy issue about the appropriate scope of the defendant's liability, a severe problem for the directness test.

The apparently intractable problem of conceptualizing a direct cause explains the appeal of the foreseeability test, which is based on the rationale for liability in the first instance. That test, however, suffers from the problems described above. "And so we go round and round, locked in a relentless rivalry" between these two competing conceptions of proximate cause.[52]

C. Untangling Proximate Cause Across the Elements

To establish the prima facie case of liability, the plaintiff must show that the defendant breached a tort duty that proximately caused some compensable harm—an inquiry that aligns the elements of duty, breach, and factual causation with the element of damages.[53] Because all of the other elements are filtered through proximate cause, the policy issues more appropriately addressed by any one of them can instead be shunted to proximate cause, creating confusion of the type that has long plagued the relation between duty and proximate cause. The core meaning of proximate cause—its distinctive contribution to a tort claim—can be uncovered only if the inquiry is untangled from all other elements of the tort claim.

This conclusion is fully illustrated by the relation between proximate cause and the determination of damages—the last step in the tort inquiry. Having established an entitlement to damages for at least some compensable harm in the prima facie case, the plaintiff must then prove the quantum of damages or amount of compensable harm *caused* by the tortious conduct. For example, "[t]he injured plaintiff is entitled to recover reasonable medical and other expenses proximately resulting from tortious

52. Kelley, *supra* note 2, at 105.

53. *See* Geistfeld, *Misalignment*, *supra* note 33, at 148–57 (showing how the element of proximate cause renders negligence liability internally coherent by aligning the elements from duty to damages within the prima facie case).

injury and expenses that will probably result in the future."[54] Similarly, "[t]he plaintiff is entitled to recover for all forms of suffering proximately caused by tortious injury, including future suffering."[55] Unless damages are limited by proximate cause, the defendant's liability for a tortious injury would extend to all future harms factually caused by that predicate injury, a sum that can continually expand due to the ongoing factual consequences produced by any given condition.[56] As is true for the liability phase of the case, the damages phase of the case must also rely on proximate cause to limit the scope of the defendant's liability.

In first developing the element of proximate cause, courts and commentators largely relied on damage rules to formulate a monolithic test of proximate cause governing all aspects of the tort claim.[57] This approach rests on the unexamined premise that the policy reasons for limiting the scope of liability in the prima facie case are the same as those for limiting the scope of liability with respect to the determination of damages. Is this assumption valid? Throughout the history of modern tort law, courts and scholars have not adequately addressed this question. Doing so is necessary to understand how proximate cause properly applies in tort cases.

II. PROXIMATE CAUSE IN THE PRIMA FACIE CASE

Regardless of the label that a court applies to its test for proximate cause, the prima facie case of liability is inherently limited to the harms encompassed by the duty the defendant owes to the plaintiff. This axiomatic limitation of liability unifies the directness and foreseeability tests within the liability phase of the case, while adequately structuring the inquiry in a manner that is well suited for resolution by the jury.

A. A Reprise of Duty and Proximate Cause

"It is fundamental that the existence of a legally cognizable duty is a prerequisite to all tort liability."[58] The element of duty determines the types of harms for which the defendant is responsible as a matter of tort law.

54. DOBBS ET AL., *supra* note 8, at § 479.

55. *Id.*

56. *See supra* note 1 and accompanying text (explaining why proximate cause is required to limit liability for factually caused losses).

57. *See supra* notes 38–40 and accompanying text.

58. Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993); *see also, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) (holding that "common-law damages actions of the sort raised by petitioner"—involving strict products liability, negligence, express warranty, and intentional tort claims—"are premised on the existence of a legal duty").

Without an antecedent duty, there is no legal basis for subjecting a defendant to tort liability for the injury in question.

In a negligence case, duty determines the risks of harm that factor into the standard of reasonable care.[59] The standard of reasonable care then determines how a duty-bearer should behave in light of those potential harms. As a functional matter, whether a defendant breached the duty to exercise reasonable care—the second element of negligence liability—must be determined by reference to the harms governed by that duty. Establishing duty, therefore, is the first element of negligence liability.

The duty to exercise reasonable care is limited to the risks of foreseeable harm: "No actor can be counted as negligent unless he either actually foresaw, or a reasonable person in a similar position would have foreseen that harm to someone's interests was an unreasonably likely outcome of his conduct."[60] Not all foreseeable harms, however, are encompassed by the duty.[61] By defining duty exclusively in terms of certain types of foreseeable harms, tort law obligates the duty-bearer to consider only those harms when engaged in risky behavior. Harms that fall outside of the duty are not within the actor's legal obligation and cannot factor into the determination of whether the actor behaved in the legally required manner.

The role of foreseeability within the element of duty, however, has created confusion about the appropriate test for proximate cause. Foreseeability limits duty, so why place further limits on liability for unforeseeable harms with a separate inquiry into proximate cause?

Resolution of this issue depends on the different roles of foreseeability across the different elements of a tort claim. Duty is defined by "relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[62] Rules applicable to a general class of cases are questions of law decided by judges, including the rule that the duty to exercise reasonable care is limited to the risks of foreseeable harm for *all* negligence cases. Foreseeability in this respect is only a general limitation of liability that fundamentally differs from its case-specific application.

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59. *See* Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1923–28 (2002); *see also* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 161–72 (2008) (showing how different specifications of the duty result in different specifications of the risks governed by the standard of reasonable care).

60. *See* DOBBS ET AL., *supra* note 8, § 179.

61. *Id.* ("[F]oreseeability of harm, though necessary, is not sufficient."). For example, foreseeable harms of pure economic loss and stand-alone emotional distress fall outside of the duty and are not compensable as a result. *See supra* note 35 and accompanying text.

62. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a. (AM. L. INST. 2010).

Individual cases turn on their particular facts, requiring case-by-case determinations of whether the plaintiff suffered a foreseeable harm that is within the general class of foreseeable harms governed by the duty. The prima facie case of liability accordingly depends on a case-specific inquiry into foreseeability, explaining why "virtually all jurisdictions employ a foreseeability (or risk) standard for some range" of proximate cause issues.[63] "Central to the limitation of liability . . . is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious."[64]

Though easily justified in these terms, the rationale for the foreseeability test is even more fundamental. Liability is inherently limited by the scope of the tort duty; one cannot incur liability for an injury without being legally responsible for it. A duty limited to the risks of foreseeable harm necessarily absolves a defendant from responsibility—and thus liability—for any harm that is entirely unforeseeable.

The distinctive roles of foreseeability within the elements of duty and proximate cause, however, has created yet another source of confusion. "[B]ecause the existence of a legal duty is a question of law," some courts "have also treated the foreseeability of a particular injury as a question of law" to be decided by judges.[65] By relying on the element of duty to make case-specific findings of foreseeability as a matter of law, judges conflate the categorical role of foreseeability with its case-specific application, thereby usurping the role of the jury. Consequently, the *Restatement (Third)* "disapproves" of judicial no-duty rulings of foreseeability that depend on case-specific facts "to protect the traditional function of the jury as factfinder."[66] To address this problem, the *Restatement (Third)* eliminates foreseeability from duty and places case-specific issues of foreseeability within the element of proximate cause or scope of liability for determination by the jury.[67]

This resolution of the problem, however, severs the requisite connection between duty and proximate cause. According to the *Restatement (Third)*, "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[68] Because

63. *Id.* § 29 cmts. e, j.

64. *Id.* cmt. d.

65. A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907, 914–16 (Neb. 2010) (recognizing also that "[o]ur mistake was a common one").

66. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (AM. L. INST. 2010).

67. *Id.* cmt. a ("When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability.").

68. *Id.* § 7(a).

this formulation of duty is not limited by the requirement of foreseeability, it "essentially gives rise to a presumed duty every time a plaintiff is [physically] injured by a defendant."[69] Such a duty to exercise reasonable care accordingly encompasses *all* physical harms—both foreseeable and unforeseeable—factually caused by the defendant's negligent behavior. Lacking any limitation of liability for unforeseeable harms, the rationale for the foreseeability test is eliminated: it no longer can be justified by "the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious."[70]

The logic behind conclusion can be more rigorously expressed by the standard of reasonable care famously articulated by Judge Hand: "if the probability [of injury] be called *P*; the injury, *L*, and the burden [of a precaution], *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$."[71] Consider a defendant who negligently failed to take a precaution with a burden B_1 that would have eliminated a risk of foreseeable physical harm PL_1. Suppose that the plaintiff was instead physically harmed by an unforeseeable risk PL_2 that would also have been eliminated if the defendant had exercised reasonable care. Even if the jury only relied on the foreseeable risk PL_1 in deciding that the defendant acted negligently, $B_1 < PL_1$, that conclusion makes the unforeseeable risk PL_2 tortious as well. The duty to exercise reasonable care encompasses all risks within the duty that would be eliminated by the exercise of reasonable care, so the finding of negligence implies $B_1 < PL_1 + PL_2$. Hence the unforeseeable harm caused by the risk PL_2 is within "those harms that result from the risks that made the actor's conduct tortious" as required by the *Restatement (Third)*'s formulation of proximate cause.[72] The harms that the defendant improperly risked by behaving negligently necessarily include *all* harms within the duty that would have been eliminated by the exercise of reasonable care, permitting the plaintiff to recover for the unforeseeable injury.

Proximate cause limits liability to foreseeable harms only if the duty is also limited to foreseeable harms. In attempting to prevent judges from usurping the jury's role in resolving case-specific issues of foreseeability, the *Restatement (Third)* goes too far by removing foreseeability from the specification of duty.

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69. Quiroz v. ALCOA Inc., 416 P.3d 824, 837 (Ariz. 2018).

70. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. d (AM. L. INST. 2010).

71. U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (opinion of Hand, J.).

72. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

This problem can be fixed: the substantive framework of the *Restatement (Third)* does not entail the complete elimination of foreseeability from duty, even though it correctly "disapproves" the "widespread use of foreseeability in no-duty determinations" in order to "protect the traditional function of the jury as factfinder."[73] According to the *Restatement (Third)*, "No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[74] A legal rule that limits duty to the risks of foreseeable harm satisfies this requirement without authorizing judges to make case-specific findings of foreseeability.

A legal rule limiting duty to foreseeable harms is no different from any other legal rule of general application. For example, the tort of trespass on land is nothing other than a general rule obligating individuals not to "trespass on another's land." Judges then specify further legal rules defining the elements of trespass, and the jury ultimately determines how these rules apply to the case at hand. So, too, a legal rule that limits duty to foreseeable harms specifies an element of negligence liability that categorically applies to all negligence cases, which is different from its case-specific application by the jury. Consequently, a legal rule that limits duty to foreseeable harms for all negligence cases does not misapply foreseeability in the case-specific manner that is defensibly disapproved of by the *Restatement (Third)*.

The categorical limitation of duty to foreseeable harms, moreover, is required in order to limit the standard of reasonable care to a consideration of only those harms as required by the *Restatement (Third)*.[75] Courts cannot import a requirement of foreseeability into the determination of whether the defendant breached the duty to exercise reasonable care if they have previously concluded that foreseeability does not limit the duty that has been breached.[76]

Once the plaintiff has proven that the defendant breached the duty and factually caused the harm in question, the court must then decide the case-specific issue of whether the plaintiff's injury is within the general class of foreseeable harms encompassed by the tort duty. The *Restatement (Third)*

73. *Id.* § 7 cmt. j.

74. *Id.* cmt. a.

75. *Compare id.* cmt. j ("Foreseeable risk is an element in the determination of negligence."), *with supra* notes 70–72 and accompanying text (explaining why duty determines the types of risks governed by the standard of reasonable care).

76. This problem has not been recognized by courts that have followed the approach in the *Restatement (Third)*. *See, e.g.*, A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 N.W.2d 907, 914–16 (Neb. 2010) (eliminating foreseeability from duty and concluding, without analysis, that the standard of reasonable care only considers foreseeable risks).

properly places this issue within the element of proximate cause or scope of liability for the jury to resolve.[77] The entire negligence framework in the *Restatement (Third)* can be squared with the rule adopted by the vast majority of courts that categorically limits duty to foreseeable harms threatened by the risky conduct.[78]

To be sure, this framework logically locates the case-specific issue of the plaintiff's foreseeability within the element of duty—the approach taken in *Palsgraf v. Long Island Railroad Co.* that has been followed by most courts.[79] In *Palsgraf*, for example, the court first adopted the legal rule limiting duty to the foreseeable victims of the unreasonable conduct.[80] Having resolved this duty issue in a manner that categorically applies to all negligence claims, the court then addressed the case-specific question of plaintiff foreseeability, concluding that there was no duty because the negligent conduct did not foreseeably threaten the plaintiff.[81]

The court's holdings in *Palsgaf* did not supplant the role of the jury. According to the *Restatement (Third)*, "[w]hen resolution of disputed adjudicative facts bears on the existence or scope of a duty, the case should be submitted to the jury with alternative instructions."[82] In *Palsgraf*, the foreseeability of the plaintiff was not a disputed adjudicative fact: the parties, "by concession," had agreed that the negligent conduct did not foreseeably threaten the plaintiff.[83] Due to this concession, the court could make this case-specific ruling as a matter of law without usurping the role of the jury. But when the parties contest the plaintiff's foreseeability, the jury can be instructed that in order to consider whether the defendant breached the duty to exercise reasonable care, it must first decide that the plaintiff was foreseeably threatened by the allegedly negligent conduct. The element of duty can accommodate case-specific determinations of plaintiff foreseeability in a manner that fully protects the jury's role as finder of fact.

77. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010) ("When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability.").

78. *See supra* notes 29, 60 and accompanying text.

79. 162 N.E. 99, 101 (N.Y. 1928) (concluding that because defendant owed no duty to the unforeseeable plaintiff, "[t]he law of causation, remote or proximate, is thus foreign to the case before us"). *See also supra* note 29 and accompanying text (describing widespread adoption of this rule across the country).

80. *Palsgraf*, 162 N.E. at 100.

81. *Id.* at 101.

82. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. b (AM. L. INST. 2010).

83. *Palsgraf*, 162 N.E. at 101.

Too many judges, however, have used the element of duty to take over the jury's role in making case-specific determinations of foreseeability. To avoid this problem, the *Restatement (Third)* has moved this particular issue from the element of duty to the element of proximate cause. An unforeseeable plaintiff necessarily suffers an unforeseeable harm, so the defendant's negligence is never the proximate cause of such an injury. By relocating every case-specific issue of foreseeability to the element of proximate cause, the *Restatement (Third)* ensures that juries will decide the matter. When properly applied, this approach leaves untouched the other holding in *Palsgraf* that defines duty in the categorical, relational terms of foreseeability, which in turn fully justifies the foreseeability test for proximate cause.

B. The Inexorable Logic of the Risk Standard

Courts that employ the directness test for proximate cause cannot impose liability on a defendant whose tortious conduct only caused unforeseeable injuries that are wholly outside of the duty. Doing so would impermissibly subject the defendant to legal liability in the absence of any legal obligation for the injury. The directness test must require that the defendant caused at least some foreseeable harm governed by the duty. Courts have implicitly recognized as much when applying the directness test in the liability phase of the case.

Courts limit the directness test for reasons illustrated by the well-known case *Berry v. Sugar Notch Borough*, in which the defendant railroad was negligently speeding when its train was struck by a falling tree, injuring the plaintiff.[84] If the train had instead been operating at the reduced reasonable speed, it would not have been located on the track at the point where the tree fell. The crash would seem to have been a direct consequence of the excessive speed as required by the directness test, but the *Berry* court found otherwise: "The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety."[85] It was merely a coincidence that the tree fell on the speeding train, severing the necessary causal link between the defendant's negligence and the plaintiff's injury.

Cases like this have led courts to adopt the risk standard, a "principle which excludes liability where the injury sprang from a hazard different

84. 43 A. 240 (Pa. 1899).

85. *Id.* at 240.

from that which was improperly risked."[86] The injury in *Berry* was caused by a falling tree, a hazard different from the injuries the defendant railroad had improperly risked by speeding. The risk standard limits liability to injuries caused by a tortious hazard or risk (the dangerously high speed of a train), absolving the defendant of liability for injuries coincidentally connected to the tortious behavior (a falling tree).

For largely the same reasons, the risk standard prevents a defendant from incurring liability for only causing harms that were entirely unforeseeable. In *Berry*, the train's speed did not affect the risk of a tree falling—the crash was a coincidence. The defendant's safety decision could not have reasonably accounted for the countless coincidental outcomes that might also follow. Consequently, the coincidental harm caused by the falling tree was unforeseeable and outside the scope of the defendant's duty to exercise reasonable care in selecting the speed of the train.[87]

To be sure, an unforeseeable harm is not always coincidental. A defendant's tortious conduct could increase an unforeseeable risk of harm, unlike the conduct in *Berry*. But as long as the duty is limited to foreseeable harms, the defendant's breach of duty is wholly defined by the tortious or unreasonable risks threatening those harms. Such a tortious risk cannot cause an unforeseeable harm, so the risk standard ensures that the defendant incurs liability only for injuries governed by the tort duty.

Consider again the case in which the defendant was negligent for not taking a precaution B_1 that would have eliminated a risk of foreseeable physical harm PL_1, and that the plaintiff was instead injured by an unforeseeable risk PL_2 that would also have been eliminated if the defendant had exercised reasonable care. Under the Hand formula, the jury's finding of negligence implies that $B_1 < PL_1$. Although the exercise of reasonable care would also have eliminated the unforeseeable risk PL_2, that risk is not tortious because it is excluded from the duty and does not factor into the standard of reasonable care. The occurrence of this unforeseeable harm instead is "coincidental" in the sense that it would have been prevented if the defendant had complied with a tort duty that did not account for the harm.[88]

86. *In re* Kinsman Transit Co., 338 F.2d 708, 723 (2d Cir. 1964).

87. *See* DOBBS ET AL., *supra* note 8, § 205 ("When courts say that such a risk is unforeseeable what they mean is that it is not a risk enhanced or created by the defendant's conduct."); Simler v. Dubuque Paint Equip. Servs., 942 F.3d 448, 451 (8th Cir. 2019) (concluding that negligent speeding by another driver was not foreseeable and recognizing that "[t]he analysis is different, however, if the initial act increases the likelihood that others will act negligently").

88. By contrast, the risk is not coincidental but instead tortious if the duty encompasses the unforeseeable risk of harm. *See supra* notes 70–72 and accompanying text.

In adopting the risk standard that limits liability "to those harms that result from the risks that made the actor's conduct tortious,"[89] the *Restatement (Third)* explains that it "provides a more refined analytical standard than a foreseeability standard or an amorphous direct-consequences test."[90] The foreseeability standard can be unnecessarily confusing because courts still sometimes resort to the historical practice of deeming a type of injury to be unforeseeable in order to categorically limit liability for policy reasons, even though risky actors can easily anticipate the harms.[91] In addition to eliminating this lingering ambiguity in the meaning of foreseeability, the risk standard unifies the directness and foreseeability tests for proximate cause in the liability phase of the case. Finally, the risk standard is also appropriate for rules of strict liability,[92] making it the most general formulation of the causal inquiry in cases of accidental harm.

C. The Characterization of Tortious Risk

To establish proximate cause under the risk standard, the evidence must show that the plaintiff suffered some foreseeable harm, like bodily injury, caused by the type of risk that made the defendant's conduct tortious. Resolution of this issue critically depends on how the court characterizes the tortious risk.

The plaintiff would like to define the tortious risk as broadly as possible. The most expansive definition is "the risk of harm," which

89. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. L. INST. 2010).

90. *Id.* cmt. e.

91. For example, in addressing the issue of social–host liability—whether one who provides alcohol to a guest owes a duty to third parties who might be harmed in a crash caused by the inebriated guest while driving home—"the deciding factor for most courts is whether a guest's intoxication and subsequent risk-laden conduct was foreseeable to a reasonable person in the social host's position." W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 763 (2005). Given the widespread incidence of drunk driving, the risk is easily anticipated by the social host. These courts accordingly use the terminology of foreseeability to limit liability based on "considerations of broad public policy." *Id.* at 765; *see also* Geistfeld, *Policy-Based Limitations of Duty*, *supra* note 32, at 907–16 (discussing the public policy considerations that courts invoke in considering whether social hosts should be subject to such a tort duty and showing how these concerns can defensibly limit the duty).

92. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. l (AM. L. INST. 2010); Covey v. Brishka, 445 P.3d 785, 792–93 (Mont. 2019) (applying the rule that "strict liability is limited to instances of harm that made the activity or condition abnormally dangerous"). For example, the rule of strict liability governing dog bites is based on the dog's vicious or dangerous propensities, so one court concluded that it does not apply to a "ranch's herding dog nipping at a cow, causing the cow to charge into the employee" plaintiff. Smith v. Meyring Cattle Co., 921 N.W.2d 820, 823, 826 (Neb. 2019).

establishes proximate cause anytime the defendant was a factual cause of the injury. This characterization of the tortious risk effectively eliminates proximate cause as an additional limitation of liability, making it too broad.

The defendant, by contrast, would prefer to narrowly define the tortious risk. The most restrictive definition includes all details of the accident, turning the tortious risk into the prospect that the particular plaintiff would suffer the particular injury at a particular time on a particular date at a particular location. This characterization effectively requires omniscience, an unrealistic behavioral obligation far more demanding than foreseeability.

Between these two extremes lies the appropriate characterization of the tortious risk. According to the *Restatement (Third)*, "No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes" of establishing proximate cause.[93]

This depiction of the inquiry lends support to the claim that foreseeability is inherently indeterminate. According to the U.S. Supreme Court, "If one takes a broad enough view, *all* consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all."[94] The problem, as another critic explained, is that "almost anything is foreseeable, given enough time and incentive to project possible consequences, [so] a test formulated in terms of 'foreseeable consequences' provides no definite guidance for decision."[95]

This critique misstates the relevant inquiry. The issue is not whether a risk or the associated harm is foreseeable if one had unlimited time and resources to consider the matter; the inquiry is whether the defendant knew or should have known about the risk.[96] "The term *should have known* . . . is one way of saying that the reasonable person standard governs the question of unreasonable risk and foreseeability. . . ."[97] Whether a risk is reasonable "involves some manner of balancing the costs or burdens of mitigating it against the likelihood and severity of the injuries it threatens."[98] So, too, whether a risk is reasonably foreseeable also turns on a balancing of these

93. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. i (AM. L. INST. 2010).

94. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 553 (1994) (emphasis in original).

95. Kelley, *supra* note 2, at 92.

96. DOBBS ET AL., *supra* note 8, at § 159.

97. *Id.*

98. Grubb v. Smith, 523 S.W.3d 409, 417 (Ky. 2017) (observing that this condition has been "widely understood" from "*United States v. Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947) to the *Restatement (Third) of Torts: Phys. & Emot. Harm* (2010)").

factors. Reasonable foreseeability depends on costs or burdens for the undeniable reason that risky actors do not have unlimited time and resources to consider every possible consequence of their behavior.

For example, product sellers have a duty to warn about foreseeable product risks.[99] As an implication of this duty, the "seller bears responsibility to perform reasonable testing prior to marketing a product and to discover risks and risk-avoidance measures that such testing would reveal. A seller is charged with knowledge of what reasonable testing would reveal."[100] Whether a seller should have known about a product risk—whether the associated harm is foreseeable—accordingly depends on whether it would be discovered by "reasonable testing," a form of reasonable care that depends on the costs and safety benefits of acquiring information about product risk.[101] Reasonable foreseeability does not require sellers to expend unlimited time and resources to consider every possible way in which their products might cause harm.

The concept of reasonableness, however, does not independently limit the meaning of foreseeability. Within a tort claim, a foreseeable risk is one that a reasonable person would account for when making the decision in question. Such a risk is necessarily reasonably foreseeable. Adding the proviso of reasonableness simply underscores the behavioral idea that risky actors are not omniscient and cannot realistically make safety decisions by considering every potential outcome, no matter how far-fetched.[102] Instead, a foreseeable harm is one that is "reasonably anticipatable" at the time of the safety decision in question.[103]

By definition, risky actors cannot identify unforeseeable harms at the time of a safety decision, and so these risks are excluded from the duty to exercise reasonable care. "The goal of the law is to induce conduct that is capable of being performed. That goal is not advanced by imposing

99. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (AM. LAW INST. 1998).

100. *Id.* cmt. m.

101. *Id. See also id.* cmt. a (observing that products with defective or inadequate warnings are not "reasonably safe," and so liability "achieve[s] the same general objectives as does liability predicated on negligence"). Indeed, the costs of acquiring and processing information about product risk determine the scope and content of the tort duties generally owed by sellers to consumers. *See* MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 45–52 (3d ed. 2020).

102. *Cf.* DOBBS ET AL., *supra* note 8, at § 128 (describing the attributes of the reasonable person in terms of "normal intelligence" and "normal perception").

103. *Foreseeability*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, Gay v. O.F. Mossberg & Sons, Inc., No. 200–P–0006, 2009 WL 1743939, at *14 (Ohio Ct. App. June 19, 2009) ("Ostensibly, this [allegedly foreseeable injury] would suggest that [defendant manufacturer] should have foreseen these events and, therefore, should have foreseen the need for [the safety precaution in question] at the time of manufacture. . . .").

liability for . . . risks that were not capable of being known."[104] An outcome that is wholly unforeseeable is also not fairly attributable to the actor's exercise of agency or autonomy.[105] For good reasons made apparent by a behavioral conception of foreseeability, tort law absolves individuals of legal responsibility for unforeseeable harms through a limitation of duty.[106]

In addition to explaining why only certain harms are foreseeable, the behavioral conception also rebuts a related claim that the foreseeability test is inherently indeterminate because there are no "limits on permissible descriptions" of the tortious risk, making "the foreseeability rule of proximate cause . . . completely vacuous in the judicial decisions that it dictates."[107] Under the behavioral conception, the permissible descriptions of foreseeable harms are framed by the safety decision in question, which in turn makes the case-specific foreseeability test of proximate cause adequately determinate.

If the foreseeability test were completely vacuous in the proximate cause phase of the case, then the standard of reasonable care would also be completely vacuous. To be sure, this standard does not involve "a binary choice (foreseeable/unforeseeable), but only seek[s] a probability" that the risky conduct will cause injury.[108] To compute any probability, however, the decision-maker must rely on a reference class of causally related outcomes. The reference class of "coin tosses," for example, is a set of outcomes for which the flip of the same coin is governed by the same set of causal conditions. Based on the relative frequency of heads and tails within this reference class of causally related outcomes, one can then derive a probability assessment that any given toss will be heads or tails. The reference classes that generate probability assessments employ the same type of categorical reasoning embodied in the behavioral conception of

104. Vassallo v. Baxter Health Care Corp., 696 N.E.2d 909, 922–23 (Mass. 1998) (discussing the duty to warn).

105. *Cf.* Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 92 (Gerald Postema ed. 2001) ("The normative power of this conception . . . resides in the idea that the exercise of a person's positive agency, under circumstances in which a harmful outcome could have been foreseen and avoided, leads us to regard her as the author of the outcome."). *See also supra* note 27 and accompanying text (describing the Holmesian rationale for foreseeability).

106. *See supra* notes 29, 60 and accompanying text.

107. Michael S. Moore, *Foreseeing Harm Opaquely*, *in* ACTION AND VALUE IN CRIMINAL LAW 125, 127 (Stephen Shute et al. eds., 1993).

108. *Id.* at 155 (arguing that foreseeability is not necessary for determining the requirements of reasonable care).

foreseeability. Hence the standard of reasonable care cannot be adequately determinate unless foreseeability is adequately determinate.[109]

When individuals make safety decisions of the type governed by the duty to exercise reasonable care, they consider categories of causally related injuries or general fields of danger in order to make meaningful predictions. These categories determine the foreseeable harms that factor into the standard of reasonable care, which in turn structures the inquiry for determining whether the particular harm in the case at hand was foreseeable.

"Categorization is one of the most basic cognitive functions."[110] Because of their predictive function, "[c]ategories tend to form around clusters of causally related features."[111] Consequently, individuals

> have a preferred level of categorization. When observing a canary, for example, most people do not categorize it as an animal or a canary; rather, they prefer to include it in the category 'bird.' The preference for a basic-level categorization appears to be based on the need to maximize inferential, predictive potential. Hence, for someone who is not an ornithologist, the basic-level categorization of a canary will be as a bird, as this way to categorize it maximizes at once distinctiveness and informativeness, allowing meaningful predictions to be made.[112]

While driving an automobile, for example, the reasonable person considers how a particular precaution such as reduced speed would reduce the risk of injury faced by the basic-level categories of nearby drivers, bikers, pedestrians, and property owners. The safety decision does not

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109. *Cf.* Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081, 2083 (2009) ("Statistical inferences depend critically on how people, events, or things are classified. The problem is that there is an infinite number of possible characteristics, and (purportedly) no principle for privileging certain characteristics over others. As a result, statistics arguably become highly manipulable.").

110. James E. Corter & Mark A. Gluck, *Explaining Basic Categories: Feature Predictability and Information*, 111 PSYCH. BULL. 291, 291 (1992).

111. Bob Rehder & Russell C. Burnett, *Feature Inference and Causal Structure of Categories*, 50 COGNITIVE PSYCH. 264, 265, 306 (2005) (reporting results of a study indicating that "people take characteristic features [of a category] as diagnostic of the . . . underlying causal mechanisms"). *See also, e.g.*, Brett K. Hayes & Bob Rehder, *The Development of Causal Categorization*, 36 COGNITIVE SCI. 1102, 1102 (2012) ("It is well established that causal knowledge plays an important role in adult categorization. Adults are more likely to assign an object to a category if it has the same causal features as known category members."); Woo-kyoung Ahn & Nancy S. Kim, *The Causal Status Effect in Categorization: An Overview*, 40 PSYCH. LEARNING & MOTIVATION, 23, 37 (2001) (reviewing existing studies and concluding that the causal status effect "may be the underlying mechanism for phenomena involving the use of categories in reasoning").

112. CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS 89 (2006).

depend on the particular identities of these differently situated individuals, nor does the decision turn on the precise manner in which a crash might occur—these details are unnecessary for the driver to make meaningful predictions about how a precaution will reduce the risk of crash faced by these causally related parties in the zone of danger. These behavioral reasons fully explain why the standard of reasonable care considers the general class of harms foreseeably threatened by the risky behavior.[113]

The plaintiff's allegation of breach—that the defendant was driving at an unreasonably dangerous speed, for example—accordingly defines tortious risk in terms of the general categories of foreseeable harms threatened by the negligent behavior. Once the plaintiff has proven that the defendant breached the duty and factually caused the harm in question, the court must then decide whether this particular injury was a foreseeable consequence of the negligence. In resolving the case-specific question of foreseeability, "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated."[114]

This formulation of proximate cause does not depend on jurors sharing identical conceptions of the "general field of danger which should have been anticipated." The general field is nothing other than a basic-level categorization or reference class that individuals use for evaluating risky outcomes. Different jurors can rely on significantly different reference classes and still agree about the foreseeability of a particular outcome when their basic-level categories overlap. Individual differences of this type explain why a conclusion about foreseeability can be easy or obvious in some cases and controversial in others.

Consider the following example:

> In some cases, damages resulting from misconduct are so typical that judge and jurors cannot possibly be convinced that they were unforeseeable. If Mr Builder negligently drops a brick on Mr Pedestrian who is passing an urban site of a house under construction, even though the dent in Pedestrian's skull is

113. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010) (describing the "risk" relevant to the standard of reasonable care in terms of the "overall level of foreseeable risk created by the actor's conduct").

114. Moran v. Faberge, Inc., 332 A.2d 11, 19 (Md. 1975) (emphasis omitted) (quoting McLeod v. Grant Cnty. Sch. Dist. No. 128, 255 P.2d. 360, 363 (Wash. 1953)). *See also* DOBBS ET AL., *supra* note 8, § 159 ("But without identifying all the possible versions of speed-related harm, we can surely foresee broad categories of risks and harms to persons and property resulting because the driver might lose control.").

> microscopically unique in pattern, Builder could not sensibly maintain that the injury was unforeseeable.[115]

The argument of Builder is a clear loser because it relies on a causal model or reference class for computing probabilities that incorporates too much detail from the case at hand. Such an excessive overfit of the data is inherently lacking in adequate predictive value: "overfitted models capture not only the relationship of interest, but also the random errors or fluctuations that inevitably accompany real world data."[116] When the causal model or reference class for predicting whether a dropped brick will hit someone on the street below depends on the microscopically unique pattern of the individual's skull, the inherent variation in that factor will produce unnecessary random errors across cases—it "makes more errors in predicting . . . than a simpler model that ignores the noise."[117] Builder's argument that foreseeability depends on the unique pattern of the plaintiff's skull is easily rejected on the ground that the reasonable person would make predictions about possible harms by relying on a simpler causal model that ignores this detail.[118]

So, too, if the plaintiff argues that foreseeability is simply defined by the occurrence of physical harm, that argument is also a clear loser for the opposite reason: it depends on a causal model or reference class that obviously underfits the data in the case at hand. "Too simple a model will fail to identify the underlying relationship and have low predictive accuracy."[119]

As these examples illustrate, the choice of the appropriate reference class for computing probabilities involves a tradeoff "between fit and complexity"—the need to track the limited data that are available while also abstracting away from the details to simplify the causal model in the hope of enhancing predictive accuracy for future cases.[120] Statisticians rely on different criteria for evaluating this tradeoff,[121] and lay individuals like jurors presumably do the same. A hard or contested case of foreseeability, therefore, involves instances in which jurors disagree about the appropriate

115. CLARENCE MORRIS, TORTS 174–77 (1953).

116. Cheng, *supra* note 109, at 2092.

117. *Id.* at 2093.

118. Because the inquiry asks what outcomes would be foreseeable to the reasonable person, it is not subject to the critique that the defendant might have defined foreseeability differently. *But see* Moore, *supra* note 107, at 154 (rejecting the foreseeability test, in part, because "the typing of harms (under which we are to ask, was *it* foreseeable) is . . . wholly dependent on the level of typing done by the actor as he framed his intentions or his beliefs").

119. Cheng, *supra* note 109, at 2093.

120. *Id*.

121. *Id.* at 2093–94.

tradeoff and rely on different reference classes that lead to differing conclusions about risk and foreseeability in the case at hand.

Because there is no single best method for determining the optimal specification of a reference class, the jury is particularly well suited for applying the behavioral conception of foreseeability to determine both breach and proximate cause.[122] "[D]eciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community—matters that have long been understood to be uniquely the province of the finder of fact."[123]

D. An Illustration of How Courts Characterize Tortious Risk

To see how a behavioral conception of foreseeability frames the inquiry for proximate cause, consider the tort claims stemming from the September 11, 2001 terrorist attacks on the World Trade Center. The attacks were unprecedented and unforeseeable in many profoundly important respects. "[T]errorists had not previously used a hijacked airplane as a suicidal weapon to destroy buildings and murder thousands," so the defendant owners and operators of the buildings moved to dismiss the plaintiffs' tort claims because "they had no duty to anticipate and guard against deliberate and suicidal aircraft crashes into the Towers, and because any alleged negligence on their part was not a proximate cause of the plaintiffs' injuries."[124]

Despite the extraordinary nature of the events on September 11, the court concluded that plaintiffs' allegations in the complaint were legally sufficient to establish both duty and proximate cause.[125] The rationale for this ruling fully illustrates how the plaintiff's allegation of breach—the identification of the reasonable safety precaution that the defendant failed to take—frames the analysis of foreseeability for purposes of duty and proximate cause:

> [D]efendants contend that they owed no duty to "anticipate and guard against crimes unprecedented in human history." Plaintiffs argue that defendants owed a duty, not to foresee the crimes, but to have designed, constructed, repaired and maintained the World

122. *Cf.* Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 112 (2007) ("[N]othing in the natural world privileges or picks out one of the classes as the right one; rather, our interests in the various inferences they generate pick out certain classes as more or less relevant.").

123. A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 914 (Neb. 2010).

124. *In re* Sept. 11 Litig., 280 F. Supp. 2d 279, 295, 299 (S.D.N.Y. 2003). In the interest of full disclosure, I provided legal advice on this matter to the Plaintiffs' Executive Committee, so my role in that capacity might bias the following discussion.

125. *Id.* at 301–02.

> Trade Center structures to withstand the effects and spread of fire, to avoid building collapses caused by fire and, in designing and effectuating fire safety and evacuation procedures, to provide for the escape of more people.[126]

Of course, the fire that destroyed the World Trade Center was not an ordinary fire; it was caused by an unprecedented criminal act of terrorism. This detail, however, does not factor into the definition of tortious risk alleged by the plaintiffs for readily understandable behavioral reasons, explaining why the court rejected the defendants' arguments about the harms being unforeseeable and outside the scope of the tort duty.

Relying on established precedent, the court recognized that those who own and operate commercial buildings have a duty to "adopt reasonable fire-safety precautions, . . . *regardless of the origin of the fire*."[127] The general threat of fire motivates the adoption of reasonably safe procedures for retarding fires and enabling occupants to quickly evacuate the building. Safe egress from a burning building is all that matters, regardless of how the fire originated—whether electrical problems or arson. And because the safety decision does not depend on the source of the fire, the motives of arsonists (or terrorists) in setting a particular fire are not relevant to the foreseeability analysis. A behavioral conception of foreseeability fully explains why the duty encompasses "fires caused by criminals," including the fires caused by the terrorists who destroyed the World Trade Center.[128]

Based on the plaintiffs' allegations of negligence, they were foreseeably harmed by the defendants' failure to adopt reasonably safe methods of fire protection. To be sure, these reasonable precautions would not necessarily have saved all the victims from dying in the horrific fire, but that issue is one of factual causation, not legal or proximate cause. The particular injuries suffered by those victims who would have escaped were clearly within the general category of harms that would have been eliminated by the exercise of reasonable care, establishing foreseeability as a matter of proximate cause.[129]

In addition to illustrating why foreseeability is not inherently indeterminate, the World Trade Center case shows why proximate cause is

126. *Id*. at 299.

127. *Id.* (emphasis added).

128. *Id*.

129. "Large-scale fire was precisely the risk against which the WTC defendants had a duty to guard and which they should have reasonably foreseen." *Id.* at 302. In light of the court's holding that the tort duty does not depend on the origin of a fire, it is hard to see what type of evidence would negate proximate cause for those who were killed by the fires, even though the court left open the possibility that "[d]iscovery will either supply evidence to substantiate or eviscerate the parties' divergent claims about foreseeability." *Id*.

more structured than an alternative formulation of the doctrine based on how "people ordinarily think about causation and morality."[130] As a matter of ordinary thinking about causation and morality, the terrorists destroyed the World Trade Center and murdered the occupants who were unable to escape the ensuing fire, which makes it hard to explain why the owner and operator of the buildings—innocent victims of the attack—were also proximate causes of those wrongful deaths.[131] In effect, this is exactly the type of argument made by the defendants and rejected by the court.

Proximate cause formulates the inquiry in a different manner; it decides the liability of a defendant whose tortious conduct factually caused the plaintiff to suffer compensable harm. To determine whether this factual cause was also a proximate cause, jurors must know why they are asking the question. The foreseeability test or risk standard frames the inquiry by asking whether the particular risk in the case at hand is of the general type that factors into the safety decision that the defendant was obligated to make as a matter of reasonable care. This behavioral conception of foreseeability does not produce unambiguously clear answers in all cases, but it still structures the inquiry in an adequately determinate manner that does not dissolve into an all-things-considered moral determination of causality.

How lay individuals think about the morality of risky behavior instead guides jurors in determining the requirements of reasonable care.[132] In making this normative judgment, jurors consider the categories of foreseeable harms risked by the defendant's conduct and encompassed by the duty. The element of proximate cause then requires jurors to determine whether the particular injury suffered by the plaintiff is within one of these general categories—the approach embodied in the foreseeability test and its substantive equivalent, the risk standard.

III. PROXIMATE CAUSE IN THE DAMAGES PHASE OF THE CASE

For cases in which the risk standard is satisfied, the tortious risk must have proximately caused the plaintiff *some* foreseeable compensable harm, completing the plaintiff's proof of the prima facie case (duty, breach,

130. Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 169 (2021) (arguing that such an inquiry explains proximate cause in tort cases).

131. *See id.* at 223–24 (explaining why "malicious or criminal acts" are more "morally abnormal than the original defendant's negligence," and so these "intervening cause[s] will supersede the defendant's liability").

132. *See generally* Mark A. Geistfeld, *Folk Tort Law*, *in* HANDBOOK OF PRIVATE LAW THEORIES 338 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (arguing that jurors apply social norms of reciprocity to evaluate the reasonableness of risky behavior in negligence cases).

causation, and damage). Having established liability, the plaintiff must then prove the amount of damages.

Like the element of proximate cause in the prima facie case, the damages inquiry involves a causal question. "One injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort."[133] The test for legal or proximate cause in the damages phase of the case must address a normative problem that does not exist in the prima facie case, and that difference explains why the directness test has been widely adopted.

A. The Equitable Logic of the Direct-Consequences Test

"Even when a foreseeability standard is employed for scope of liability, the fact that the actor neither foresaw nor should have foreseen the extent of harm caused by the tortious conduct does not affect the actor's liability for the harm."[134] This principle is called the eggshell-plaintiff or thin-skull rule when applied to an individual's preexisting physical condition.[135]

The eggshell-plaintiff rule is nothing other than the directness test in the damages phase of the case. Under the directness or direct-consequences test, "'[l]iability is imposed for all consequences that follow, without the intervention of new external forces, in unbroken natural sequence from the original act."[136] According to the eggshell-plaintiff rule, even if the defendant could not foresee that the plaintiff had some preexisting susceptibility to physical harm (the thin skull), the defendant incurs liability for the full extent of the physical harm directly caused by the tortious conduct (a crushed skull from an impact that would foreseeably cause only minor harm). As long as the tortious conduct foreseeably caused some compensable harm (a bruise or bump on the head), the extent of harm (the crushed skull) does not have to be foreseeable when directly caused by the tortious force (the blow to the head). Describing the inquiry in terms of the eggshell-plaintiff rule is certainly more evocative, but it is nothing more than a particular application of the directness test in the damages phase of the case.

The connection between the eggshell-plaintiff rule and directness test is long standing. When courts first formulated the element of proximate

133. RESTATEMENT (SECOND) OF TORTS § 910 (AM. L. INST. 1979).

134. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. p (AM. L. INST. 2010).

135. *Id.* § 31 cmt. a.

136. HARPER, JAMES & GRAY, *supra* note 4, § 20.6.

cause, they relied on damage cases.[137] The eggshell-plaintiff rule governs the determination of damages, so framing proximate cause by reference to this class of cases naturally produced the directness test.

"[E]xtensive research has failed to identify a single United States case disavowing the rule."[138] In applying this rule, jurisdictions that use the foreseeability test for proximate cause in the prima facie case effectively apply the directness test in the damages phase of the case.[139] The eggshell-plaintiff rule accordingly unifies the directness and foreseeability tests in the damages phase of the case, much like the risk standard unifies these tests in the prima facie case.

The rationale for the eggshell-plaintiff rule, however, has never been clearly identified. It produces a "result that has been attacked as one quite inconsistent with the prevailing limitation on the scope of duty to interests and hazards that are foreseeable."[140] In defense of this rule, a leading treatise argues that "[t]here is no reason to apply the restrictive foreseeability test to all problems just because it is applied to some."[141] The different tests, on this view, represent "a practical compromise where policies conflict."[142] The same sort of practical compromise underlies the *Restatement (Third)*'s reasoning that the eggshell-plaintiff rule is merely a matter of "administrative convenience" that avoids the "sometimes uncertain and indeterminate inquiry into whether the extent of the harm was unforeseeable."[143] The eggshell-plaintiff rule seems fair enough, but the reasoning behind this conclusion has been elusive.

Once conceptualized as a rule of proximate cause governing the determination of damages, the eggshell-plaintiff rule has an identifiable rationale. As compared to the foreseeability test, the directness test more equitably resolves a normative problem that is distinctive to the damages phase of a tort case.

Although liability is properly limited by the foreseeability test or risk standard in the prima facie case, this limitation can produce unfair measures

137. *See supra* notes 38–40 and accompanying text.

138. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 31 rep. note cmt. b (AM. L. INST. 2010).

139. *See supra* note 48 and accompanying text (discussing application of the directness test within jurisdictions that use the foreseeability test in order to subject a negligent defendant to liability for wrongful death caused by a trivial scratch of the skin that directly caused unforeseeable blood poisoning due to the decedent's preexisting blood condition).

140. HARPER, JAMES & GRAY, *supra* note 4, § 20.5.

141. *Id.*

142. *Id.*

143. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. p (AM. L. INST. 2010).

of damages. Compensatory damages are limited to the amount of harm suffered by the plaintiff, even if those damages are unforeseeably low. A blow that would crush an ordinary skull, for example, could cause only minor injury to a hard-headed plaintiff, yielding a compensatory damages award substantially less than the foreseeable amount. The foreseeability test would not prevent the defendant from paying damages that are much lower than would be foreseeable, whereas it would prevent the defendant from paying unforeseeably high damages (for the thin skull)—a one-sided advantage that is unfair for the plaintiff.

By contrast, the directness test more fairly determines the extent of damages. The defendant must pay for unforeseeably high damages directly caused by the tortious risk, the result attained by the eggshell-plaintiff rule for cases in which the tortious risk directly caused bodily injury. Any unfairness for the defendant in this respect is adequately offset by the requirement that compensatory damages equal the amount of harm in question, limiting the defendant's liability to actual harms that can be substantially less severe than the foreseeable harms. Unlike the foreseeability test, the directness test does not confer a one-sided advantage on either party.

In determining damages, tort law must place some limits on liability; a defendant's liability cannot extend to all future harms factually caused by the tortious risk—the rationale for proximate cause in the first instance. For indirect causes, courts defensibly limit liability by relying on foreseeability.[144] The extent of damages proximately caused by the defendant's tortious conduct, therefore, encompasses both direct harms and indirect, foreseeable harms—the rule embodied in the directness test.[145]

Consistent with this reasoning, "[t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked."[146] Having caused damages of the "same general sort that was risked," the defendant satisfies the foreseeability test in the liability phase of the case. Any remaining causal issues are determined by the directness test, which makes the defendant liable for unforeseeably large harms (the crushed skull) directly caused by the tortious force acting on the predicate foreseeable compensable harm (the slight blow to the head).

144. *See supra* Part II.A (explaining the rationale for formulating the test for proximate cause in terms of foreseeable risks).

145. *See supra* notes 50–52 and accompanying text.

146. *In re* Kinsman Transit Co., 338 F.2d 708, 724 (2d Cir. 1964).

Once the directness test is framed by the eggshell-plaintiff rule, it also becomes apparent why courts and commentators have not adequately recognized that its application is limited to the determination of damages. The harm suffered by the plaintiff (the crushed skull) garners all the attention because it vastly exceeds the predicate compensable harm foreseeably caused by the tortious conduct (a slight bruise or bump), making it seem as if the liability question turns entirely on the unforeseen harm. In the first instance, however, liability depends on the relatively minor foreseeable compensable harm, even though the extent of liability or amount of damages is almost wholly determined by the unforeseen injury.

When conceptualized in terms of the eggshell-plaintiff rule, the meaning of a direct cause also becomes more transparent. In the abstract, there is no reason to distinguish between a direct cause and an intervening cause.[147] For the equitable reasons recognized by the eggshell-plaintiff rule, however, it would be unfair to limit a defendant's liability when the plaintiff had a preexisting vulnerability to suffering unforeseeably large harm. The directness test is wholly formulated to address this inequity while still placing limits on liability. Within this conception, a direct cause operates directly on preexisting conditions to enhance a predicate compensable harm foreseeably suffered by the plaintiff. Precisely identifying these preexisting conditions is not always easy, but the various rules regarding direct and intervening causes nevertheless coherently attempt to determine whether the injury in the case at hand is sufficiently analogous to the harms suffered by the thin-skulled plaintiff.

For these same reasons, the directness test is not limited to bodily injuries. The unfairness of the foreseeability test is made manifest by a comparison of the compensatory damages it would produce for a thin-skulled plaintiff as compared to a hard-headed plaintiff; the unfairness, however, is not limited to bodily injuries or even to mental harms.[148]

All of these points are fully illustrated by the *Polemis* case,[149] which arguably involves the most (in)famous application of the directness test. The defendant's employees negligently dropped a plank into the hold of a ship. The dropped plank could have foreseeably damaged persons or cargo in the hold below or even the ship itself by denting its structure. The plank

147. *See* HARPER, JAMES & GRAY, *supra* note 4, § 20.5 ("To the eye of philosophy the distinction between intervening and pre-existing causes of conditions is tenuous if it exists at all."); *see also supra* notes 51–52 and accompanying text (illustrating this problem).

148. *Compare* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 31 (AM. L. INST. 2010) (limiting eggshell-plaintiff rule to preexisting bodily injuries and mental conditions), *with id.* § 29 cmt. p (recognizing that foreseeability does not necessarily limit liability when the extent of harm is unforeseeable).

149. *In re* Polemis & Furness, Withy & Co., 3 K.B. 560 (C.A. 1921)

instead threw a spark that unexpectedly ignited petroleum vapors, causing a fire that destroyed the ship. The fire was not reasonably foreseeable, but the court nevertheless concluded that the defendant was liable for the entire harm. As one of the justices concluded:

> [I]f the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact caused sufficiently by the negligent act, and not by the operation of independent causes having no connection with the negligent act, except that they could not avoid its results.[150]

This holding has been interpreted to mean that the directness test can establish proximate cause in the prima facie case, regardless of foreseeability.[151] This interpretation has made *Polemis* infamous for having adopted an overly expansive formulation of proximate cause that the court in *Wagon Mound I* subsequently rejected in favor of the foreseeability test.[152] The facts, however, clearly show that the *Polemis* court was applying the eggshell-plaintiff rule, even though it did not expressly describe the inquiry in this manner.

The defendant's employees created a tortious risk of damaging the ship or its cargo by the concussive force of the dropped plank. On landing in the hold below, the plank hit either the ship itself or some cargo—otherwise the plank could not have caused a spark. That damage may have been slight, but it nevertheless was both foreseeable and compensable. The plaintiff's proof accordingly established the prima facie case—the defendant had breached the duty to exercise reasonable care in a manner that caused the plaintiff to suffer some foreseeable compensable physical harm.

The only remaining issue involved the extent of damages. In addition to causing relatively minor physical harm by denting the ship or cargo, the tortious risk (concussive force) directly caused an unforeseeable fire that destroyed the entire ship. The ship in this respect was vulnerable due to an

150. *Id.* at 577 (Scrutton, L. J.).

151. *See* HARPER, JAMES & GRAY ON TORTS, *supra* note 4 , § 20.5 (observing that *Polemis* and another English case made it "appear[ ] . . . that liability would be extended there to entirely unforeseeable consequences"). According to one interpretation of *Polemis*: "Consequences are proximate where defendant's positive wrongful act is a cause in fact and there is no new cause either in the form of a positive act or omission of duty intervening between his wrong and the consequence. This principle seems clear beyond the need of elucidation. To no other causal agency than that of defendant's can responsibility for the consequence be ascribed." Charles E. Carpenter, *Workable Rules for Determining Proximate Cause (Part III*: *Proximate Consequences)*, 20 CAL. L. REV. 471, 473 (1932).

152. *See* Overseas Tankship (U.K) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound I), 1961 A.M.C. 962, 100 A.L.R. 2d 928 (Privy Council 1961) (overruling *Polemis*).

unforeseeable preexisting condition (petroleum vapors in the hold), which is wholly analogous to a thin-skulled individual's unexpected vulnerability to injury from a slight blow to the head. The liability in *Polemis* can be fully justified by the directness test limited to the determination of damages, even though the court did not expressly apply the test in this manner.

Polemis figures prominently into the long-running debate about the respective merits of the directness and foreseeability tests. For good reasons, courts and commentators have found it hard to choose between them. The debate mistakenly assumes that a monolithic rule of proximate cause should apply throughout the tort claim. However, each test has a distinctive role that only becomes clear once the element of proximate cause in the prima facie case is untangled from the role of proximate cause in the damages phase of the case. Rather than treating the two tests as competing conceptions of proximate cause, this approach coherently utilizes both of them by recognizing that each one is the appropriate test for a distinctive causal inquiry required by normatively different phases of the tort case.

Although the analysis so far has been largely framed in terms of negligence liability, it does not change in most cases of strict liability. "Typically, strict-liability torts require that some form of physical harm be foreseen."[153] Liability in the first instance depends on the foreseeability test or risk standard, whereas the amount of damages depends on the eggshell-plaintiff rule or directness test. The rules of proximate cause do not substantively differ for negligence and strict liability.

B. Proximate Cause and Culpability: The Intentional Torts, Recklessness, and Criminal Liability

The intentional torts might require a different analysis. According to the *Restatement (Third)*, "[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."[154] The conventional rationale for this rule is that the risk standard (or foreseeability test) is inappropriate: "such a narrow scope of liability is especially unsatisfactory given the highly culpable nature of the tortfeasor's act."[155]

153. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. j (AM. L.. INST. 2010). *See also id.* cmt. *l* (explaining why the risk standard "is equally applicable to scope-of-liability limits on strict liability").

154. *Id.* § 33(b).

155. *Id.* § 33 cmt. a.

On this view, the rule of proximate cause for intentional torts is importantly shaped by "the moral culpability of the actor."[156]

This reasoning further underscores the extent to which courts and commentators have failed to recognize that proximate cause in the prima facie case for liability normatively differs from proximate cause in the damages phase of the case. Accounting for this difference fully explains why the rule of proximate cause for intentional torts inherently differs from the appropriate inquiry in cases of accidental harm, which in turn has implications for recklessness and criminal liability.

Unlike rules of negligence or strict liability, the intentional torts do not require a separate inquiry into proximate cause in the prima facie case:

> In cases of intentional torts to the person and property—assault, battery, false imprisonment, for example—the tort itself is regarded as harmful and the plaintiff is always entitled to recover at least nominal damages and often entitled to recover a substantial sum without proof of any specific loss other than the tort itself.[157]

Proof of an intentional tort establishes an entitlement to compensatory damages, limiting any discrete issues of proximate cause to the damages phase of the case.

Applying the risk standard or foreseeability test would unfairly limit liability in these cases. This problem is fully illustrated by the thin skull unforeseeably crushed by a slight blow constituting the intentional tort of battery. Proof of the prima facie case for battery shows that the defendant intentionally caused the plaintiff to suffer a harmful bodily contact, and the crushed skull was directly caused by the tortious force operating on that predicate compensable harm. Like any other intentional tort, proof of battery establishes an entitlement to compensatory damages, limiting the issue of proximate cause to an inquiry of whether the defendant should incur liability for the full extent of injuries factually caused by the tortious conduct. Like the tort rules governing accidental harms, the issue of proximate cause for determining the damages owed by an intentional tortfeasor is fairly resolved by the directness test, not the foreseeability test.

To be sure, the *Restatement (Third)* also applies the same rule of proximate cause to both intentionally caused harms and recklessly caused harms.[158] The conduct in both instances is culpable. In light of the long-running confusion involving the appropriate test for proximate cause, it is

156. *Id.* § 33(b).

157. *See* DOBBS ET AL., *supra* note 8, at § 479.

158. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (b) (AM. L. INST. 2010).

not surprising that courts and commentators have exclusively focused on culpability as the reason for applying a more expansive test of proximate cause in order to punish intentional wrongdoers.[159] Reasoning by analogy, such a causal rule should also presumably apply as a way to punish highly culpable forms of reckless behavior.

Relying on culpability to extend the rule of proximate cause from the intentional torts to reckless behavior, however, misses the fundamental difference between these two forms of liability with respect to the scope of liability in the prima facie case. Unlike the proof of an intentional tort, proof of reckless behavior does not establish liability without further proof that the wrongdoing was both a factual and proximate cause of at least some compensable harm suffered by the plaintiff. A drunk driver who does not cause injury is not liable in tort for the reckless behavior; the behavior is wrongful for tort purposes only if it proximately causes compensable harm. As in the case of ordinary negligence, the prima facie case of liability for reckless behavior requires a separate finding of proximate cause, unlike the intentional torts.

Recklessness is a species of negligence that involves a reprehensible breach of the duty to exercise reasonable care [160] The duty, however, does not consider the actor's culpability or bad state of mind.[161] Reckless behavior, therefore, does not expand the duty beyond the ordinary requirements of reasonable care, and so a reprehensible breach can result in liability only if the tortious conduct caused a foreseeable harm governed by the duty. Reckless behavior that only causes unforeseeable injury falls entirely outside of the duty, eliminating the defendant's legal responsibility for the injury.[162] The inexorable logic that justifies the foreseeability test or risk standard within the prima facie case of negligence liability applies with equal force to reckless behavior, eliminating any defensible reason for crafting a rule of proximate cause distinct to recklessness.

159. *See* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 233 (2006) (concluding that "[t]he primary justification for imposing liability for unforeseeable consequences in cases of intentional wrongdoing . . . seems to be retributive").

160. *See* DOBBS ET AL., *supra* note 8, at § 32 ("Both elements of recklessness—high risk and consciousness of the risk—bear some relationship to intent, but both fall somewhat short of intent. . . . In the overwhelming number of tort cases, the defendant's liability turns on intent or negligence, so that recklessness is irrelevant except perhaps to show grounds for punitive damages.") (paragraph structure omitted).

161. *See id.* § 126 ("A bad state of mind is neither necessary nor sufficient to show negligence; conduct is everything . . . . The legal concept of negligence as unduly risky conduct distinct from state of mind reflects the law's strong commitment to an objective standard of behavior.").

162. *See supra* Part II.A.

The greater culpability inherent in reckless behavior only becomes relevant after the plaintiff has established the prima facie case by proving that the defendant's tortious conduct proximately caused some compensable harm. "In the great majority of states, punitive (or 'exemplary') damages may be awarded when the plaintiff has suffered legally recognized harm and the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice."[163] Highly culpable conduct can merit more extensive liability, but only by triggering the remedy of punitive damages and not by altering the test for proximate cause in the prima facie case.[164]

This conclusion has implications for the rule of proximate cause in criminal cases because "the courts have generally treated legal causation in criminal law as in tort law."[165] Like tort law, criminal law applies the directness test to preexisting conditions such as the thin-skull.[166] As we have found, however, culpability does not justify the directness test in tort law; the rationale, instead, involves the equitable resolution of a normative problem inherent in the calculation of damages—an issue not relevant to criminal law. Perhaps there are normative reasons distinct to criminal law for applying the directness test, but the rationale cannot be derived from the common law of torts.[167] Proximate cause must not only be untangled across the elements of a tort claim; its tort version must also be untied from its criminal counterpart.

163. *See* DOBBS ET AL., *supra* note 8, § 483.

164. In addition to the punitive damages remedy, a defendant's culpability also affects the extent of liability in other instances that depend on a finding of liability in the first instance, such as eliminating contributory negligence as a defense in cases of reckless wrongdoing. *See* HARPER, JAMES & GRAY ON TORTS, *supra* note 4, § 16.13. But the relevance of culpability in the prima facie case "is a different one—it concerns the measure of the duty that may be owed in varying circumstances, and whether there has been any wrongdoing at all." *Id.* (discussing the unitary standard of reasonable care).

165. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(c) (3d ed. Oct. 2019 update); *see also* Paroline v. United States, 572 U.S. 434, 444 (2014) ("The concept of proximate causation is applicable in both criminal law and tort law, and the analysis is parallel in many instances.").

166. LAFAVE *supra* note 165, § 6.4(f)(2) (stating that a defendant who attacks with "intent to kill, but succeeds only in inflicting what would be a non-fatal wound in a person of ordinary health," is guilty of murder, "his act being a direct cause" of the death); *id.* § 6.4(g)(1) (applying the same rule "where the crime was one of recklessness or negligence").

167. *Cf. id.* § 6.4(c) (recognizing that "on principle" courts need not apply the same rule of proximate cause in criminal and tort cases because tort liability turns on the normative question of who "should bear the cost," whereas criminal liability is "generally accompanied by moral condemnation").

CONCLUSION

Due to the ongoing consequences that flow from the imprint of one's behavior on the world, liability would be potentially unlimited if the prima facie case only required proof that the defendant's tortious conduct was a factual cause of the plaintiff's harm. The requirement of legal cause limits the scope of a defendant's liability, cutting off liability for injuries that were factually but not proximately caused by the tortious conduct. What are the policies that justify this limitation of liability?

Framed at this level of generality, the meaning of proximate cause is bound to be confusing. Throughout the history of modern tort law, proximate cause has furthered different policies while being defined by two different tests based on foreseeability and directness, each of which has been both widely adopted and roundly criticized. Proximate cause is commonly thought to be a "hopeless riddle."[168]

Proximate cause is confusing and prone to controversy because it is entwined with all elements of the tort claim, ranging from duty to the determination of damages. The inquiry in this respect is like a prism. It can refract the various facets of a tort claim, creating the appearance that the element simultaneously furthers these multiple purposes. The properties of a prism, however, can also work in the other direction, focusing light from a range of refracted sources. Properly applied, the element of proximate cause functions in this manner, focusing the more general properties of the other tort elements onto the particulars of the case at hand.

In the prima facie case of negligence liability, proximate cause determines whether the more generally defined components of duty and breach apply to the specific injury suffered by the plaintiff. Duty is defined in categorical terms, such as risks of foreseeable physical harm. Based on the general class of physical harms governed by the duty, the issue of breach—whether the defendant complied with the duty to exercise reasonable care—focuses on a more narrowly defined category: the class of foreseeable physical harms that would be avoided by the safety precaution in question. The inquiry at this stage is still framed in general terms. For example, reasonably safe driving behavior reduces the risk of a crash for nearby drivers, pedestrians, and so on. A defendant driving in an unreasonably safe manner accordingly creates a general field of danger, comprised of myriad individuated risks threatening numerous individuals, each of whom can be differently situated. The element of proximate cause filters these more generally defined facets of the tort claim to focus on the issue of how they apply to the plaintiff's injuries in the case at hand.

168. Kelley, *supra* note 2, at 50.

Consequently, proximate cause serves the distinctive role of aligning all elements of the tort claim in the prima facie case. The inquiry ensures that the defendant's breach of duty was a factual cause of an injury encompassed within the duty owed by the defendant to the plaintiff, thereby establishing the requisite basis for liability in the first instance. Proximate cause aligns the element of duty with the final element of damages, and so a duty that is limited to foreseeable harms requires the foreseeability test for determining proximate cause.

Once liability has been established with proof showing that the defendant's breach of duty proximately caused some foreseeable compensable harm, the tort inquiry must then determine the amount of damages or full extent of the compensable harms caused by the tortious conduct. The compensatory damages award is not fully aligned with all other elements of the negligence claim, and that misalignment explains why the appropriate test for proximate cause is altered within the damages phase of the case.

The element of duty does not fully align with the element of damages in the sense that the two elements do not measure injuries in the same manner. The negligence duty relies on the social value of an injury to determine the requirements of reasonable care, whereas the compensatory damages remedy is based on the compensable harm actually suffered by the plaintiff.[169] Due to this misalignment, the duty to exercise reasonable care can fully value fatal injuries, even though the loss of life's pleasures in a case of wrongful death is not compensated by the monetary damages remedy.[170] The social value of other irreparable harms can also be considerably higher than the compensatory damages award, creating a misalignment between the elements of duty and damages that has important implications for the nature of negligence liability.[171]

The misalignment that occurs in the damages phase of the case extends to the rule of proximate cause. Although the foreseeability test appropriately applies in the prima facie case, it is not a fair method for determining the full extent of harm proximately caused by the defendant's tortious conduct. It would reduce liability for a defendant who caused unforeseeably high damages, whereas it could not increase the liability of a defendant who caused unforeseeably low damages—the amount of compensatory damages is capped by the requirement of actual harm. Consequently, the foreseeability test gives the defendant an unfair, one-

169. *See* Geistfeld, *Misalignment*, *supra* note 33, at 159.

170. *Id.* at 159, 162–63, 169.

171. *See generally id.* (demonstrating how the problem of irreparable injury shapes the liability rules for accidental harms).

sided advantage in determining the extent of damages, a problem more fairly solved by the directness test or its substantive equivalent in this phase of the case, the eggshell-plaintiff rule. The particular requirements of the compensatory damages remedy, once again, create a misalignment—in this instance concerning proximate cause—across other elements of the prima facie case.

For these same reasons, the directness test always applies to intentional torts. The prima facie case for such liability establishes that the defendant intentionally caused the plaintiff to suffer some compensable harm. Any discrete or separate inquiry into proximate cause only determines damages or the full extent of liability for other injuries factually caused by the predicate intentional harm, an inquiry fairly determined by the eggshell-plaintiff rule for reasons having nothing to do with the greater culpability associated with intentional wrongdoing.

Although the directness test fairly determines proximate cause for intentional torts, it is not appropriate for determining the liability of a reckless tortfeasor in the first instance. Recklessness is a culpable form of negligence. The prima facie case of negligence liability, however, does not depend on culpability, and so proximate cause still depends on the foreseeability test. Culpability only becomes relevant after the plaintiff has established an entitlement to compensatory damages; it justifies an award of extra-compensatory damages to punish the reckless defendant for having reprehensibly breached the duty to exercise reasonable care. The damages phase of the case, once again, creates a misalignment between the element of duty—for which culpability is irrelevant—and the damages remedy—for which culpability can justify a punitive award. That misalignment fully accounts for the culpability of a reckless actor, eliminating that factor from the appropriate formulation of proximate cause in the prima facie case.

Proximate cause implicates a host of issues, illustrating the more general point that "one must know the purpose of causal ascription in tort law before one can say what causation in that law means."[172] The core meaning of proximate cause—its distinctive purpose—can be derived only after its roles and associated concepts are untangled across all elements of the tort claim.

172. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 229 (1987). *See generally* John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419 (1979) (arguing that causal determinations necessarily depend on normative or subjective considerations).