

Case Western Reserve University

From the Selected Works of Peter M. Gerhart

February 1, 2008

Responsibility and Proximate Cause

Peter M. Gerhart, *Case Western Reserve University*



Available at: https://works.bepress.com/peter_gerhart/4/

RESPONSIBILITY AND PROXIMATE CAUSE

PETER M. GERHART¹

ABSTRACT

This article solves the many puzzles of proximate cause by articulating a normative theory that explains why a person who acts unreasonably and causes harm is sometimes not responsible in negligence for that harm. The article first articulates a methodology of justification and explains how our understanding of proximate cause has lacked a justificational basis. The article then develops a theory of responsibility that explains proximate cause cases. Rather than seeing proximate cause as a device to cut off liability, this theory sees proximate cause as determining whether unreasonable conduct is the source of an obligation with respect to particular occurrences. I argue that the theory of responsibility embedded in the reasonable person standard denies that an actor is responsible for harm when the circumstances that link an actor's conduct to the harm are ones that a reasonable person would not be expected to take into account when making choices. This fault-based theory allows us to see the proximate cause cases as a unified and coherent set of outcomes that respond to the normative basis of responsibility in tort.

Proximate cause cases in tort represent outcomes in search of a justification. In these cases, an actor who acts unreasonably and causes harm is nevertheless not responsible for that harm. A trolley company is not responsible when a falling tree hits its speeding trolley, even though the harm would not have occurred had the trolley not been unreasonably speeding.² A railroad is not responsible if it negligently knocks a package out of a passenger's hand and another passenger is hurt when the contents of the package explode.³ A shipping company that spills heating oil in the harbor is not responsible when the heating oil catches fire and burns down a dry dock,⁴ but is

¹ Professor, Case Western Reserve School of Law. Thanks to Max Mehlman and ____ for helpful comments and to Augustus Makris and Namrata Mohanty for helpful research assistance and discussion.

² *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 A. 240 (1899).

³ *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (1928) (decided under the language of duty but generally discussed as a proximate cause case).

⁴ *Overseas Tankship (U.K.) Ltd. V. Mort's Dock & Engineering Co. (Wagon Mound I)*, [1961] A.C. 388 (P.C.) (appeal taken from Austl).

responsible for the damage to the ship in the dry dock.⁵ Despite the volumes written about proximate cause, neither tort doctrine nor tort principles have satisfactorily addressed the justification for these outcomes. Why, exactly, should a defendant whose unreasonable conduct has caused harm not be responsible for that harm?

In this article, I address both methodological and justificational issues raised by proximate cause. From a justificational standpoint, I present a theory of responsibility that explains the proximate cause cases in terms of a theory of fault, rather than as a limitation on liability for faulty conduct.⁶ Briefly, I argue that the theory of responsibility inherent in the reasonable person standard limits responsibility when the circumstances that link an actor's conduct to the harm are ones that a reasonable person would not be expected to take into account when making decisions. Under this theory, we should understand proximate cause *not* as a limitation on liability for faulty conduct – the usual conception – but as an expression of the requirements of the reasonable person – as one aspect of the breach of a standard of care.⁷ Proximate cause is not about stimulus and effect but about responsibility for the harm on occasions.⁸

⁵ *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound II)*, [1967] 1 A.C. 617 (P.C.) (appeal taken from Austl.) (damage to the ship being repaired in the dry dock was the defendant's responsibility).

⁶ In other words, I challenge the conventional view that we can separate the negligence cause of action into issues of obligation and issues of limitations on obligations. See, e.g., Jane Stapleton, *Legal Cause: Cause-In-Fact and the Scope of Liability for Consequences*, 54 *VAND. L. REV.* 941, (2001) (discussing separately the legal concerns that generated the obligation and the scope of liability for consequences). More recently, scholarly focus has centered on "the appropriate scope of responsibility" or the scope of the risks. See, e.g., DAN B. DOBBS, *HANDBOOK ON THE LAW OF TORTS* 443 (2002). This usage is ambiguous because it could describe either a finding that the defendant had no obligation as to that harm – which is how I would endorse the term – or as limitation on liability, which is how most commentators continue to understand proximate cause.

⁷ This article therefore follows the hint of scholars who would understand proximate cause in terms of a theory of responsibility. JULES L. COLEMAN, *RISKS AND WRONGS* 346 (1992) (hereinafter, COLEMAN, *RISKS AND WRONGS*). See also, John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 *SAN. L. REV.* 1315 – 1332-1339 (2003) (positing that an actor who commits a wrong (in the sense of unreasonable behavior) is responsible for resulting harm only if the behavior is also wrongdoing, and positing that proximate cause plays the role of determining when unreasonable conduct is not wrongdoing toward the plaintiff) and Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, *CHI. KENT L. REV.* 554, 555 (1987) (responsibility, not causation, changes as the causal chain lengthens).

In particular, Jules Coleman has disclaimed any detailed analysis (*RISKS AND WRONGS* at 346) but he understands proximate cause (which he calls scope of the risk) as requiring not only faulty conduct but also that "the [plaintiff's] loss is connected in an appropriate way with that aspect of his conduct that is at fault." *Id.* This article articulates a theory of responsibility that tells us how to determine when a connection is an appropriate basis for imposing liability.

⁸ Accordingly, this article can be understood as part of the long evolution in our understanding of proximate cause from a causal approach to a liability approach. The tradition of using causal analysis to determine this issue goes back centuries. See FRANCIS BACON, *MAXIMS OF THE LAW*, REG. I: *In jure non remota causa, sed proxima, spectator*, [In law the near cause is looked to, not the remote one]. It were infinite for the law to judge the causes of causes, and their impulsion of one another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Since then, the causal approach has been championed by luminaries in works such as H.L.A. HART AND A.M. HONORE, *CAUSATION IN THE LAW* (1959) and Richard A. Epstein, *A Theory of Strict Liability*, 2 *J.OF LEG.STUD.* 151 (1973). Other luminaries pushed back, arguing that responsibility could not follow an

I join the many who would attempt to replace the term “proximate cause” with another term.⁹ But I do so not by substituting a new term for the words “proximate cause” but by resituating our understanding of the concept of proximate cause and locating it as an aspect of determining whether the defendant has breached an obligation to the plaintiff. Under this conception, fault does not depend on the reasonableness of the defendant’s conduct in isolation or in a vacuum – that is, “in the air”—but on its reasonableness in relation to the circumstances that led to the harm, and proximate cause is not a doctrine to limit liability but to determine liability

Consider the ambiguity in the concept of proximate cause as way of “limiting liability.” In some cases, the defendant’s conduct is clearly unreasonable and causes various types of harm but courts cut off liability as to some potential plaintiffs in order to preserve the recovery of plaintiffs who are more directly related to the risk for which the defendant is responsible.¹⁰ A seller of electricity that negligently fails to supply the electricity will cause harm –either physical or economic – to customers and non-customers and courts must determine for which harms the defendant is responsible.¹¹ This is a limitation on liability in the sense that a defendant is relieved of liability to some potential plaintiffs in order to keep liability from cascading out of control, even though the defendant is held liability to other victims. Here liability is limited for purely prudential reasons.¹² Limitations on liability in this sense are not addressed in the theory developed in this article.

But I give the notion of limiting liability a different meaning, one that limits liability by determining that the defendant has breached no obligation to the victim, much like the concept of duty. This article discusses liability limitations that deny the primary obligation of the defendant. Just as liability is limited because the defendant’s conduct is not unreasonable –there is no primary obligation – so too liability can be limited because the defendant’s unreasonable conduct is not the source or responsibility to another because of the way the unreasonable conduct resulted in harm. Because negligence law

analysis of causation. Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON 1 (1960). This article seeks to put an end to causal approaches to proximate cause.

⁹ DRAFT RESTATEMENT OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM, PROPOSED FINAL DRAFT NO. 1, at 574 (the term proximate cause “is an especially poor one to describe the idea to which it is connected”).

¹⁰ See e.g., *Strauss v. Belle Realty Co.*, 482 N.E. 2d 34 (N.Y. 1985) (applying duty to deny recovery to a victim who was injured in a blackout caused by defendant’s unreasonable conduct, recognizing that those who purchased electricity directly from the defendant could sue for their injuries), *Homac Corp. v. Sun Oil Co.*, 258 N.Y. 462, 180 N.E. 172 (1932) (limiting responsibility for negligently started fire to persons near the fire and cutting off responsibility those injured by the fire who were further away); and *Petition of Kinsman Transit Co.*, 338 F. 2d 708 (2d Cir. 1964) (although property owners could recover for negligent collisions on the Buffalo river, those whose economic expectancies were damaged could not recover).

¹¹ *Strauss v. Belle Realty Co.*, 482 N.E. 2d 34 (N.Y. 1985) (applying duty to deny recovery to a victim who was injured in a blackout caused by defendant’s unreasonable conduct, recognizing that those who purchased electricity directly from the defendant could sue for their injuries)

¹² This is the concept of limiting liability that Justice Andrews had in mind in his concurring opinion in *Palsgraf*

involves the allocation of losses between two private parties, negligence law is scrupulous in focusing not on the question of whether the defendant acted unreasonably in an abstract sense, but on the question whether the defendant acted unreasonably with respect to the harm to the particular victim making the claim against the defendant. The obligation of the reasonable person is to potential victims, not to society, and that obligation will change as the circumstances that link the defendant to the victim change. Negligence law is not looking to see whether the defendant acted unreasonably; negligence law is looking to see whether the defendant acted unreasonably with respect to the risk that injured the victim who is making the claim against the defendant. Proximate cause cases are an important normative limitation on the responsibility of one person for harms that befall another.

I also have a methodological goal in this article. Our methodology for understanding proximate cause has been non-justificational. Rather than seeking to understand proximate cause by appealing to a normative understanding of tort law, we have adopted the methodology of legal reasoning, seeking to interpret proximate cause in terms of conclusory distinctions and tests that are thought to allow us to understand the outcome of cases in relation to each other. In doing so, we have relied on only the most general, non-revealing concepts of fairness, and have resorted to tests and doctrines that themselves are unrelated to a theory of justice that would support the outcomes. Once we approach proximate cause cases from a methodology of justification, we can begin to understand the theory of responsibility underlying the cases.

There is great variety in the factual situations that give rise to proximate cause problems and humility suggests that no single test will account for the variety. Once one puts aside those cases where liability is cut off to some in order to ensure recovery by others, however, we can approach the variety of proximate cause situations with a single mode of analysis. Under the theory of responsibility that I propound, the proximate cause cases can be understood as responding to a single analytical question that focuses on the fault of the defendant in failing to take into account circumstances that a reasonable person would have taken into account. That question is this: were the circumstances that link the defendant's negligence to the victim's harm ones that a reasonable person would take into account if the person were thinking in an appropriate way about the welfare of others?. If a reasonable person could ignore those circumstances, then the defendant should not be responsible for harm flowing from those circumstances because the defendant, although in control of his conduct, is not in control of the circumstances that connect his conduct to another's harm. If the circumstances are ones that a reasonable person ought to have in mind, then the defendant is responsible for that harm because controlling his conduct also controls those circumstances. Magically, with this focus, all of the "proximate cause" cases merge into a consistent pattern of normative responses to the question of whether it was reasonable to ignore the circumstances that led to the harm. The many categories of proximate cause cases dissolve into a single analytical quest – to determine the circumstance that a reasonable person ought to be taking into account when making decisions.

The theory propounded here can be understood as a species of comparative fault, recognizing that one actor's responsibility for harm may be curtailed when another actor's failure to address the risk predominates, or when the harm is unavoidable by human intervention. Under this theory, the speeding trolley is not at fault for a falling tree, a railroad is not at fault when passengers bring explosives onto the railroad platform, and a shipper is not at fault when a dry dock owner, knowing that the shipper negligently spilled heating oil under the dry dock, continues welding operations while debris accumulates on the oil. Like comparative fault, proximate cause allocates responsibility based on human control over risky situations.

I. The Methodology of Understanding Proximate Cause

At the root of our misunderstandings about proximate cause is a failure of justification –the failure to use a methodology that would help us understand the theory of responsibility that supports the outcomes courts reach. In this section, I describe the kinds of arguments and analysis that count as a good justification, assess the justificational basis of our understanding of proximate cause, and explain why our understanding of proximate cause is non-justificational.

A. What Serves as a Justification?

The term “justification” is ambiguous and ambiguously used. On the one hand, to justify an outcome is to provide reasons for the outcome, almost as a synonym for “explanation”. This usage is associated with legal reasoning. Under this usage, to justify an outcome is to try to describe how an outcome fits coherently within legal doctrine and what factors are thought to be relevant when determining the precedential effect of the outcome – ingredients of the stare decisis system. This sense of explanation provides only a loose constraint on the kinds of reasons that serve as a justification. In particular, the reasons do not have to be either particularly revealing or normatively sound to count as an explanation. As long as the reasons provide a basis for fitting the outcome within principles thought to be established in prior cases or inherent in the law, the outcome is thought to be “justified.” I will call this kind of reasoning an explanation.

I use the word “justification” in a narrower, normative sense. Under this meaning, a justification is a well-specified statement of the attributes of a dispute that compel the court to decide the case the way it did. A justification cannot be complete unless it is founded on, and reveals, a normative vision of the law's values and explains the attributes of a dispute that are relevant to implementing those values in the context of such disputes, given the institutions of the law.

This meaning of justification emphasizes, first, that a justification must have a normative basis – it must point to the values that are protected and enhanced by the outcome and must explain how the law orders and compares clashing values under a well-specified theory of justice. Appeals to the “fairness” or “justice” of an outcome are non-justificatory unless the analyst also explains the analytical and moral basis for

concluding that one outcome is fairer than another. The values that are being served by the outcome must be clear and the basis for choosing one set of values over another must be articulated. Adequate justification must tell us *why* we impose or withhold liability and it must do so with as much specificity as can be mustered and without relying on undefined terms or concepts.

This narrower meaning of justification also requires an articulated basis for implementing the values by identifying the facts and factors that are relevant to knowing whether the values we seek to protect, given the weight required by our normative theory, are in fact protected. Adequate justification must tell us *when* the court will intervene and when it will withhold its intervention force. The theory that purports to be a justification must have the quality of determinacy and must be capable of elaboration and development as it is applied in related situations.

My claim, which I now proceed to discuss, is that proximate cause outcomes continue to search for a justification because we have not yet identified the normative basis for the outcomes or the factors that allow us to understand, from that normative theory, whether to find proximate cause or not.

B. The Non-justificational Understanding of Proximate Cause

By the standards I have articulated, the proximate cause concept remains unjustified. None of the standard justifications for proximate cause provide much content or traction to the justification.

Proximate cause is most frequently justified by two arguments: the fear of crushing liability and concerns for fairness.¹³ Such arguments only *look like* normative justifications.

The crushing liability rationale provides a partial (but incomplete) explanation in those cases – already alluded to – where liability is found as to some victims but is cut off

¹³ See e.g., DRAFT RESTATEMENT OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM, PROPOSED FINAL DRAFT NO. 1, at 579 (“This limit on liability serves the purpose of avoiding what might be unjustified or enormous liability by confining liabilities scope to the reasons for holding the actor liable in the first place) [hereafter DRAFT RESTATEMENT THIRD]. Later the proposed final draft suggests that its standard “appeals to intuitive notions of fairness and proportionality by limiting liability to harms that result from risks created by the actor’s wrongful conduct, but for no others.” *Id* at 585. Such rationales come in a variety of verbal formulae. See, e.g., Mark F. Grady, *Proximate Cause Decoded*, 50 U.C.L.A. L. REV. 293, 294 (2002) (suggesting that because some negligence is inadvertent, limiting liability is necessary to avoid making people overly cautious and to induce people to intervene to protect risk from ripening into harm). Others have said, for example, that the “law’s concern that a defendant not be held liable for the infinite stream of consequences flowing from tortious conduct requires the limitation of every obligation to a finite set of consequences.” Jane Stapelton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941 (2001). The proposition is self-evident but not substantively revealing. It fails as a justification because it does not explain why an infinite stream of consequences are outside the scope of responsibility; without that explanation there is no justificational basis for knowing where to draw the line. Moreover, it is a justificational mistake to analyze, under this rationale, cases in which the stream of consequences is not a concern, such as *Palsgraf* and *Wagon Mound*.

for victims who are further removed from the conduct in question.¹⁴ The law sometimes has to stop liability from cascading from one set of victims to another, through the generations or toward victims more remote from the risk.¹⁵ Otherwise, there would be no end to liability and the defendant's resources would be threatened. However, the crushing liability rationale does not explain most proximate cause cases, where the fear of crushing liability is minimal and where the question often is whether *anyone* has the right to sue the defendant. Moreover, the concept of "crushing liability" cannot serve as a justification unless it is supported by a well-articulated statement of the attributes that distinguish crushing from non-crushing liability and explain how those attributes are to be applied.

For its part, the fairness rationale has no normative, justificatory appeal unless the justificatory basis for the unfairness conclusion is articulated. That is never done. The *Draft Restatement Third's* appeal to "intuitive notions of fairness and proportionality"¹⁶ suggest the lack of a justificational basis for its rules. Intuition is a method of making decisions but it is not a justification *for* decisions. Just the opposite. An appeal to intuition calls out for justificatory analysis to explain the intuition and to provide a basis for evaluating it. More is needed than appeal to general and unspecified notions of fairness. And the restatement's appeal to the rules themselves – for example to the rule that the liability is limited to the risks created by the actor's wrongful conduct – provides no basis for justifying a decision unless both the justification for the rule and the determinants of its application are clearly understood. In the absence of such justifications, proximate cause is a repository of the unexplainable, a kind of justice cocktail.¹⁷

Mark Grady's justification for proximate cause is informed by his theory of efficient negligence.¹⁸ Under this notion, the negligence standard is so exacting that unless there is some liability relief valve people will shun productive activity. Accordingly:

¹⁴ See *supra* note 10. The justification is only "partial" because the real concern in these cases is not the amount of damages the defendant must pay, but the possibility that liability to victims whose interest was derivative or less important would impair the ability of other, more deserving plaintiffs to recover.

¹⁵ See, e.g. Justice Andrews in *Palsgraf*: "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 the railroad; he may not." 248 N Y at 345. As Jane Stapelton has written, "no legal wrong can be allowed to lead to unending liability for the infinite stream of consequences flowing from [a] breach." Jane Stapelton, *Occam's Razor Reveals an Orthodox Basis for Chester v. Ahshar*, 122 L. Q. R. 426 (2006) (hereafter Stapelton, *Occam's Razor*).

¹⁶ See DRAFT RESTATEMENT THIRD, *supra* note 13 at 585.

¹⁷ See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 158 (4th ed. 1971) ("The term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.") *Zaza v. Marquess and Nell, Inc.*, 144 N.J. 34 675 A.2d 620 (1996) (proximate cause doctrine "is an instrument of fairness and policy.... The determination of proximate cause by a court is to be based upon mixed considerations of logic, common sense, justice, policy, and precedent.") [This case is actually quoting an earlier case that should also be acknowledged].

¹⁸ Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397 (1998).

“the liability that remains after people have used reasonable efforts to take due care constitutes the insurance component of negligence liability; it is liability that exists without inducing any beneficial behavioral response. Everyone faces an expectation of negligence liability. Liability that is too extensive will cause people to reduce activity levels. The reasonable foresight doctrine bars liability for merely coincidental accidents. Making people liable for these accidents would punish their inadvertent lapses too severely and would cause them to reduce their activity levels.”¹⁹

Putting aside the merits of the notion that the law imposes liability even on people who act reasonably, the inadvertent negligence rationale fails as a justification for proximate cause. It provides no test for distinguishing advertent from inadvertent negligence, and therefore no test for determining when liability should be limited. As a result, Professor Grady analyzes proximate cause cases without regard to a theory of responsibility or the nature of the negligence, using tests that are applicable to both inadvertent and advertent negligence. Although one could realistically make the claim that jostling a package loose on a train platform is “inadvertent” in some sense (as in *Palsgraf*) that claim cannot be made with respect to the spilling of heating oil in the harbor (as in *Wagon Mound*). Yet liability is limited in both cases. Moreover, although the tests of foreseeability and directness that Professor Grady uses could embody the concept of coincidental harm, the relationship is never made clear. When one spills heating oil in a harbor, in what way is the resulting fire coincidental?²⁰

The luck-based theories of the *Draft Restatement Third* – which refers to limiting liability when harm is “merely serendipitous or coincidental”²¹ – fare no better. Luck-based theories, fail to tell us why luck matters, or what luck has to do with responsibility. And they do not explain why a defendant is sometimes responsible for his bad luck (hitting a plaintiff with a preexisting heart condition) and sometimes not (driving the trolley so fast that it arrives at a point in the tracks where a tree is falling). At bottom, the

¹⁹ Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. Rev. 293, 300 (2002). See also, Michael L. Wells, *Proximate Cause and the American Law Institute: The False Dichotomy Between the “Direct-Consequences” Test and the “Risk Standard”*, 37 U. RICH. L. REV. 389, 391 (2002) (advocating a “magnitude of the harm approach” in order to “save the defendant from the unfairness of paying huge damages for small departures from due care.”)

²⁰ Of course, to disparage the justificational basis of Professor Grady’s rendition of proximate cause, is not to disparage its normative intuition, which I endorse. Indeed, one can understand this article as endorsing the notion that some unreasonable (inefficient) conduct is nonetheless not the source of responsibility because making it so would unduly reduce an actor’s incentive to engage in the activity – the same conclusion reached by Professor Grady. I also provide a basis for determining when harm is merely “coincidental” to the defendant’s conduct. Jane Stapleton follows a similar line when she says that: “burdening the inadvertent tortfeasor with liability for a coincidental consequence can do nothing to generate meaningful deterrence effects of such carelessness in the future.” Jane Stapleton, *Occam’s Razor Reveals an Orthodox Basis for Chester v. Afshar*, 122 L.Q.REV. 426, 439 (2006). Because over-deterrence is as harmful as under-deterrence, liability for coincidental consequences cannot be meaningful.

²¹ DRAFT RESTATEMENT THIRD, *supra* note 13, at 633.

luck-based theories lack a convincing account of the normative basis on which luck matters.²²

In the absence of a justification, proximate cause is most often understood in terms of the tools of legal reasoning: tests or doctrines that are thought to explain the outcome of cases. But tests and doctrines fail to reveal any normative basis for adopting the test and fail to connect the theory of justice underlying the test to the factors that govern its application.²³ A brief survey of proximate cause tests shows why.

We understand, with Warren Seavey, that “[p]rima facie, at least, the reasons for creating liability should limit it.”²⁴ But this is no more than a starting point for justification. We need also to understand *why* this is so. We need to understand the reasons for creating liability, and to implement this aphorism we need a theory of responsibility that helps us understand the reasons that *simultaneously* create and limit liability, which requires that we be able to articulate a well specified theory of responsibility that imposes liability for some unreasonable conduct but withholds liability for other unreasonable conduct. What is it about the theory of responsibility underlying tort law that justifies imposing liability and what does that tell us about the limits of responsibility?

Similarly, we can agree with the basic notion of the *Draft Restatement Third* that “an actor is not liable for harm different from the harms whose risks made the actor’s conduct tortious.”²⁵ Yet without a way of identifying the “harm whose risks made the actor’s conduct tortious” we cannot apply the rule. It is easy enough to say that the risk of a negligently made vacuum cleaner does not include the risk that a person who takes

²² Law and economics scholars would seem to face a unique justificational challenge because it would seem that unreasonable conduct that causes harm ought to be deterred regardless of the connection between conduct and harm. Yet law and economics scholars continue to provide arguments supporting the proximate cause limitations on liability for unreasonable conduct. *See generally*, Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980), William Landes and Richard Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983), Guido Calabresi, *Concerning Cause and the Law of Torts, An Essay for Harry Kalvern, Jr.*, 43 U. CHI. L. REV. 69 (1975). We can agree with law and economics scholars that we do not want to over-deter risky activity, but we still need a theory to tell us how we know that deterrence would be counterproductive. In addition, we can agree that an actor’s liability might be limited in order to reflect the obligation of another to intervene to avoid the harm, but we still need a basis for understanding when and why this is to occur. And to speculate that some proximate cause cases are designed to save judicial resources when administrative costs are high relative to the harm incurred provides neither a general theory nor a basis for applying the theory.

²³ The need to have proliferating rules to differentiate what appear to be different proximate cause cases is itself a symptom of the lack of justificational understanding of proximate cause. The *Draft Restatement Third* has done an admirable job of narrowing the range of rules governing proximate cause, but it still posits eight different rules – a general rule (limiting an actor’s liability to “physical harms that result from risks that made the actor’s conduct tortious”), *Id* § 29, at 633, and then special rules for the speeding trolley case (no liability), §30, the thin-skull cases (liability), § 31, liability to rescuers, § 32, intentional and reckless tortfeasors, § 33, intervening acts and superseding causes, § 34, enhanced harm from medical aid to the victim is attended, § 35, and, finally, trivial contributions to multiple sufficient causes. § 36.

²⁴ Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 34 COLUM. L. R. 20, at 34 (1939). *See e.g.*, DOBBS, *TORT LAW* 446 (2000) (“proximate cause cases seek to limit liability to the reasons for imposing liability in the first place”).

²⁵ DRAFT RESTATEMENT THIRD, *supra* note 13, § 29, at 575.

the vacuum cleaner to be repaired will be hurt in an auto accident. But why, exactly, is that so? What is it that takes that harm out of the risks that makes the defendant's conduct tortious? Why do we not say the opposite? And why is the risk of colliding with a tree not one of the risks that made the speed of the trolley tortious?

The non-justificational underpinning of the *Restatement* test is revealed once we try to apply it. Consider the *Draft Restatement Third's* illustration 6.²⁶ The defendant negligently ran a car off the road, and the victim stopped her car to observe the accident. While she was stopped, another driver negligently hit her and the law must decide whether the defendant should be responsible for this harm (perhaps in conjunction with the second negligent driver). Under the *Draft Restatement Third* we need to determine whether the risks that a victim-bystander would be hurt are among the harms that made the act of running a car off the road tortious. How, exactly, are we to think about an answer to that question?

The difficulties are apparent if we consider how juries would decide cases under the rule. The *Draft Restatement Third* sees the difficulties,²⁷ but its approach does not solve them. Under the *Draft Restatement Third*, the jury would be told:

that in deciding whether plaintiff's harm is within the scope of liability, it should go back to the reasons for finding the defendant engaged in negligence or other tortious conduct. If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm.²⁸

It is not clear to me what the jury will understand from this instruction, for they would understand neither the justice underlying the instructions nor how to think about that justice. How does the jury decide what "general sort of harm" was risked by the tortious conduct or whether that "general sort of harm" was properly considered in the "negligence" phase of the case because it was one of the harms risked? Does the instruction focus on the victim's bodily injury ("the harms risked") or on the risk the victim faced and the risk for which defendant is responsible. Not only are those concepts not distinguished and defined, but they are not tied to a theory of responsibility that would guide their application.

If we think about whether the defendant *should* be responsible for this harm, we would naturally think of a host of factors that are not even alluded to in the test.²⁹ The jury, it seems to me, would want to consider factors like the following:

²⁶ *Id.* at 582 – 583.

²⁷ See Reporter's notes to § 29, at 609.

²⁸ *Id.*, cmt d, at 6

²⁹ I discuss this example in the context of the theory of responsibility developed in this article in the text at footnote 69.

- Whether the road was lightly or heavily traveled (in order to think about the likelihood that bystanders would appear),
- The kinds of risks that bystanders would expose themselves to if they did stop (given, for example, the width of the highway's shoulder), and whether the bystanders could take steps to minimize those risks.
- The general hazards to bystanders that are generated by the nature of the traffic on the highway.

One can well imagine that a jury might find the defendant not responsible for this harm if the highway were not congested, if bystanders could safely pull off the highway, or if the traffic was slow. The jury might come to the opposite conclusion if traffic were congested, the highway's shoulder were narrow, or the drivers erratic — all of which make the risk to bystanders greater and therefore require the actor to think about how his behavior might affect the bystander's interests. Yet none of this is hinted at in the test of the *Draft Restatement Third* and, without more, the jury would be left to guess at to what the test meant in practice.

Aside from the *Draft Restatement Third* approach, the law often takes refuge in tests based on “foreseeability” or “directness,” the two standard doctrines that are used to understand and explain proximate cause cases.³⁰ These approaches, however, are unhelpful as justificatory explanations. For one thing, the tests themselves require so many qualifications and elaborations that they offer little utility in deciding cases and they offer no hope for finding unity in the proximate cause concept. The problems are well known. How do we know whether to use a foreseeability approach or a directness approach? If one “works” when the other does not, how do we know that it works? And how do we explain the many contradictions that either a foreseeability test or a directness test gives us. After all, in the famous *Wagon Mound* pair of cases,³¹ a defendant spilled heating oil that later caught fire and burned a dry dock in which a ship was being repaired. Yet for this single act, the defendant was held liable as to one plaintiff (the owner of the ship in the dry dock) on the ground that the fire was foreseeable and was held not liable to another plaintiff (the owner of the dry dock) on the ground that the fire was not foreseeable. One fire was said to be both foreseeable and unforeseeable.

The problem with tests of foreseeability and directness is that the justification that would guide the application of the test is not revealed by the test. The concept of

³⁰ See e.g., JOSEPH A. PAGE, TORTS: PROXIMATE CAUSE (2003), Jane Stapleton, *Legal Cause: Cause in Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, (commenting on the difference between direct test and foreseeable tests) (hereinafter Stapleton, *Legal Cause*), Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 Iowa L. Rev. 363 (1984) (dividing proximate cause into two types of situations—multiple-risk situations and concurrent efficient cause situations—to be governed by two tests—the reasonable foresight doctrine and the direct consequences doctrine) (hereinafter, Grady, *Proximate Cause and Negligence*) and Mark F. Grady, *Proximate Cause Decoded*, 50 U.C.L.A. L. Rev. 293 (2002) (identifying five direct consequences paradigms and five reasonable foresight paradigms) (hereinafter, Grady, *Proximate Cause Decoded*).

³¹ *Overseas Tankship (U.K.) Ltd. V. Morts Dock & Engineering Co. (Wagon Mound I)*, [1961] A.C. 388 (P.C.) (appeal taken from *AuRerseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound II)*), [1967] 1 A.C. 617 (P.C.) (appeal taken from Austl.) (damage to the ship being repaired in the dry dock was the defendant's responsibility).

“foreseeability” is by itself empty, for it has no meaning by itself. It takes on its meaning as it is applied in particular circumstances and this requires a structured way of thinking about the concept’s application. Without either a normative basis for understanding why foreseeability is important or a structured way of thinking about foreseeability, the application of the concept of foreseeability is hopelessly conclusory. The crucial issue is *why* a person is responsible only for foreseeable harms. Until we answer that question we cannot know what foreseeability means; once we answer that question we can understand how to apply the concept of foreseeability.

Similarly, the test of “directness” is normatively empty, helping us identify neither the number nor the quality of connecting steps that render a cause only indirect. Because the tests of foreseeability and directness are justificationaly vacuous, they provide only explanations, not justifications, for the law.³²

³² Even a seemingly air-tight rule is non-justificational. Take, for example, the thin-skull rule, which, in the *Draft Restatement Third* is clear:

When an actor’s tortious conduct causes physical harm to a person that, because of preexisting physical or mental condition or other characteristic of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person. *Id.* § 31, at 638 – 639.

Not only is the rule clear, it is also steadfast; as the reporter’s notes indicate, no court has ever disregarded the rule. *Id.* at 644 – 645. What could be better than a clear rule that admits of no exception?

Yet even this settled and respected rule is a deficient source of understanding of the law, for at least two reasons. First, what is the relationship between this rule and the general rule that responsibility flows from harm of the type that made the actor’s conduct tortious? On the one hand, if harm from preexisting conditions is one of the harms that made the conduct tortious, then why do we need the special, thin-skull rule? On the other hand, if it is an exception to the general rule, then the general rule really reads as follows: “an actor is not liable for harm different from the harms whose risks made the actor’s conduct tortious, unless the victim’s harm was from a preexisting condition, in which case the actor is responsible for the harm.” But that means that the general rule is not really a general rule; it is simply a rule to be applied unless it should not be applied. Either way, the rules are not self-defining.

Moreover, even when the circumstances in which the rule is to be applied are clear –and, admittedly the rule is easily applied in many instances – the outer edges of the rule still need to be defined. Are we sure that we know which characteristics of a person qualify for the rule? If the victim knows of her preexisting condition, knows that it can be addressed with medication, and yet fails to take the medication, we could make a strong argument that the defendant should not be responsible for the harm that could have been prevented by the victim’s reasonable care. Yet is that instance one where the rule would impose responsibility because the harm results from a preexisting condition, or instead, is liability outside the rule because the condition could not “reasonably be expected” (it being reasonable to expect that the victim would self-protect)? In those kinds of cases, a court is likely to ignore the thin-skull rule altogether or never even think about it. Instead, the court is likely to decide the case under the related doctrines of avoidable consequences or contributory negligence. *See, e.g.,* *Smith v. Edwards*, 195 S.E. 236 (S.C. 1938) (plaintiff was injured in beauty shop from preexisting diabetes, but could not recover because she knew of the condition). But that simply means that we apply the rule in cases where it applies and not in cases where it does not apply, and that is no rule at all.

This ambiguity is related to the familiar problem of dealing with thin-skull cases in terms of foreseeability. Obviously, an actor cannot know whether a potential victim has a preexisting thin-skull condition; in that sense, the existence of the preexisting condition is not foreseeable. If that kind of foreseeability is the test, then an actor should not be responsible for harm from pre-existing conditions. Yet it is foreseeable that some percentage of the population will be particularly susceptible to physical

C. The Methodology of Justification

The methodology of justification looks for ways of understanding the law by specifying the analysis that make a court's intervention decision normatively appealing and that informs the resolution of other disputes. It seeks to marry our intuitions about justice with a well-specified and systematic exploration of the values that animate the law and the way the law incorporates those values into its decisions.

The methodology of justification starts with the understanding that the law is a social institution designed to address conflicts between people in an increasingly crowded and interdependent world. Law is a socially constructed set of binding obligations that reflect social norms that communities have developed to deal with potential conflicts between the values that underlie personal decisions. Intervention choice must therefore be grounded in an understanding of the nature of the social conflicts facing society and how people respond to them. Because law is a social institution that addresses human behavior, the methodology of justification starts by understanding the particular problem of social behavior that the law must address as it determines whether to assign responsibility to an actor for the harms the actor occasions.³³ It then seeks to understand the values that are implicated by the social problem the law faces and how those values are in tension with one another. Finally, the methodology of justification determines how legal institutions can best accommodate conflicting values in a way that comports with a well-specified theory of justice.

Two methodologies are crucial to justificational analysis. The first is the methodology of "why" – namely, to continually ask why the law would react the way it does to the competing values that are at stake in a dispute. Legal analysis is incomplete until we have answered the "why" question with as much depth and specificity as can be mustered. This means that any statement of legal reasoning must be subjected to a cascading series of question about why that statement would be true. Once we explain the first statement we must subject that explanation to the why question, seeking to further understand the normative pull of the explanation. Then we must ask why the explanation of the explanation is likely to be true. This process must go on until we arrive at an irreducible statement of the foundational values that help us to understand the normative basis of a decision.

The "why" question is important because it avoids answers that are true but unrevealing (and therefore non-justificational). For example, it is true that under the proximate cause cases an actor is not responsible for harm that is merely coincidental to

harm, and if that kind of foreseeability is what matters, then the actor should be responsible for harm from preexisting conditions. Because of this ambiguity, a foreseeability test does not work until we know what kind of foreseeability matters and why it matters. Again, if a victim with a preexisting condition does not self-protect by taking her medicine, is that foreseeable and how does that determination affect the outcome?

³³ See, Peter M. Gerhart, *Responsibility and Duty* (manuscript on file with the author).

the defendant's unreasonable conduct. That true statement, however, does not reveal why this is so and therefore does not give us a sense of the values that are being enhanced or protected when liability for coincidental harm is withheld. The coincidental harm statement (like the harm within the risk rule in general) is simply incomplete as a justification because our understanding of it does not reveal the normative values underlying the statement. And without an understanding of those values we do not know how to recognize coincidental harm.

Of course, the "why" question is often answered by appealing to a word or concept that is thought to have normative significance. We say, for example, that a statement is justified because any other view of the dispute would be "unfair." However, as I have already indicated, this too is non-justificational unless the content and meaning of the term "unfair" is itself articulated and justified. Without such a justification, the use of a term is a mere conclusion, with no normative content and therefore with no hint as to why the statement is true or false. The appeal to the term "unfair" must itself be subjected to the why question.

This highlights the second important methodology of justification: the analyst must avoid terms and concepts that have no stable and well-understood meaning unless the analyst is prepared to articulate that meaning in normative terms that reveal the irreducible normative content of the term. In other words, a term or concept that is used to answer the "why" question must have normative content that is either widely accepted or fully explained if it is to be used in justificational analysis. This is a rigorous requirement. An analyst might say that an actor is not responsible for harm because the actor could not foresee the consequences of her act, but that is not a justificational statement unless we know in what sense we are using the term "foresee." The concept of foreseeability has no known or stable meaning; it could relate to the probability that something will happen, to the ability to think broadly about a potential occurrence, or to limitations on human thinking capacity. No one of these (or other) meanings is conveyed by the statement about foreseeability and in the absence of such a meaning the statement is a mere conclusion, without analytical content.

In short, the methodology of justification requires the analysis to continually subject statements of reasons to the question of why that would be true, and to continually define and explain the meaning of the terms that are used in statements of reasons. Had the proximate cause cases been subjected to this discipline, our understanding would have been normative rather than simply doctrinal and explanatory.

II. The Substance of Proximate Cause

Proximate cause ought to be understood and justified in terms of the theory of responsibility that is embedded in the reasonable person standard. In this view, proximate cause is simply an application of the concept of reasonableness, an elaboration of the standard of care that the law expects people to follow. If an injurer was the proximate cause of the injury, it is because the actor acted unreasonably with respect to the way the risk turned into the victim's injury. If an injurer was not the proximate cause

of the victim's injury, it is because the injurer, despite her unreasonable conduct, did not act unreasonably with respect to the way the risk led to the victim's injury – a recognition of the limits of responsibility that private law embodies.

On the surface, this appears to be paradoxical. How can a person who is unreasonably speeding not be unreasonable with respect to the risk of speeding? And if the risk of speeding is unreasonable, why would responsibility not follow when harm is occasioned? The answer to this paradox is the recognition that tort law concerns itself with consequences, not with conduct. There is no “negligence in the air”³⁴ because unreasonable conduct is not the source of responsibility in private law until it has consequences, and the consequences determine the moral content of the actor's responsibility. What matters in tort law is not the conduct as conduct, but the conduct and its consequences, and that implies that the connection between the conduct and its consequences is crucial to a theory of responsibility.³⁵ That is why we can say that the risk of speeding makes the actor responsible for some consequences but not for other consequences, and that unreasonably speeding itself is not blameworthy in a claim by an injured victim. When the consequences of speeding are not the responsibility of the speeding actor we conclude that the consequences are not one of the risks of speeding. Responsibility hinges on the **way** that risk ripens into harm, not on the **fact** that risk ripens into harm.

It is possible, of course, to imagine a legal system in which the connection between blameworthy (unreasonable) conduct and harm is less rigorous, one where acting unreasonably and causing harm would make one responsible for the harm. We would then not need the analytics of proximate cause to help us understand the limits of responsibility. But, as we will see, there are good reasons to reject such a system. We do not want to hold an actor responsible for another's misfortune unless the actor had a fair chance at ameliorating or addressing the misfortune without unduly limiting the actor's own freedom of action. The theory of responsibility inherent in the proximate cause concept is justified by the belief that human responsibility should end when reasonable human control ends.

As described below, because responsibility depends on the connection between risk and harm, the reasonable person standard contains both a theory of responsibility and a theory that limits responsibility for harm that one causes. The reasonable person concept is at once a basis for imposing liability and a limitation on liability, a measure of what the law expects of people and an expression of what the law cannot expect. The

³⁴ Sir Frederick Pollack, *THE LAW OF TORTS* 445 (11th Ed. 1920), quoted by Justice Cardozo in *Palsgraf v. Long Island Ry*, 162 N.E. 99, 102 (1928) and in *Martin v. Herzog*, 126 N.E. 814, 816 (1920).

³⁵ Some believe that the function of tort law is to sanction or inhibit blameworthy conduct. *See generally*, Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 *Theoretical Inquiries*, No. 2 (2002). But if we could measure the blameworthiness of conduct without attending to its consequences we would not need to resort to the proximate cause notion. Tort law measures the responsibility of one person for the misfortunes of others, not the blameworthiness of conduct from a social standpoint. Tort law does a poor job of addressing blameworthiness for the simple reason that unreasonable conduct is not the source of responsibility until harm results.

same theory of responsibility that tells us what to expect of people also dictates the limits of those expectations.

Moreover, the theory of responsibility that grounds and limits the reasonable person standard, and therefore the proximate cause standard, has a strong normative basis, one that is built on a moral and consequential view of human behavior in a community of interacting human beings. There are good reasons to impose the responsibility to act reasonably when an actor's decisions adversely affect others and those reasons also suggest the limits of responsibility for harms that befall another. The theory of proximate cause presented here is fully justified.

A. A Theory of Responsibility in Tort

The essence of the reasonable person obligation is that one must take into account, in an appropriate way, the wellbeing of others.³⁶ This is the central insight of both deontic and consequential thought. In terms of the Hand formula,³⁷ an actor who considers only her own interest and ignores the interests of others will omit precautions that take time, thought, energy, and money, even when precautions would yield a compensating reduction in harm to others. The law wants to deter that kind of selfishness by requiring each actor to internalize the interests of others that can be protected by investing in cost-effective precautions. Because the law requires the actor to care about the interests of others, the actor will benefit from, and therefore want to invest in, precautions that reduce the adverse impact of her decision on others.

From the deontic viewpoint, the reasonable person standard embodies the normative view that each person is entitled to equal respect and thus equal freedom under the law³⁸ and that therefore an actor's decisions, in order to be socially appropriate, must

³⁶ See e.g., Ariel Porat, *The Many Faces of Negligence*, 4 *Theoretical Inquiries* L. 105 (2003) (showing that this conception is inherent in the Hand formula); Ernst Weinrib, *THE IDEA OF PRIVATE LAW* 3-21 (1995); and Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449 (1992). Lord Acton writing in *Donoghue v. Stevenson*, [1932] AC 562 (HL) captured the thought this way: "You must take reasonable care to avoid acts or omissions that you can reasonably foresee are likely to injure your neighbour. Who, then, in law is my neighbor? The answer seems to be persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

³⁷ *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2d Cir. 1947). Under this approach, the defendant would be negligent if the burden of precautions was less than the probability of harm times the gravity of the harm. Among the commentaries about the Hand formulation that are consistent with the views expressed in the text see Hurd and Moore, *Negligence in the Air*, 3 *Theoretical Inquiries in Law*, at notes 93 to 106 [2002] and Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 *VAND L. REV.* 901 (2001) (hereafter, Simons, *The Hand Formula*). In this Article, I will not enter the argument about the precise way in which the contents of the Hand "formula" might be articulated and envisioned. See, e.g., Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 *Am. J. Juris.* 143 (2002) and Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 *VAND. L. REV.* 813 (2003).

³⁸ Richard W. Wright, *Right, Justice, and Tort Law*, in DAVID G. OWEN, *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, 165 (1995) [hereinafter, Wright, *Wright Justice and Tort Law*]. See also, Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 *AM. J. JURIS*, 143 (2002).

ensure equal dignity to the interests of both the actor and potential victim. The source of this norm is the Kantian notion that the aspect of humanness that is worth valuing by society (and therefore by the law) is the individual autonomy of each person as a being that is capable of making decisions, acting volitionally, and accepting responsibility for decisions.³⁹ That view of what it means to be human requires that when making decisions each person must act not only as an individual who has interests and pleasures to be fulfilled, but also as a member of a community where the interests and pleasures of others also need to be taken into account.⁴⁰ An actor who elevates his or her interests above those of other individuals essentially denies the humanness of others by taking away their decision-making autonomy.

These accounts of the normative justification for imposing liability take the unit of analysis of tort law to be the choice made by an actor (whether an individual or an entity). A choice for which one is responsible is a choice that fails to account for the interests of others in an appropriate way. Choices determine behavior and behavior determines the nature of the risks that an actor addresses and the potential harms that those risks occasion for others. More fundamentally, the obligation to take into account the wellbeing of others implies that one must be “other thinking” (as tort law defines it) and that implies that a central concern of tort law is the attitude that one has toward the wellbeing of others. Tort law oversees the choices that people make and tort law examines those choices to appraise the moral quality of an actor’s attitude toward others in society.⁴¹

³⁹ *Id.* (“If a person’s actions will affect the persons or property of others, those actions must conform to those others’ rights – that is, they must be consistent in their external effects with equal absolute moral worth of those others as free rational beings.”). This view is now a staple of the torts literature, although it is sometimes rolled out in various guises. See, e.g., Gregory C. Keating, *The Social Contract Conception of the Tort Law of Accidents*, in GERALD J. POSTEMA, ED. PHILOSOPHY AND THE LAW OF TORTS, 22 at 27 (2001) (“If the fundamental idea of Kantian social contract theory is the idea of society as a system of cooperation among free and equal persons, a fundamental task of principles of justice on this account is to find terms of cooperation that express the freedom and equality of democratic citizens, recognizing that these citizens hold diverse and incommensurable conceptions of the good.”) [hereinafter, *Social Contract Conception*], Ernest J. Weinrib, *The Disintegration of Duty*, [in a forthcoming volume].

⁴⁰ The notion that the content of the reasonable person principle turns on equal respect for the interests of others has a long tradition in negligence law. See e.g., Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (tracing the notion back to Warren Seavey).

⁴¹ This thought is an old one. A century and a quarter ago, Oliver Wendell Holmes wrote:

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....

A man need not, it is true, do this or that act,—the term *act* implies a choice,—but he must act somehow. ⁴¹ O. W. HOLMES, THE COMMON LAW 94 – 96 (1881).

Because an actor's choices are the unit of analysis for tort law, the reasonable person standard is best understood by thinking about how people make choices and the cognitive processes people use to deal with information about the world they inhabit the way in which their choices might affect the interests of others.

Actor's choices are both informed and constrained. Choices are informed by understandings about cause and effect, by social norms that help guide people as they determine when they should consider the interests of others, and by the cognitive power of the reasonable person to process information about how those interests might be adversely affected. An actor who creates a risk knows that she is wagering the welfare of others and she is equipped to think about how that risk might ripen into harm. An actor who digs a hole in the sidewalk can think about how the risk that conduct creates might lead to harm and about the interests of the people who might be harmed. And a reasonable actor has the mental capacity to adjust choices and evaluate options so that the actor takes appropriate measures to address the harm.

Similarly, if an actor has not created a risk, an actor can assess the risks that others pose and the relationship the actor has with potential victims in ways that allow the actor to determine whether the actor should do more to protect the victim. A landlord, knowing that tenants rely on the landlord for a measure of safety, and knowing something about the neighborhood (and able to get additional information about it) may decide to fix a broken lock on the door because of that knowledge. That landlord's choices are informed by a sense that others rely on him and by his knowledge of the risks that the tenants face.

But choices are also constrained. Even when an actor has, or takes on, an obligation to think of the wellbeing of others, the actor may not find it easy to see the way in which the actor's decisions might adversely affect that wellbeing. This puts the wellbeing of others effectively out of the control of the reasonable person. The law understands, because it is a fact of life, that people make decisions under uncertainty because of bounded rationality⁴² – that is, because of limited abilities to acquire, assimilate and evaluate information.⁴³ The law therefore understands that even mistaken

⁴² Theories of bounded rationality explore human decision-making under uncertainty, emphasizing that decision-making requires people to decide how much to invest in information, which information to rely on, and which rules of thumb or belief systems to rely on in the absence of information. The field derives from Herbert Simon's effort to use models of human behavior to understand human decision-making. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955), HERBERT H. SIMON, *MODELS OF MAN* (1957). The subsequent literature is huge, having united fields such as behavioral studies, sociology and anthropology. See, e.g., Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (a version Kahneman's Noble acceptance speech) and Robert Boyd and Peter J. Richerson, *Norms and Bounded Rationality*, available at www.sscnet.ucla.edu/anthro/faculty/boyd/Dahlem.pdf. Gerd Gigerenzer & Richard Selten, *BOUNDED RATIONALITY* (2001). More general treatments appear in ARIEL RUBENSTEIN, *MODELING BOUNDED RATIONALITY* (1997) and GERD GIGERENZER AND REINHARD SELTEN, eds., *BOUNDED RATIONALITY, THE ADOPTIVE TOOLBOX* (2002).

⁴³ Theories of bounded rationality and cognition have influenced legal analysis in Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

choices can be reasonable. And the law does not expect an actor to exert more control over the circumstances that might lead to harm than is reasonable.

This notion is embodied in negligence law, which has repeatedly reminded us that the reasonable person is not expected to have prevision⁴⁴ and that even a reasonable person may fail to see through the uncertainty that people confront, given the normal cognitive processes. Thus, negligence cases have long recognized that when an actor makes reasonable (but mistaken) assumptions about the state of the world, the actor is not responsible for resulting harm. A person is allowed to assume, for example, that an ordinary package can safely be opened with a chisel; if it turns out that the package contains nitroglycerine, the actor is not responsible for the resulting harm.⁴⁵ The possibility that the package contains nitroglycerine is not the kind of circumstance a reasonable person must consider when determining how to open the package. Similarly, a person is allowed to assume that a victim who has the opportunity to avoid or ameliorate harm will do so.⁴⁶ The possibility that the victim will not protect himself is not a consequence that the defendant must consider, a reflection of the division of responsibility for harm that accords with social expectations and cost-minimization. And a trolley company that maintains exposed wires above its tracks is not responsible if a twelve year old boy walks over a bridge twirling an eight foot wire and is electrocuted when his wire comes in contact with the trolley wire.⁴⁷ This occurrence was so beyond what could be predicted reasonably that it fails to provide a source of responsibility for the trolley company.

Decisions like these represent the law's understanding of the limits on cognitive processes and the way that people approach the uncertainty that is a part of life. It is for this reason that the reasonable person standard always requires a connection between the act and the harm of the kind that demonstrates that the actor failed to think about the

⁴⁴ As Judge Cardozo reminded us in *Palsgraf*: "Life would have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform." 248 N.Y. 2d at 341.

⁴⁵ *Parrott v. Wells-Fargo*, 15 Wall [U.S.] 524 (1872). The defendant, Wells Fargo, a common carrier, saw that a package that it was transporting was leaking and decided to open it. Wells Fargo neither knew nor had reason to know that the package contained nitroglycerine. When a Wells Fargo employee opened the package with a chisel, the package exploded. The objective likelihood of injury was not foreseeable from the point of view of what the defendant knew or should have known, and, therefore, the defendant was not liable. See also *Van Skike v. Zussman*, 318 N.E. 2d 244, 247 (Ill. App. Ct. 1974). The defendant placed a gumball machine that dispensed toy lighters in a store that also sold lighter fluid. A boy was burned when he filled the toy with lighter fluid purchased at the store. The defendant was not responsible for the harm because "creation of a legal duty requires more than a mere possibility of occurrence." In *Cunis v. Brennan*, 308 N.E. 2d 617, 619 (Ill. 1974) the defendant left a drain pipe protruding from a parkway and a victim who was thrown from the car had his leg impaled on it. The defendant was not responsible because "the risk, although recognizable, would commonly be disregarded."

⁴⁶ This basis for refusing to hold a defendant responsible for harm is sometimes explicit in the cases. See, e.g., *Sinram v. Pennsylvania Railroad Co.*, 61 F. 2d 767 (2d Cir. 1932), discussed *infra* at notes 74 to 79. Judge Hand, in finding the defendant not responsible for all the harm his negligence conduct caused, said that the defendant "need not have considered the possibility that if he struck her [the plaintiff's barge] she might be injured, that her bargee might be so slack in his care of her as to let her be loaded without examination, and might so expose her to the danger of sinking." *Id* at 771.

⁴⁷ *Adams v. Bullock*, 227 N.Y. 208 (1919)

welfare of the defendant in an appropriate way.⁴⁸ The act of opening a package with a chisel does not demonstrate the requisite connection between act and harm because it does not demonstrate that the defendant unreasonably ignored the welfare of those who might be injured by the act.

Because human choice is both informed by and constrained by the thought processes of the reasonable person, the theory of responsibility embedded in the reasonable person standard provides both a source of responsibility and a limitation on responsibility. The limitations on personal responsibility stem from the same normative impulse as the source of the responsibility. Just as the theory of responsibility recognizes the normative necessity of taking into account the wellbeing of others as a general matter, the theory of responsibility recognizes the normative necessity of not imposing more expectations on human cognitive processes than humans can be expected to fulfill. When an actor cannot know, even with the exercise of reasonable cognitive capacities, how her decisions, in combination with other circumstances, will result in harm, the law does not hold the actor responsible for the resulting loss because the loss is effectively beyond the control of the reasonable person. For the reasons I will now give, the law cannot command what it is impossible for humans to accomplish. If people cannot reasonably get the information they need to understand the circumstances that will connect their acts to harm, it would be wrong for the law to punish them for their failure.

This form of the justificatory foundation for the reasonable person is aligned with the theory of corrective justice – the theory emphasizing that the wrong to which negligence law is aimed is always a wrong between the defendant and a victim. The essential connection between actor and victim is the actor’s awareness that her decisions affect others and that her decisions must take into account, in an appropriate way, how her decisions may adversely affect others. Where an actor of reasonable cognitive capabilities should have thought about the circumstances more reasonably, the actor has failed to take the interests of the victim into account, and justice commands that that lapse be corrected when harm occurs. On the other hand, when an actor could not, with reasonable cognitive abilities, have anticipated how her actions would ripen into harm (that is, what other circumstances would contribute to the harm), the actor has not failed to think of the interests of another in a way that needs to be corrected, and corrective justice does not require that responsibility be assigned to the actor.

In consequential terms, if the law were to hold people responsible for effects that are beyond their cognitive capabilities, people would become unduly cautious in the decisions they make. They would systematically overestimate the possibility that external circumstances would combine with their own decisions to render them liable for acting, even when they had done the best they could to make sure that their decisions took into account the effect of their behavior on others. Trolleys would run more slowly and conductors would no longer help people onto trains. Holding people to a higher

⁴⁸ That is what Cardozo meant when he said that there is no “negligence in the air”. Negligence is in a connection between injurer and victim that connects the act with the harm in a way that is relevant to determining whether the injurer failed to think inappropriately about the welfare of others.

standard of cognitive ability than it is possible for people to meet would over-deter socially beneficial conduct and society would be the loser.

Normative theory therefore explains why tort law does not create a private right of action for merely wrongfully creating a risk and why the law insists that the wrong be a wrong to the victim rather than to someone else. The wrong of negligence reflects a failure to be other-regarding with respect to the victim in a relevant way, and this means that being wrong to society does not demonstrate a wrong toward the victim. The wrong with respect to the victim must be something over which the defendant has reasonable control – that is, a matter over which the defendant has the capacity to make a difference. If the source of the harm is beyond the capacity of the defendant to remedy, then the defendant does not bear responsibility for that harm in a suit by the victim, for imposing responsibility for matters beyond human capacity would detract from our sense of human potential. That is why a defendant is not responsible for all the circumstances that connect the defendant’s bad act to the victim’s harm. The circumstances must be within the capacity of the defendant to do something about.⁴⁹

D. The Theory of Responsibility and the Proximate Cause Problem

The theory of responsibility just elaborated requires that actors think about the wellbeing of others in an appropriate way, but it also recognizes limitations on human cognition that limit responsibility for harms that a person causes. Because of the Janis-faced nature of this theory of responsibility, negligence law needs a structured way of thinking about the interests and values that are a reasonable person is required to consider and the circumstances that could connect conduct with a violation of those interests and values. There must be a structured way of thinking about how the reasonable person makes decisions that respect the interests and values of others while acting under uncertainty about what circumstance beyond the control of the actor might lead to harm. The proximate cause cases are a part of working out that structured analysis.

The proximate cause cases present special problems of cognition for the reasonable person because in proximate cause cases circumstances for which the defendant is not responsible combine with the defendant’s acts to bring about harm. In *Palsgraf*, the railroad triggered an explosion when it negligently handled the passengers on the platform, but Mrs. Palsgraf would not have been hurt if the passengers had not been carrying fireworks. In *In re Polemis*, the board that was negligently dropped into

⁴⁹ The same normative value is reflected in the “but for” test of causation. Necessity measures an actor’s control over the harm. If the law compels a driver to blow his horn when going around a bend on a mountain road and the driver fails to do so, it is widely believed that the driver is not responsible for an accident if the oncoming driver is deaf and would not have heard the horn anyway. In that case, the failure to sound one’s horn (the unreasonable act) is not the “but for” cause of the accident (because the accident would have occurred anyway). Under the theory developed here, the defendant had control of his own poor choices, but no control over the ability of the victim to hear the warning. To hold the defendant responsible for the victim’s harm would be to hold the defendant responsible for consequences over which he had no control. By basing responsibility only on conduct that was necessary to the result, the law ensures that the defendant is not responsible when circumstances beyond his control would have caused the accident to happen anyway.

the ship's hold would not have caused an explosion if the board had not inexplicably caused a spark to ignite the benzene vapor in the hold. In *Wagon Mound*, the spilled bunkering oil would not have caught fire if the owner of the dry dock had not continued welding.⁵⁰

The circumstances that determine the nature of the harm from an actor's conduct could occur before the actor acts, or after, and they can result from the victim's decisions as well as from acts of nature. A thoughtless or risk-tolerant person could put a Ming vase in the back seat of his car; when a negligent defendant hits him, the harm will be different than if he had carefully wrapped the vase. A driver with a bad heart will be a different type of victim than a driver with a strong heart, and the owner of a shop on a busy street is a different type of victim than one on a less traveled street. Similarly, the negligent actor could see the damages caused by the negligence increase if the victim does not seek to minimize the damages or if subsequent events aggravate the damage.

The chain of circumstances that link a defendant act with a victim's harm is extended further when a single act can result in multiple types of harm because then different circumstances connect the act to the different harms. A wooden plank placed over a ship's hold may, through negligence, be knocked into the hold, threatening damage to a worker below, damage to the ship, or damage from benzene fumes that have gathered there (if the fall causes a spark that ignites the fumes).⁵¹ One risk (a falling plank) is connected to different potential consequences by differing circumstances; how should we know circumstances are the responsibility of the defendant? Or railroad employees, negligently handling a passenger who is getting on the train, may, by dislodging a package, cause damage to the package, damage to a person struck by the package, or damage from an explosion (if the package contains fireworks and falls

⁵⁰ The fact that the defendant was responsible for some, but not all, of the circumstances that connected the defendant to the victim's harm is what led courts and legal analysts to turn the problem into a causal problem. Because proximate cause cases involve situations in which several circumstances led to the harm, it was natural for the law to think in causal terms, and for courts to ask whether the cause of the harm was circumstance A (for which the defendant was responsible) or circumstance B (for which the defendant was not responsible). But causation concepts do not allow one to attribute harm to one circumstance or another, for each of the circumstances is generally important to bringing about the harm. As Ronald Coase taught us (*The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960)), if a railroad goes through a field where hay is stored and a fire starts, it is not clear whether the circumstance that caused the fire was the fault of the railroad (putting its railroad too near the hay without spark protection) or the fault of the farmer (putting its hay too near the railroad). More generally, when two people try to be in the same place at the same time or use the same resource at the same time, it is impossible to say which person caused the interference. In causal terms, both persons impose harm on the other by occupying the space or using the resource. Causal analysis simply does not tell us which person had the right to use the space.

Because causal analysis is unavailing, we have to find some other way of figuring out *why* the circumstances matter, and based on that reason, to figure out *which* circumstances matter. The answer is to charge the defendant with responsibility for harm from circumstances the defendant –had he acted reasonably –would have taken into account, but not for other circumstances.

⁵¹ *In re Polemis & Furness Withy & Co.*, 3 K. B. 560 (C.A.1921) (It was negligent “to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship.”).

beneath the wheels of the train).⁵² It all depends on circumstances beyond the employees control and we need to know which circumstances are relevant to the railroad's responsibility.

Or a ship, through negligence, may spill bunkering oil into the harbor, causing environmental damage and (if a dry dock company lets sparks fall on debris near the dry dock) causing damage to the dry dock itself and to the ship under repair in the dry dock.⁵³ One act, three harms, connected by the circumstance. Finally, a banana peel thoughtlessly tossed on the sidewalk will cause one type of harm if someone slips on it (the circumstance of not seeing the banana peel and not being able to adjust to its effect), still another type of harm if someone wrenches one's back while trying to pick it up (the circumstance of the victim's back), and still a third type of harm if a person injured by the banana peel is then injured again by a negligent doctor.⁵⁴ For which of these circumstances is the defendant responsible?

Under the theory developed here, the proximate cause cases force courts to confront the cognitive limitations of the reasonable person by determining whether a reasonable person would have contemplated the circumstances that connected the defendant's act to the victim. We can understand this task by understanding the nature of the inquiry that underlies the proximate cause determination.

The court must ask whether the circumstances that connected the defendant's act to the victim's harm were ones that a reasonable person should have had in contemplation when deciding how to act?⁵⁵ Where a reasonable person, investing reasonably in getting relevant information, would have understood the circumstances that connect that person's act to the victim's harm, then the victim has established the requisite connection between the defendant's act and the victim's harm – a connection that demonstrates that the defendant failed to take into account the wellbeing of the victim in an appropriate way. An actor who digs a hole in the sidewalk must think about a plethora of circumstances when thinking about reasonably protecting others from the risk – the pedestrians who

⁵² *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y.1928).

⁵³ *Overseas Tankship (U.K.) Ltd. v. Mort's Dock & Engineering Co. (Wagon Mound I)*, [1961] A.C. 388 (P.C.) (appeal taken from Austl.) (damage to the dry dock) and *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound II)*, [1967] 1 A.C. 617 (P.C.) (appeal taken from Austl.) (damage to the ship being repaired in the dry dock).

⁵⁴ This example is from DOBBS, TORT LAW, *supra* note 6 at 451. As the *Draft Restatement Third* says: "Tortious conduct may be wrongful because of a variety of risks to a number of different classes of persons. Thus, driving a vehicle negligently poses risks to persons and property who might foreseeably be harmed in a number of ways—by collision with another vehicle or pedestrian, by the vehicle leaving the road, by the consequences of a narrowly averted collision, by the confusion and distraction of an accident scene, or by other consequences. Some of those risks may be more prominent than others, but all are relevant in determining whether the harm is within the scope of liability of the actor's tortious conduct." DRAFT RESTATEMENT THIRD, *supra* note 13, sec. 29, following illustration 5, at 582.

⁵⁵ Jane Stapleton has something like this in mind when she determines whether particular consequences for the breach should be within the scope of the liability for the breach. In the context of a duty to warn, for example, she asks whether a reasonable person would have warned of the risk of the event that occurred to determine whether the event is one of the consequences that would make the failure to warn a source of responsibility. See Stapleton, *Occam's Razor*, *supra*, note 20 at 446

might come by (number and capability), the conditions surrounding the hole (well lit versus dark), the terrain, and the effectiveness of various ways of protecting others from the danger presented by the hole. But must the actor also think that the person falling into the hole will be carrying an explosive that is ignited by the fall and injures a victim twenty feet away. If so, then that risk is included in the risks for which the actor must take reasonable precautions.

On the other hand, if the circumstances that connected the defendant's act to the victim's harm are ones that a reasonable person need not have contemplated, then the connection between the defendant's act and the victim's harm is broken because the victim cannot demonstrate that the defendant failed to think appropriately about how his acts might harm the victim. Where a reasonable person, investing reasonably in getting information, could not have understood the way in which circumstances not in her control would lead to harm, the defendant is not acting unreasonably if the defendant fails in that understanding.

The analysis boils down to a single question – namely, are the circumstances that led to harm those that a reasonable person who is thinking in an appropriate way about the interests of others would take into account when making a decision?

III. The Theory of Responsibility Illustrated

In this section, I illustrate that courts have intuitively applied this test in a way that implements the theory of responsibility articulated here.

A. Circumstances and Information

In order to assess the circumstances that a reasonable person ought to be considering when deciding how careful to be, we need to consider what information base the reasonable person is charged with considering and the relationship between that information and the risks for which the defendant is responsible. This is illustrated if we consider the speeding trolley case and the thin skull case.

On the surface, the speeding trolley case and the thin skull case look to be inconsistent outcomes. In both cases, a preexisting condition combines with defendant's negligence to produce harm, but in the speeding trolley case the defendant is not responsible for the harm and in the thin skull cases the defendant is responsible. These different results, however, are easily understood in terms of the relationship between the risk the actor took and the circumstances that connected the risk to the victim's harm.

When a trolley driver is deciding how fast to go, the trolley driver knows that somewhere along the track a tree might fall, so the risk of a tree falling is a foreseeable event. But the driver cannot know (without more information) which tree might fall or what circumstances might cause the tree to fall; that knowledge is simply beyond the cognitive ability of the driver. The driver must decide how fast to go knowing that a tree

might fall, and therefore knowing that he must be able to stop within a reasonable time if a tree is on the track. But, when deciding how fast to go, the driver need not take into account where the tree might fall, for that is simply beyond what the driver can reasonably know. If a tree does fall on the speeding trolley, neither the driver nor the trolley company is responsible for the harm.⁵⁶

Without more knowledge of a particularized sort, the knowledge of that a tree might fall is not relevant to the decision of how fast to drive. No risk created by a speeding trolley is going to be affected by the knowledge that a tree *might* fall for the possibility that a might fall does not increase the risks that are associated with driving a trolley at an excessive speed.⁵⁷ Moreover, we do not require the trolley driver to invest in information about something over which he has little control and that has only a small possibility of occurring.⁵⁸ The possibility that a tree might fall is not the kind of circumstance that are reasonable person would take into account when deciding how fast to go.

The analysis changes, of course, as the driver's information base changes. If the driver had been told that a tree was going to fall on the track within the next ten minutes, that information would have changed the way we would expect the driver to think about the situation. Then, a reasonable driver would have driven extremely slowly, always on the lookout for that falling tree. Or, the driver might have delayed his departure, knowing that after the tree fell the risks could be more easily assessed. Or, if the driver had been told that a particular tree was in danger of falling, we would expect the driver to alter his

⁵⁶ *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 A. 240 (1899). This type of case is given its own section in the draft restatement. See THIRD RESTATEMENT, PROPOSED FINAL DRAFT, *supra* note 13, § 30. (An actor is not liable for physical harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm). See also, *Texas and Pacific Ry. v. McCleery*, 418 S.2d 494 (Tex. 1967) (railroad whose train was speeding is not responsible for harm to passenger in a car that ran into the train when the driver of the car would not have observed or averted the train even if the train had been going a reasonable speed), *Mahone v. Birmingham Electric Co.*, 73 So. 2d 378 (Ala. 1954) (bus company that let the passenger out on the street rather than at the bus stop is not responsible when passenger slipped on a banana peel, which could have happened even if the passenger has been let out at the bus stop).

⁵⁷ As the *Draft Restatement Third* explains, "greater care would not reduce the frequency of such accidents" (that is accidents in which a tree falls on a trolley only because the trolley was speeding). DRAFT RESTATEMENT THIRD, *supra* note 13 at 633. The *Draft Restatement Third* further suggests that this result is because "the wrongful aspect of the actor's conduct is merely serendipitous or coincidental in causing the harm." *Id.* This approach, however, requires "careful attention to and description of the risks created by the actor's tortious conduct." *Id.* at 635. The theory I provide is consistent with this treatment but seems to me to be superior to it. The theory I present focuses not on the risks alone but on the relationship between the risks and the circumstances that contribute to the harm, and thus does not direct the decision-maker to focus on risks apart from their consequences. Moreover, my formulation avoids the potentially dangerous notion that merely serendipitous injury is exempt from responsibility in negligence. If the defendant behaves unreasonably, the fact that the defendant is unlucky should not be a defense when the conduct is appropriately linked to the harm. Finally, my rendition unifies this instance of proximate cause (or scope of liability) with the other cases of proximate cause.

⁵⁷ See, e.g., DRAFT RESTATEMENT THIRD, *supra* note 13, § 31

⁵⁸ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW*, 243 (1987) (showing how the low probability of something happening can reduce defendants responsibility with respect to that circumstance).

decision-making process (and his behavior) in a different way. His decision about how fast to go would be unaffected if he were not in the area of the tree, but would be affected if he were.

But without that specialized information, the decision is simply not faulty with respect to that risk.⁵⁹

The thin-skull case is consistent with this outcome because the circumstances that gave rise to the harm are different. Under the thin-skull rule, a defendant takes the victim as is and is therefore responsible for all harm caused by the breach of a standard of care, even if the amount or nature of the harm is unexpected or unexpectedly great.⁶⁰ In the prototypical case, the defendant's unreasonable driving causes a minor accident but, because of the victim's pre-existing condition, the harm turns out to be greater than would be expected from that kind of accident. This case looks like that of the speeding trolley because the victim's harm was influenced by circumstances that were beyond the control and prevision of the defendant. Yet cases uniformly hold that the driver is responsible for the unforeseeable circumstances that led to the harm.⁶¹

The reason is that the victim's preexisting condition is highly relevant to an actor's decision about how carefully to drive. It is one of the circumstances the law wants the defendant to guard against when the defendant decides how careful to be because the preexisting condition is one of the attributes of the potential victim's interests that a reasonable person should consider when deciding how to act.⁶²

⁵⁹ See also, *Ventricelli v. Kinney System Rent A Car, Inc.*, 383 N.E. 2d 1149 (N.Y. 1978) (defendant who negligently causes the victim to park his car is not responsible for harm inflicted at the parking space by negligent driver; evidently the defendant is not required to take into account the possibility of the negligent driver because defendant did not increase the risk of that event occurring) and *Central of Georgia Ry. v. Price*, 32 S.E. 77 (Ga. 1898) (defendant who negligently let the victim miss her stop is not responsible when a lamp exploded in the hotel that defendant has gotten for the victim). But see *Betancourt v. Manhattan Ford Lincoln Mercury, Inc.*, 607 N.Y. 2d 924 (App. Div. 1994) (defendant whose negligent repair placed victim in side of interstate highway is responsible for injury inflicted by another driver).

⁶⁰ See, e.g., DRAFT RESTATEMENT THIRD, *supra* note 13, § 31 ("When an actor's tortious conduct causes harm to a person that, because of the person's preexisting physical or mental condition or other characteristic, is of a greater magnitude or different type than might be expected, the actor is nevertheless subject to liability for all such harm to the person"). As this provision makes clear, although the rule is sometime articulated to apply only if the amount of harm is greater than expected, the rule can also extend if the type of harm is different than expected. For example, when the defendant negligently runs into the back of plaintiff's car in a way that would normally result in bruises and whiplash, the defendant is also responsible for the damages from the victim's heart attack if the breach caused the heart attack. *Benn v. Thomas*, 512 N.W. 2d 537 (1994). Mark Grady's effort to bring the "type of harm" cases into the "extent of harm" cases (see Grady, *Proximate Cause and Negligence*, *supra* note 30 at 447-448) is therefore unnecessary. As long as the type of harm is one of the circumstances that an actor should take into account when deciding how careful to be, the normative theory I advance makes the actor responsible if that circumstance does come about.

⁶¹ The cases are collected in the DRAFT RESTATEMENT THIRD, *supra* note 13 at 644 – 645 (§ 31, Reporter's Note).

⁶² This is, of course, supported by the traditional economic analysis of the thin skull rule; it recognizes that if thin skull plaintiffs are not allowed to recover damages, the actor would underestimate the expected injury costs because the average of all damage awards would be below the actual average harm from that

The thin-skull rule reflects the intuition that reasonable actors know that some portion of the population is peculiarly susceptible to injury (even if they cannot tell which potential victim will have a preexisting condition). Such potential victims do increase the risk of not taking adequate precautions and the expected harm to them is relevant to how carefully actor should drive. We therefore want actors to take into account the interests of those people, just as we allow actors to take into account the effect on those who are especially strong and therefore immune from injury. The expected harm that reasonable people must guard against includes the expected harm to both the particularly weak and the particularly strong. Including that harm as part of the damages that a negligent defendant must pay is a way of signaling that the law wants actors to be aware of that possibility and to include that possibility in their risk analysis when they decide how to behave. When an actor is negligent and injures a thin-skull plaintiff, the actor *a fortiori* has not thought appropriately about the interests of others because the actor, although knowing that some people are peculiarly susceptible to injury, has not thought about their interests in an appropriate way.

The speeding trolley case and the thin-skull case fit comfortably within the theory of responsibility articulated here because the information base on which the reasonable person relies is different in the two cases. In the thin-skull case, the decision of how fast to drive a car (for example) influences whether an accident will occur, and we want the driver to consider the possibility that some percentage of the people that might be hit will have thin-skulls. As a result, even though a driver cannot determine ahead of time which other people on the road have thin-skulls (just as the trolley driver cannot determine which tree will fall), the auto driver in the thin shell skull case is required to act on the knowledge that some percentage of the people the actor hits will be peculiarly susceptible to injury. By contrast, the trolley driver need not consider where a tree might fall when deciding how fast to go because that unlikely event is not subject to reasonable human cognition.⁶³

B. Risk and Circumstances

type of accident. William Landes and Richard A. Posner, *Causation in the Law of Torts: An Economic Approach*, 12 J. OF LEG. STUD. 109 (1983).

⁶³ To further show the similarity between the cases, when the trolley driver is thinking about how fast to go the driver must think about the possibility that his speed will cause the trolley to jump the track and hit a tree. In making that decision, the trolley driver must know that some percentage of trees will be unusually weak and therefore do unusual damage. And the trolley driver, in determining his speed, must know that a tree might fall on the tracks and that he must determine his speed to reasonably take that possibility into account. Moreover, with respect to the risk that a tree will fall on the driver, the trolley driver is in the same position as an automobile driver who is unreasonably speeding and hits a boy who darts between two parked cars when even a non-speeding driver could not have avoided hitting the boy. The connection between the defendant's risky decision and the harm is insufficient in negligence because even a reasonable person would not have changed her conduct in light of that possibility.

Once we focus our attention on the kinds of considerations that we want a reasonable person to incorporate in her decisions, we see that seemingly disparate outcomes in fact reflect a single analytical framework.

From these examples we can see that a reasonable person will take into account circumstances that are related to the risks for which the reasonable person is responsible, but not circumstances that are unrelated to that risk. To illustrate how courts assign responsibility by examining the circumstances that connected the defendant's risk to the victim's harm, consider some illustrative cases. When a company has its employees work near oncoming traffic but omits protective barriers, the defendant is responsible when a car hits a worker even though the driver of the car had a seizure that sent his car into the victim.⁶⁴ The risk to which the defendant exposed its employees was the risk of injury from errant drivers of whatever kind; the defendant should have known that the injury could occur because of drunk, inattentive, or even non-negligent drivers.⁶⁵ Although the precise reason a car went into the unprotected area might be unexpected, a car going into the unprotected area was the kind of circumstance that adversely affected the victim's interests and that the defendant should have considered.⁶⁶

⁶⁴ *Derdiarian v. Felix Contracting*, 51 N.Y. 2d 308 (1980). *See also*, *Tise v. Yates Construction Co., Inc.*, 345 N.C. 456, 480 S.E. 2d 677 (1997).

⁶⁵ *See also* *Tetro v. Town of Stratford*, 189 Conn. 601 (1983) (police department that violated departmental guidelines for high speed chases is responsible for harm that speeding motorist caused to the victim; collisions with victim were the kind of circumstance the guidelines were trying to avoid), *Parvi V. City of Kingston*, 41 N.Y. 2d 553, 362 N.E. 2d 960, 394 N.Y.S. 2d 161 (1977) (police taking charge of drunken pedestrian were responsible when he got free and was struck after entering the highway; the duty to reasonably protect the pedestrian once they took charge included just such an occurrence), *McClure v. Allied Stores of Texas, Inc.*, 608 S. W. 2d 901 (Tex. 1980) (security guard is responsible for harm caused when shoplifter he was negligently chasing ran into the plaintiff), and *McKenna v. Volkswagenwerk Aktiengesellschaft*, 57 Haw. 460, 558 P. 2. 1018 (1977) (road designers must consider possibility that drivers will be negligent and therefore are responsible for unreasonable road design even though accident was caused by driver's negligence).

⁶⁶ *See also*, *Johnson v. Komos Portland Cement Co.*, 64 F 2d 193 (6th Cir. 1933) (one who negligently allows explosive gas to gather is responsible when lightening ignites it. The danger posed by the explosive gas is of explosion from any ignition and the low probability of lightening does not make lightening a circumstance the defendant can ignore); *Ferroggiaro v. Bowline*, 315 P 2d 446 (Cal Dist. Ct. App. 1957) (defendant who negligently knocked down a power pole, so that the traffic lights went out, is also responsible for crash between two cars that occurred at the intersection; one of the risks a reasonable person should have considered when deciding how careful to be was the possibility that knocking out the traffic lights would result in an accident); *Hairston v. Alexander Tank and Equipment Co.*, 311 S.E. 2d 559 (N.C. 1984) (car dealer that negligently installed a wheel is responsible when another driver struck the disabled victim; the possibility of a breakdown and risks from being stranded on the side of the road were circumstances that defendant should have contemplated when he decided how careful to be), *In re Guardian Casualty, Co.*, 16 N.E. 2d 397 (N.Y. 1938) (mem), *aff'g* 2 N.Y.S 2 232 (App. Div. 1938) (defendant who negligently caused accident is responsible when stones dislodged from a building in the accident hit the plaintiff, even though the stones fell some time after the accident; this is the kind of circumstance that defendant should have contemplated when he decided how carefully to drive), *Bigbee v. Pacific Telephone and Telegraph Co.*, 665 P 2d 947 (Cal. 1983) (telephone company that located its booth too near a busy street and failed to keep door working is responsible when a drunk driver hits a person in the phone booth who could not get out because of the defective door). Sometimes, the circumstances are ones that a reasonable person need not take into account. *Harpster v. Hetherington*, 512 N. W. 2d 585 (Minn. 1994) (defendant who negligently failed to repair a backyard gate is not responsible when the dog gets out and the person caring for the dog falls on a neighbor's porch; the fall is not one of the risks that a reasonable person would contemplate when deciding the level of care to exercise over the broken gate). This approach allows us to reconcile seemingly inconsistent cases. A bus company that lets a passenger off at an inappropriate place is responsible when the passenger is hit by a car (one of the risks that should have been taken into account in determining where to let the passenger off), *see O'Malley v. Laurel Line Bus Co.*, 166

On the other hand, the defendant's failure to take measures to prevent a victim from accidentally falling into an unguarded hole generally does not make the defendant responsible if the victim is intentionally pushed into the hole by a mugger.⁶⁷ The risk of an unguarded hole is the risk of accidental, not intentional, injury. The defendant who digs a hole generally has insufficient knowledge and control over the risk of mugging to have to take that circumstance into account when considering what kind of barriers to put around the hole. Moreover, the defendant is generally not required to erect a barrier that would prevent a mugger from pushing the victim into the hole because the mugger could injure the victim just as much if the hole were reasonably guarded (or even if there had been no hole). Accordingly, the risk of mugging is not one of the circumstances that a person digging a hole must take into account when deciding how to protect against that risk.⁶⁸

The same line of analysis helps us unpack the difficult proximate cause questions in illustration 6 of the *Draft Restatement Third*, which I used above to explain the inadequacies of the risk test.⁶⁹ When one is deciding how carefully to drive, a reasonable person would contemplate that another driver might be forced off the road, which would attract bystanders who would themselves be at risk. The range of potential bystander harms that the reasonable person should contemplate would depend on conditions along the highway. If the conditions were such that a reasonable person would not expect a bystander to be in danger, then any injury to the bystander would not be proximate to the choices made or the risks imposed by the defendant. The defendant would not have to have those risks in contemplation when deciding how carefully to drive and would not be responsible if those risks ripened into harm.⁷⁰

A. 868 (Pa. 1933), but not when the victim slips on a banana peel (not one of the risks that should be taken into account. *Mahone v. Birmingham Electric Co.*, 73 So. 2d 378 (Ala. 1954).

⁶⁷ See, e.g., *Loftus v. Dehail*, 133 Cal. 214, 65 P. 379 (1901); *Miller v. Bahmmuller*, 124 App. Div. 558, 108 N.Y.S. 924 (1908); and *Restatement Second*, § 442B, illus 7.

⁶⁸ These cases have a strong element of dividing responsibility between negligent and intentional actors, putting responsibility (and liability) on the intentional actors. With the rise of obligations to protect victims against harms inflicted by intentional actors – that is, with an increasing scope of the duty to protect others from intentional harm -- these cases could very well be decided differently. There may be circumstances in which we could say that an actor who creates a risk by leaving an open excavation is not unlike the landlord who leaves a defectively maintained lock on the door. Certainly, where the defendant knows of the risk of intentional wrong-doing, a court may well include harm from that circumstance within the risk for which the defendant is responsible if reasonable precautions would have prevented the mugging from occurring or from doing as much damage. Mugging might have become a frequent occurrence but muggers might have few opportunities to ply their trade except for the defendant's excavation. One can then imagine a jury determining that indeed the defendant *was* responsible for thinking about the possibility of mugging when determining how to protect others from harms caused by the hole. It might, under that hypothetical, be unreasonable to ignore those circumstances.

⁶⁹ See *supra*, text at notes 24 to 28.

⁷⁰ Admittedly, given the bizarre nature of the circumstances that sometimes connect the defendant's negligence to the harm, it is not always easy to determine whether a reasonable person would have had those circumstances in contemplation. In *Bunting v. Hogsett*, 21 A. 31 (Pa. 1891), for example, the driver of a small train was negligent in failing to see a larger train coming at a railroad intersection. The initial impact between the two trains caused little damage but the driver of the small train put it into reverse (in a vain attempt to avoid any harm) and jumped off the train. After the initial accident, the small train, now

This analysis is based on a theory of responsibility that makes a defendant responsible only for injury that is connected to the defendant's failures as to a particular victim, not to the defendant's failures as to other potential victims. For example, in *McLaughlin v. Mine Safety Appliances*,⁷¹ the defendant negligently failed to warn users of a heat block that they should wrap the heat block before using it in rescuing a person taken from the water. Although the heat block did not contain a warning, in this case, the defendant had trained one of the fireman who would oversee use of the heat block, expecting that the fireman would convey the warning to the nurse who actually applied the heat block. Although the court held that the failure of the fireman to warn the nurse was a superseding, intervening cause, the case is better analyzed as one where the defendant was not responsible for the circumstance that led to this harm. The court concluded that the defendant "could not be expected to foresee that its demonstrations to the fireman would callously be disregarded by a member of the department." This is tantamount to saying that this method of warning users of the need to wrap the heat block was not unreasonable as to this victim, even though in the absence of the direct instruction the warning on the heat block would have been inadequate. As long as it is reasonable to rely on direct training of the fireman to avoid the risk, the fact that the defendant did not reasonably warn other users of the heat block is relevant only to other victim's, not to this one.

C. Victim Behavior

Harm is often the product of two sets of decisions – those of the defendant and those of the victim – and negligence law spends a good deal of time determining how the two sets of decisions should be viewed in order to assign responsibility to the defendant and victim. Accordingly, some proximate cause cases deal with situations in which the defendant's choices are influenced by the defendant's expectations about the victim's behavior; negligence law must determine whether the defendant's choices were informed by a reasonable appraisal of what to expect from the victim.⁷²

running backwards without an engineer, ran out of control until it reached a point where its tracks again crossed the main line, this time hitting the larger train and causing bodily injury. The defendant was held responsible for the harm in the second impact. This case fits the theory of fault espoused here because the circumstances, although bizarre, were ones that a reasonable person would have taken into account when thinking about how careful to be when approaching the first intersection. The dangers of the double intersection were known to the engineer. Although the precise way the accident occurred was difficult to foresee, all of the circumstances leading to the harm were ones that a reasonable train engineer would have taken into account when deciding how careful to be.

⁷¹ 11 N.Y. 2d (1962).

⁷² This is as much to say that every case of contributory or comparative negligence could also be termed a "proximate cause" case. To the extent that the victim is responsible for the harm under principles of comparative or contributory negligence, the defendant was not the "proximate cause" of the harm. By the same token, some "proximate cause" cases are really contributory negligence cases. See *infra*, text accompanying notes 111 to 112 (discussing *Wagon Mound I*). The label, of course, is not important; the normative basis for assigning or withholding defendant's responsibility is.

In general, a reasonable defendant is allowed to assume that the victim will reasonably self-protect and avoid additional harm.⁷³ The poster child is Judge Hand's opinion in *Sinram v. Pennsylvania R.R. Co.*⁷⁴ Defendant tugboat operator negligently collided with plaintiff's barge, causing visible damage.⁷⁵ Though the plaintiff barge owner was aware that the barge had been damaged, he nonetheless loaded the barge with cargo and left port — without sufficiently inspecting the barge.⁷⁶ The barge sank a short time later and the barge owner brought suit against the tugboat operator. Judge Hand refused to find the tugboat operator liable for the entire value of the barge. If the barge owner had reasonably addressed the risk of sinking, most of the damage would have been avoided and Judge Hand limited the damages to those that were risked by a collision, excluding those damages that were risked by the unreasonable conduct of the barge owner.⁷⁷ The defendant was permitted to assume that a barge owner would reasonably care for his barge by reasonably inspecting the barge for damage.⁷⁸ Accordingly, the

⁷³ This general principle is reflected in various settings. See e.g., *Peck v. Ford Motor Co.*, 603 F.2d 1240 (7th Cir., 1979) (because defendant negligently manufactured the truck transmission, a truck was forced to stop in the right lane of a highway. Plaintiff crashed into the truck and was injured. Defendant was not held liable to plaintiff because the driver of the truck did not reasonably warn of the danger by placing warning flags on the highway or calling police to direct traffic. In the terms used here, the defendant is permitted to assume that the driver of a vehicle disabled by its negligence will reasonably warn others, since the defendant has no particular knowledge that this particular person will exercise less than reasonable care.). Similarly, an actor is entitled to assume that one who has a duty to protect others from the actor's negligence will do so reasonably. Accordingly, one who negligently leaves blasting caps lying around is not responsible if an adult should, but did not, take them away from the children who found them. *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S.W. 2d 647 (1908). Although this result too can be understood as shifting responsibility to one who can avoid the injury at least cost (see Grady, *Proximate Cause and Negligence*, supra, note 30 at 418 -420), the result is equally understandable under the theory that focuses on the defendant's knowledge about the guardian's behavior. Because an actor is allowed to assume that others will act reasonably with respect to the risk that the actor has created, the actor is entitled to assume that guardians will reasonably look out for the welfare of the children. In essence, that means that when an actor is calculating the expected harm from leaving blasting caps lying around, the actor is entitled to assume that the risk will be minimized by the care taken by those who find them (or their surrogate). Similarly, an automobile manufacturer is obliged to design autos so that defects do not cause them to break down, but the manufacturer is entitled to assume that autos that have broken down will be removed from the highway within a reasonable period of time. When they are not, the actor with the duty to remove the auto, but not the manufacturer, is responsible in negligence. *Whitehead v. Republic Gear Co.*, 102 F. 2d 84 (9th Cir. 1939). Even a driver who negligently forces another car off the road is allowed to assume that the occupants of the other car will react reasonably. *Robinson v. Butler*, 226 Minn. 491, 33 N.W. 2d 821 (1948).

⁷⁴ *Sinram v. Pennsylvania R.R. Co.*, 61 F.2d 767 (2d Cir. 1932).

⁷⁵ Judge Hand wrote, “[i]t is clear that the bargee [the owner] thought his barge had been injured; he did not suggest that the collision was trifling.” *Id.* at 769.

⁷⁶ Regarding the behavior of the barge owner, Judge Hand wrote, “[i]t does not appear that he went below to learn what he could by looking inside, though the planks on the quarter, being started, should have showed, and the cracks in the bow went all the way through.” *Id.*

⁷⁷ *Id.* at 771.

⁷⁸ Judge Hand wrote, “[a]ll these were cases of neglect by a bargee; they all involve as a premise that a bargee's duties include such care of his boat.” *Id.* He cited the following cases for this principle: *The J. G. Rose*, 9 F.2d 917, (2d Cir. 1925); *Eclipse L. & T. Co. v. Cornell Steamboat Co.*, 242 F. 927 (2d Cir. 1917); *The Asbury Park*, 147 F. 194 (2d Cir. 1906); *The Kaiser Wilhelm Der Grosse*, 145 F. 623 (2d Cir. 1906); *The Mars*, 9 F.2d 183 (S.D. N.Y. 1914).

tugboat operator need not, when deciding how careful to be, consider that the plaintiff barge owner would not react reasonably to the accident.⁷⁹

As in the case of the speeding trolley and the thin skull case, the defendant had no way of knowing whether this barge owner was careful or careless. But that specific information was not relevant to the actor's decision. The law allocates decision-making authority to the actor who can avoid harm at least cost – that is, one who by acting reasonably can avoid imposing costs on himself or others. The law therefore allows the defendant to assume that the barge owner would act as we want a reasonable person to act in that situation.⁸⁰ Unless the actor has a reason to know that the victim will not self-protect or a duty to protect the victim from his own actions, the actor need not seek specific information about that circumstance that might lead to harm.⁸¹

On the other hand, the general principle is sometimes overridden. When an actor can reasonably predict that the victim will not act reasonably, the actor is not allowed to ignore the victims' responses. The defendant, for example, is not allowed to rely on the reasonable decisions of the victim when the defendant's negligence was in inducing the victim to act unreasonably. This occurred, for example, in *Weirum v. RKO General, Inc.*,⁸² where the negligent defendants sponsored a radio contest in which listeners were asked to race to be the first to find radio personalities in various locations. The defendant was not entitled to assume that listeners would undertake this activity reasonably because the contest was set up to encourage unreasonable behavior. The circumstances that contributed to the harm (the victim's negligent conduct) was fully within the defendant's control and provenance because the contest was set up to encourage the circumstance that would contribute to the harm (meaning that the circumstance only looked external). The defendant therefore could not ignore that circumstance when deciding how to conduct its

⁷⁹ Judge Hand made the cognitive basis of this decision explicit. The defendant “need not have considered the possibility that if he struck her [the plaintiff's barge] she might be injured, that her bargee might be so slack in his care of her as to let her be loaded without examination, and might so expose her to the danger of sinking.” *Id* at 771. Some have interpreted this result to be determined by the low foreseeability (probability) that the victim would be negligent. *See* Grady, *Proximate Cause Decoded*, *supra* note 30 at 296. This is a mistaken view. Regardless of the probability that the victim will be unreasonable, as long as there is no reason for the defendant to think that *this* victim would act unreasonably, the actor, when deciding how careful to be, is allowed to ignore that possibility. That is why contributory negligence cases are also proximate cause cases. *See e.g., United States v. Carroll Towing Co.*, 159 F. 2d 169 (2d Cir. 1947).

⁸⁰ This reading of *Sinram* allows us to distinguish it from *The City of Lincoln* case, 15 P.D. 15 (C.A. 1889), with which it is sometimes paired (*see, Grady, Proximate Cause Decoded, supra* note 30 at 297). There the defendant's ship negligently hit the plaintiff's ship in open water. Even though its navigation equipment was lost, the plaintiff continued onward. Then, heading for what it mistakenly thought was the Kentish Knock Lightship, the plaintiff's ship ran aground. The court held that neither plaintiff's decision to go forward without the navigation equipment or the mistake about location was negligent, and defendant was held to be responsible for the plaintiff's damage from running aground. The defendant is allowed to assume that the plaintiff would act reasonably, but must accept the possibility that a reasonably acting victim, trying to minimize the harm, will in fact incur additional harm.

⁸¹ *See also, Lamb v. Camden London Borough Council*, 1981 Q.B. 625 (C.A.) (defendant who negligently caused water main break is responsible for damage from the break but not for damage when squatters got in the house because the latter damage could have been avoided by boarding up the house).

⁸² 15 Cal. 3d 40, 539 P. 2d 36, 123 Cal. Rptr. 468 (1975).

contest, and the failure to reasonably understand that how its conduct affected other's conduct created the necessary connection between the defendant's conduct and the plaintiff's harm.⁸³ The defendant failed to reasonably process information about the victims' interests when it made its decision.⁸⁴

Similarly, we can understand Judge Cardozo's famous adage that "danger invites rescue"⁸⁵ by recognizing that he was summarizing the intuitive notion that people often take pains on behalf of others — not only is this not unreasonable conduct but, given the way the people get psychic pleasure from helping others, it may well be the expectation of what reasonable people will do. This being so, an actor whose conduct might put himself or another at risk ought also to consider the possibility that another person might take steps (even risky steps) to help, and therefore should include that possibility as one of the circumstance that must be taken into account when deciding how careful to be.⁸⁶

This analysis does not depend on the slippery concept of foreseeability. Many commentators had assumed that the rescue rule was inconsistent with a foreseeability test because an actor could never foresee whether a rescue attempt would be made,⁸⁷ but that

⁸³ The same analysis applies when the defendant negligently enables or encourages another to engage in conduct that hurts the victim under circumstances where a reasonable defendant would know that that conduct is likely to result. Professor Grady labels negligence that encourages free radicals. *See*, Dixon v. Bell, 105 Eng. Rep. 1023 (K.B. 1816) (entrusting gun to minor), Guille v. Swan, 19 Johns 381 (N.Y. 1822) (by ascending in a balloon defendant encouraged crowd to trample victim's crops), and Satcher v. James H. Drew Shows, Inc., 177 S. E. 2d 846 (Ga. Ct. App. 1970) (liability for failure to control mental patients who injured the victim on a bumper car ride). For Professor Grady, these results turn on the fact that the persons inflicting the damage would be unidentified or judgment proof. Under the analysis in this article, the issue is the fault of the defendant in failing to take into account the circumstances that a reasonable person would take into account when making decisions, not holding the defendant responsible for another's fault.

⁸⁴ Moreover, where the defendant's duty is to protect negligent victims from their own negligence, the defendant's responsibility is not cut off simply because the victim was negligent. *McKenna v. Volkswagenwerk Aktiengesellschaft*, 57 Haw. 460, 558 P. 2. 1018 (1977) (highway engineer must anticipate negligent drivers).

⁸⁵ *Wagner v. International Railway Co.*, 133 N.E. 437 (N.Y.1921). This concept too gets its own restatement section under the rubric of "rescue doctrine." *See* DRAFT RESTATEMENT THIRD, *supra* note 13, § 32 ("Notwithstanding §§ 29 or 34, if an actor's tortious conduct imperils another or the property of another, the scope of the actor's liability includes any physical harm to a person resulting from that person's efforts to aid or protect the imperiled person or property, so long as the harm arises from a risk that inheres in the effort to provide aid.").

⁸⁶ *See* also *Zwinge v. Hettinger*, 530 So. 2d 318 (Fla. Dist. Ct. App., 1988). There, the defendant drove under the influence of alcohol and crashed into a vehicle. Plaintiff came along and was in the process of pulling off the road to offer aid when a third-party crashed into plaintiff's vehicle, injuring plaintiff. The court held that the trial court should not have granted summary judgment for defendant. Though the court used the traditional doctrines of intervening cause and foreseeability, the court's rationale was driven by an intuitive focus on the cognition of risks. Defendant's negligent conduct risked not only a car accident, it also created the risk that passers-by would reasonably react to the car accident. Assuming that a rescue attempt is a reasonable reaction to witnessing a car accident and is reasonably done, injuries to the rescuer (plaintiff) should be one of the circumstances that a defendant should consider when deciding how careful to drive.

⁸⁷ *See, e.g.*, 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS, § 14.15, at 331 (2d ed. 1986) (rescuers are treated as if they were foreseeable, although to do so may sometimes involve some stretch of the imagination"), W. PAGE KEETON ET AL PROSSER AND KEETON ON TORTS § 43,

assumption begs the issue of what sort of foreseeability is relevant to the decisions made by the defendant. Although the defendant cannot see whether a rescuer would come, and certainly cannot know *who* might come as a rescuer, it is predictable, given what we know of human behavior, that someone might show up (because we know that “danger invites rescue”) and (as was true in the thin-skull case) that is a circumstance we want a defendant to take into account when deciding how careful to be. This being true, we incorporate that harm into the harm for which the defendant is responsible.

Moreover, the law as I interpret it is flexible enough to change course for those dangers that do not invite a rescue –that is, those dangers where the defendant should not have expected a third person to intervene because the situation made rescue unreasonable. In those instances, the defendant may ignore the possibility of rescue (a circumstance the defendant would then not have to take into account) without facing legal liability.⁸⁸

Finally, it is worth noting that the ideas discussed here are not limited to cases that are traditionally considered under the “proximate cause” category. The same rationale explains why a victim must take reasonable steps to mitigate the harm from the negligence. In *Williams v. Bright*,⁸⁹ for example, the defendant negligently injured plaintiff in a car accident. Experts for both parties agreed that surgery offered the plaintiff the prospect of a good recovery and an almost normal life.⁹⁰ Plaintiff, a devout Jehovah’s Witness, stated that she was obligated to refuse the recommended medical procedure because her religion prohibited the blood transfusions that would necessarily accompany the surgery. Consequently, the plaintiff “suffered a severely damaged left hip, as well as a painful injury to her right knee” which lead to her prognosis for a wheelchair-bound life.⁹¹ The court reversed a large jury award for the plaintiff, and remanded the case; although the jury could consider the fact that the plaintiff was a Jehovah’s Witness, “the overriding test is whether the plaintiff acted as a reasonably prudent person, under all circumstances confronting her.”⁹²

Although this line of cases is generally considered under the rubric of “avoidable circumstances” it is, in fact, structurally identical to the “proximate cause” cases. The defendant is allowed to assume that the victim will take reasonable steps to mitigate the harm, for that is what reasonable people do. This approach does not require anyone to believe that it is unreasonable not to seek to mitigate the harm, for that may well be

at 288 (5TH Ed. 1984) (declaring that claims that rescuers are foreseeable have an “artificial and fanciful character and that the rescue doctrine should be understood as an exception to requirement of foreseeability). Cardozo himself said: “The wrongdoer may not have foreseen the coming of the deliverer. He is accountable as if he had.” *Wagner v. International Railway*, 133 N.E. 437, 438.

⁸⁸ See, e.g., *Lambert v. Parrish*, 492 N.E. 2d 289 (Ind. 1986) (defendant not responsible to rescuer because rescuer acted unreasonably in light of dangers) *Kiamas v. Mon-Kota*, 639 P. 2d 1155 (Mont. 1982) (same), and *Westbrook v. Cobb*, 411 S.E. 2d 651 (N.C. Ct. App. 1992).

⁸⁹ 658 N.Y. S.2d 910 (App. Div. 1997). See also *Munn v. Algee*, 730 F. Supp. 21 (N. Miss. 1990) (defendant injured plaintiff’s wife in a car accident but defendant was not held liable for wife’s subsequent death because wife unreasonably refused a blood transfusion which would have prevented her death).

⁹⁰ *Id* at 912.

⁹¹ *Id*.

⁹² *Id* at 916.

dictated by religious beliefs (and therefore be reasonable under the belief system held by those people). The approach only requires us to determine whether the defendant is entitled to assume that victims will take steps to help themselves. Because the contrary assumption would require the defendant to invest in more care, and thereby subsidize the religious beliefs of others,⁹³ the defendant is allowed to ignore that possibility when deciding how to behave.

D. Other Subsequent Conduct

In other cases, it is not the victim's conduct, but the conduct of a third party, that combines with defendant's negligence to produce harm. The law must then determine what attitude the defendant should have had toward the third party in order to show that it has met the reasonableness standard.

A defendant who negligently discards live blasting caps is allowed to assume that parents of the child who finds them will recognize the danger and keep the blasting caps away from the children.⁹⁴ This follows from the notion that it is reasonable to assume that others will react reasonably with respect to a risk. When we say this, we are saying that when making choices about the disposition of the blasting cap the defendant must take into account the range of harm that could come from failing to dispose of them reasonably, but that the defendant is allowed to understand that the risk is minimized by the possibility that those who find the caps will make up for their deficiency. If that is true, then the expected harm from the choice is less because the defendant is not responsible for the subsequent failure of others to protect against the risk they created. The defendant is not responsible because its reliance on others was reasonable.

Similarly, an electric power company that negligently allows a live wire to fall to the sidewalk is not responsible when a police officer mishandles the wire and a bystander is injured.⁹⁵ And a railroad that negligently permitted its platform to become saturated with flammable oil was not responsible when someone, knowing of the danger, threw a match down on the platform, igniting it.⁹⁶ But prison guards are responsible when imprisoned boys escape and steal a yacht, crashing it into, and damaging, plaintiff's yacht.⁹⁷ The theft of the yacht is well within the contemplation of the guards when they decided how careful to be.⁹⁸

⁹³ Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 *CARD. L. REV.* 1693, 1730 (1995). See also *Williams v. Bright*, 658 N.Y.S. 2d 910 (App. Div. 1997).

⁹⁴ *Pittsburg Reduction Co., v. Horton*, 113 S.W. 647 (Ark 1908).

⁹⁵ *Seith v. Commonwealth Electric Co.*, 89 N.E. 425 (Ill. 1909). The court's opinion foreshadowed the theory in this article, for the court said that: "it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person or the sidewalk or on the roadway." *Id* at 429.

⁹⁶ *Stone v. Boston & Albany Ry.*, 51 N.E. 1 (Mass. 1899).

⁹⁷ *Home Office v. Dorset Yacht Co.*, [1970] 2 A.C. 1004 (appeal taken from England). See also, *Elgin, Aurora and Southern Traction Co. v. Wilson*, 75 N.E. 436 (Ill. 1905) (negligent railroad guard is responsible for allowing boys to turn the switch, diverting a train to a line where plaintiff was hurt in a crash).

⁹⁸ A case that is inconsistent with this analysis is *Cole v. German Savings & Loan Society*, 124 F. 113 (8th Cir. 1903) (a boy who was friendly with the elevator operator and hung around the lobby pretended to be

E. Multiple Consequences

The theory of responsibility presented here also unlocks a unified way of seeing another, particularly troubling line of cases – those in which one act creates risks of different consequences, depending on the circumstances. Like all proximate cause cases, each case in this line deals with a situation in which varied circumstances give rise to the harm, but in this line the variation in the circumstances means that more than one type of consequence is involved. A wooden plank placed over a hold may, through negligence, be knocked into the hold, threatening damage to a worker below, damage to the ship, or damage from benzene fumes that have gathered there (if the plank causes a spark that ignites the fumes).⁹⁹ One risk (a falling plank) has several harmful consequences; how should we know for which consequences the defendant is responsible? Or railroad employees, negligently handling a passenger who is getting on the train, may, by dislodging a package, cause damage to the package, damage to a person struck by the package, or damage from an explosion (if the package contains fireworks and falls beneath the wheels of the train).¹⁰⁰ One act results in several harmful consequences; for which of these consequences is the railroad responsible? Finally a ship, through negligence, may spill bunkering oil into the harbor, causing environmental damage and (if a dry dock company lets sparks fall on debris near the dry dock) causing damage to the dry dock itself and to the ship under repair.¹⁰¹ One act, three harms. For which harms is the defendant responsible?

Cases like these, which have given analysts fits under traditional proximate cause tests,¹⁰² are straightforwardly addressed when we think of the relationship between the risks the defendant took and the circumstances that contributed to the harm. In each of these cases, the various consequences of the defendant's decision occur with differing probabilities, depending on the circumstances. By focusing on how the defendant thought about, or should have thought about, those circumstances, we can determine whether the defendant was reasonably taking into account the interests of others. The analyst must determine what we can infer about the defendant's willingness to accept

the elevator operator and induced the victim to enter the elevator when it in fact was on a different floor. If the negligence of the defendant was in failing to exclude the boy from the lobby then the reason would have been to avoid this type of harm to this type of person. If the failure to control the boy's behavior was not negligent, it would have been because this danger was not readily comprehensible to the defendant).

⁹⁹ *In re Polemis & Furness Withy & Co.*, 3 K. B. 560 (C.A.1921) (It was negligent "to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship.").

¹⁰⁰ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y.1928).

¹⁰¹ *Overseas Tankship (U.K.) Ltd. V. Mort's Dock & Engineering Co. (Wagon Mound I)*, [1961] A.C. 388 (P.C.) (appeal taken from Austl.) (damage to the dry dock) and *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound II)*, [1967] 1 A.C. 617 (P.C.) (appeal taken from Austl.) (damage to the ship being repaired in the dry dock).

¹⁰² For example, under a foreseeability test, *Wagon Mound I* seems to overrule *Polemis*, since *Wagon Mound* seems to stand for the principle that an actor is not responsible for unforeseeable harms, while *Polemis* held the actor responsible despite the lack of foreseeability of the harm that occurred. Moreover, a foreseeability test founders on the face of it in *Wagon Mound* because it cannot explain why the fire was foreseeable in *Wagon Mound II* but not in *Wagon Mound I*.

unforeseeable circumstances from the fact that the defendant accepted the risk of circumstances that were more foreseeable. If the defendant acted unreasonably with respect to some of the circumstances –thereby showing a willingness to ignore the interests of others in one respect — what does that tell us about the defendant’s willingness to ignore the interests under different circumstances? If we can conclude from the unreasonable risks that the defendant *did* take that the defendant would have taken similar or greater risks with respect to circumstances that were less apparent, then we can easily say that unreasonable behavior as to one risk is evidence of the defendant’s failure to think appropriately of the interests of others with respect to other circumstances.

This is the theory of the lesser-included risks, and it requires that we consider the defendant’s knowledge base and cognitive ability. When a defendant unreasonably risks circumstance A and circumstance B results, can we say that the defendant’s failure to act reasonably with respect to the risk of A shows that the defendant would have been unreasonable with respect to the risk of B if the defendant had been aware of it? We must ask about the relationship between the risk of harm that *did* occur and the risk of harm that could have occurred, but did not, in order to ascertain what we can about the way the defendant considered the interests of others. When we do, the multiple consequence cases make perfect sense.

In *Polemis*, workmen loading a ship carelessly let a plank fall into the hold of the ship, which could have injured workmen or property in the hold or the ship itself. Instead, because the hold was filled with unforeseeable benzene vapors, the falling plank caused a spark that then caused an explosion and fire. Here the risk of harm that did occur (the risk of explosion and fire) is less than the risk of harm that could have occurred (had a workman been standing below). In such cases of lesser-included risk, it is easy to see that a defendant who risks bodily injury would also have risked fire on the ship had the possibility of fire been foreseeable.¹⁰³ Proof that the actor took an undue risk with respect to one circumstance leading to harm is also proof that the actor would have taken an undue risk with respect to a less foreseeable type of harm, for proof that the actor thought insufficiently about the interests of workers in the hold is good evidence that the defendant would have thought insufficiently about interests of those affected by the fire had it known of that possibility. Under these circumstances, the defendant is

¹⁰³ In other words, I understand *Polemis*, and other cases of lesser-included harm, to stand for the principle that an actor who risks a particular circumstance can be assumed to have also have risked circumstances that would lead to less harm. Professor Grady’s analysis of multiple risks is similar but differs from mine in one respect. Professor Grady argues that the reasonable level of precaution depends on the total expected harm, rather than the worst expected harm. That is, Professor Grady argues that in *Polemis* the proper level of care is a function of the expected harm to the workers, to the cargo, and to the ship, rather than the potential death of a worker. Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 Iowa L. Rev. 363, 381-85 (1984) (discussing cases that involve multiple risks). Given the facts of *Polemis*, because it was possible for all of those harms to occur from one plank falling, adding up the risks of the individual harms makes sense. However, there may be cases in which the risked harms are mutually exclusive –cases in which it is impossible for the falling plank to hurt both the ship and a person. In such instances, analysis that focuses on the total expected harm is mistaken. Rather, the analysis should focus on the harm that is greatest.

responsible for the harm that was not expected or foreseeable because we know that the defendant did not reasonably consider the circumstances that could lead to even greater harm.¹⁰⁴

In this type of case, the analyst must consider the relationship between the risk that was foreseeable and the risk that was not foreseeable. If an actor, facing the foreseeable risk, should have taken greater precautions than the actor did, and those precautions would have avoided the unforeseeable risk, then we can conclude (from the fact that the actor tolerated the foreseeable risk) that the actor did not use reasonable cognitive processes to think about the interests of others.¹⁰⁵

Although the outcome in *Palsgraf* is often thought to be inconsistent with this analysis, when one understands the different circumstances of *Palsgraf*, one can see why the railroad was not responsible for the harm to Mrs. Palsgraf. Mrs. Palsgraf was injured when railroad employees negligently helped some passengers onto the train and their package (which contained fireworks) fell and exploded. It is sometimes assumed that *Palsgraf* was wrongly decided because a railroad that imposes on society the risk of damage to a passenger from the falling package, or to the package itself, is *a fortiori*, willing to impose on society the risk of an explosion. If the railroad cannot even care enough to reasonably keep a package from dropping, the argument goes, how could it care enough to prevent the package from exploding? Is not the greater risk (explosion) included in the decision to take the lesser risk (of damage to a passenger from a falling package or to the package itself)?

To the contrary, in *Palsgraf* the railroad could not have known of the risk of explosion,¹⁰⁶ and we cannot infer, from the risk that the railroad took, what the railroad

¹⁰⁴ Similar analysis supports the decision in *Hughes v. Lord Advocate* [1963] 1 All E.R. 705 (H.L.). There, workmen in a manhole took a break; they left paraffin lamps behind as a warning to passers-by, but negligently failed to place a guard there. A boy was burned when, as he was exploring the manhole, one of the lamps fell into the manhole and exploded. Because the workmen were required to think about the possibility that boys would be attracted to the manhole and fall in, the precautions they would have taken to avoid the consequences that were understood (the guard) would have avoided the harm that actually occurred. See, Grady, *Proximate Cause and Negligence supra* note 25, at 445-446. Because the defendants could not make reasonable decisions with respect to the possibility that boys would fall into the manhole, we know that they could not make reasonable decisions with respect to lesser possibility that the boys would be burned. They are therefore responsible for the consequences.

¹⁰⁵ Similar analysis can be used when the issue is framed in terms of duty rather than in terms of proximate cause. In *Hynes v. New York Central Railroad Co.*, 131 N.E. 898 (N.Y. 1921) the defendant railroad allowed overhead wires to deteriorate and fall down, causing a boy who was diving from railroad property to be swept into the water and killed. Justice Cardozo rejected the argument that because the boy was trespassing on railroad property the railroad owned him no duty. To the contrary, because the same harm would have occurred if the wires had fallen on him while he was in the water, and because the railroad clearly breached its duty to make sure that the wires did not create that kind of risk, the railroad was responsible for the harm. Proof that the railroad was not thinking adequately about the boy's welfare had he been in the water was enough to allow the trespassing boy to recover. As Cardozo put it, the use of the defendant's property to dive into the water was not the abandonment of the boy's rights as a bather. *Id.* at 899.

¹⁰⁶ While they disagreed as to the outcome of the case, Chief Judge Cardozo, writing for the majority, and Judge Andrews, writing for the dissent, agreed that the railroad employee could not have known that the

would have done if they had known of the risk of explosion.¹⁰⁷ In *Palsgraf* the risk that the railroad did not foresee, the risk of an explosion, is not a lesser-included risk of the risk that they did take, because the risk of explosion is greater than the risk of an ordinary package falling.¹⁰⁸ We simply cannot infer, from how the railroad acted with respect to the circumstances that it reasonably could have thought about, how the railroad would have acted had they known what was in the package.¹⁰⁹ It is very possible that had the railroad known of the risk of explosion the railroad would have stayed away from the package altogether, or would have handled the passengers more carefully. If they had, and if the explosion occurred, the explosion would have been entirely the responsibility of the two men who brought the fireworks onto the platform.¹¹⁰

In other words, in *Palsgraf* we know, from the jury's verdict of negligence, that the defendant was not thinking appropriately about the interests of the passengers and their package. However, because the railroad could not have known of the risk of explosion, we have no basis for saying that the railroad was not using reasonable cognitive processes to think appropriately about the welfare of Mrs. Palsgraf. As to her,

package contained fireworks, and thus could not have been aware of the risk associated with handling the package. Concerning the contents of the package, Cardozo wrote, "[i]n fact it contained fireworks, but there was nothing in its appearance to give notice of its contents." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y.1928). Andrews wrote, "Of its contents the servant knew and could know nothing." *Id* at 101.

¹⁰⁷ This point is covered in some depth in Peter M. Gerhart, *Justificatory Analysis of Palsgraf* (manuscript available from the author).

¹⁰⁸ In *Polemis*, by contrast, the risk that they could foresee (the risk of death) was greater than the risk that they could not foresee (the fire from the benzene).

¹⁰⁹ Nor is this a case in which the railroad was required to assume that a certain percentage of packages brought on the platform contained dangerous material that could explode if dropped. There may be cases – similar to those in the thin-skull cases – where the defendant is required to assume that a certain percentage of passengers will have characteristics that must be specially taken into account when deciding how to act toward them. Under today's conditions, for example, the railway employees might be required to think that a passenger carrying a bag might be a terrorist carrying explosives, and that would trigger the obligation to treat all bags more carefully than would be required if we knew that all bags contained non-explosives. But at that time, a reasonable railroad employee was not likely to think of the extraordinary contents of the package when deciding how to help the passengers who were running for the train, especially because the act of running toward a moving train signaled to the employee that the contents of the package were not fragile.

¹¹⁰ Similarly, in *Doughty v. Turner Manufacturing Co.*, [1968] 1 Q.B. 518 (C.A. 1963) a worker negligently knocked a cover into a caldron of molten cyanide. The resulting splash—one of the risks of this negligence—did not injure anyone. However, a minute or two later an explosion occurred when the chemical combined with the asbestos cover. A person standing near the caldron was hurt by molten drops in the explosion, but was not allowed to recover. Apparently, the risk of an explosion was unforeseeable in the sense that even had the company thought about the possibility for some time they would not have understood that it could happen. Accordingly, the risk that their negligence did impose—the risk of the tarp falling—did not encompass the risk that actually occurred—the risk of an explosion. As Dean Grady has written, the precaution necessary to avoid the later risk were different from the precautions necessary to avoid the former risk. See Grady, *Proximate Cause and Negligence*, *supra* note 30 at 445-446. Under the analysis here, the circumstances for which the defendant was responsible – the possibility that a victim would be close enough to be hurt by a splash when the cover was knocked in – was less risky than the circumstance –the risk of explosion – which the defendant is not responsible for appreciating. Accordingly, proof of the negligence does not show negligence as to the greater risk.

there was no wrong in negligence at all because the circumstances that led to her injury were not within the railroads reasonable cognition.

Finally, the outcome of the two *Wagon Mound* cases makes perfect sense given the justificational analysis of proximate cause cases. The defendant negligently spilled bunkering oil into the Sidney harbor and, in addition to damaging the environment, the bunkering oil caught fire and burned a dry dock (whose owner was the plaintiff in *Wagon Mound I*) and a ship that was in the dry dock (whose owner was the plaintiff in *Wagon Mound II*). One must start with *Wagon Mound II*, which contains the major premise that guides the relevant analysis. Because the bunkering oil could be ignited only at a very high temperature, the risk that it would be ignited was relatively small; the oil would ignite only if it came in contact with a flame for some time. But the possibility that the bunkering oil would burn if the circumstances were right was absolutely foreseeable. Therefore, *Wagon Mound II*, which holds the fire to have been foreseeable, must be taken as the appropriate factual framework for understanding the case, and the suggestion in *Wagon Mound I* that the potential fire was unforeseeable can only be described as a label seeking to justify a conclusion reached on other grounds. Clearly, the possibility of fire was known (although highly unlikely) and is one of the consequences the defendant should have thought about when deciding how careful to be when handling the bunkering oil. The defendant knew what it was, and knew that under unlikely, but foreseeable, circumstances, it could burn.¹¹¹ The defendant is therefore responsible for that consequence.

How then are we to understand *Wagon Mound I*, which held that the defendant that spilled the oil was not responsible for the fire-damaged dry dock? Although the defendant knew of the risk of fire, the defendant was allowed to assume that the potential victims of the oil spill would act reasonably with respect to the spill. The defendant was therefore entitled to assume that the dry dock owner, knowing of the risk of fire, would exercise caution to make sure that the fire did not occur. The plaintiff in *Wagon Mound I*, of course, had not done that. It had gone on welding in the face of the spill, believing (mistakenly) that it could keep its sparks from igniting the oil.¹¹² Under these circumstances, the defendant has no obligation to the plaintiff because, under the cases we saw earlier, the defendant is entitled to assume that the victim (the owner of the dry dock) would act reasonably with respect to the risk.¹¹³

¹¹¹ Professor Hunter, a Professor of Chemical Engineering at the University of Sydney, testified that although it was unlikely that the bunkering oil would ignite when molten materials merely fell on it, he also testified that “with a burning object floating on the surface of the oil, ordinary furnace oil might well ignite.” Two witnesses corroborated Professor Hunter’s theory “with the observation that they had seen a small flame emanating from a smoldering piece of material atop some bark floating in the water shortly before the dock ignited.” See Saul Levmore, *The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf* in TORTS STORIES 137 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

¹¹² Apparently, the dry dock owner was correct, insofar as a mere spark could not have ignited the oil. Yet when the spark started a fire in some oily rags floating on the water, the bet that plaintiff made turned out to be wrong.

¹¹³ This reading, which makes *Wagon Mound I* a kind of contributory negligence case, shows the close relationship between the doctrines of contributory negligence and proximate cause. In every contributory negligence case it can be said that the defendant was not the proximate cause of the victim’s harm because the victim herself was the proximate cause of that harm. Both types of cases require a court to sort through

Of course, the owner of the ship that burned in the dry dock, the plaintiff in *Wagon Mound II*, stood on a different footing. That victim was innocent of the fire, perhaps not even knowing of its risk, and there is therefore no reason to say that the defendant should not have thought about the circumstances that would adversely affect that plaintiff's interests when it decided how carefully to handle the bunkering oil. When thinking of the interests of the owner of the dry dock, the defendant is allowed to assume that the dry dock owner will look out for his own interests, but when thinking of the interests of the owner of the ship in the dry dock, it does not make sense to allow the defendant to ignore the possibility that the dry dock owner would act foolishly. Although the plaintiff in *Wagon Mound II* (the owner of the ship in the dry dock), might well have sued both the company that spilled the oil and the company that dropped the spark on the rag that ignited the oil, the defendant should have thought harder about this circumstance and was wrong in negligence for not doing so.¹¹⁴

To put the matter in the context of the theory developed here, the defendant that spilled the bunkering oil was not using reasonable cognitive behavior when deciding how careful to be; it acted unreasonably with respect to both the possibility of environmental damage and the possibility that the bunkering oil would catch fire. It was not however, thinking unreasonably about the interests of the dry dock company, because the dry dock company had the power to avoid the harm by taking greater precautions. We cannot conclude from the unreasonable risks that the defendant did take that it thought inappropriately about the interests of the dry dock company, but we know that it thought inappropriately about the interests of the ship in the dry dock.

IV. Conclusion

Legal analysis took a wrong turn when it thought that proximate cause cases could be analyzed in terms of relative causal contributions. This article has sought to correct that mistake and to use the new understanding of proximate cause to reach a deeper understanding of the concept of responsibility that is inherent in the reasonable person standard.

The mistake was an understandable one. The proximate cause cases all involve situations in which the defendant's risk-taking is only one of the circumstances that contributed to the harm. When several circumstances contribute to the harm and the defendant is responsible for only some of them, it is natural to wonder whether the defendant's liability for unreasonable conduct ought to be cut off because of the relationship between the other causes and the harm. When the defendant's negligence and a stranger's unmarked package containing fireworks combine to cause harm, it is

the contributions of both plaintiff and defendant to the harm, which can best be done by considering whether the circumstance of the plaintiff's risky behavior is one of the circumstances that should have influenced the defendant's decision-making.

¹¹⁴ This example shows the importance of recognizing that risk is a relational concept. *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (1928). Although the objective risk of fire in *Wagon Mound* was the same for both plaintiffs, the two plaintiffs stood in different relationships to the risk because the owner of the dry dock had a superior ability to observe, and control, the risk.

natural to try to figure out which circumstance – that is which cause – was closest to the harm and to assign responsibility accordingly.

That attempt proved to be unworkable. For one thing, in all negligence cases a variety of circumstances combine to produce harm, which means that the basic inquiry into the defendant's reasonableness – that is, responsibility for circumstances – cannot be avoided in any negligence case (even if it is analytically hidden). A boy is electrocuted. Two circumstances contributed to that harm – the defendant's exposed trolley wire and the boy swinging an eight foot wire. Whether the trolley company is responsible for that harm – that is, is unreasonable for not taking measures to protect against it – is the issue of whether the trolley company (which is responsible for the exposed wire) is by that reason also responsible for anticipating the boy twirling the wire. Because a normative assessment of the relevance of circumstances is necessary to determine whether the defendant is negligent, it seems paradoxical to treat circumstances differently when the defendant's negligence combines with several circumstances to produce harm. If the reasonable person standard incorporates an assessment of the relevance of the defendant's responsibility for the circumstances that led to harm, then why would that not be true in every case where we are trying to determine legal responsibility?

Moreover, we have no analytics of causation that is related to the concept of personal responsibility. Causal concepts are normatively empty. Whether something is the "cause" of an "effect" depends on a normative theory that describes the nature of the relationship we are seeking to establish – that is, the nature of the relationship that matters for determining responsibility. I caused the victim a bloody nose if I hit him or if I encouraged my friend to hit him, but not if I stood by and watched strangers hit the victim. This is a normative determination, not a causal one. Even a common sense understanding that I did not cause the bloody nose if I stood by and watched strangers pummel the victim contains the normative conclusion that I had no responsibility to do otherwise. If I had such a responsibility then I caused the harm. We can, as Epstein has tried, build our normative evaluation into causal shells, but we cannot avoid the normative evaluation.

Tort law recognized this point by adopting a normatively weak concept of cause in fact. The test of necessity establishes the minimum requirement that is prerequisite for establishing responsibility under the theory of responsibility in negligence cases – that without which there will be no responsibility. It points to the minimum relationship that is necessary for responsibility. If my action or inaction was not necessary to the result, I did not cause it and have no responsibility for the effect.

The very weakness of this causal connection is revealing. Because it is weak, it is over-determinative – it assigns responsibility even in cases where responsibility makes no sense (like the speeding trolley case). That forced the law to find another way of reflecting the theory of responsibility in negligence and this induced the law to invent the concept of proximate cause as an additional filter on responsibility, which is what led to the proximate cause cases. But the resort to a theory of responsibility that was

understood to relieve a negligent defendant of liability proved to be unworkable, because it was hard find a theory that would explain the justice in that notion.

The mistake was the failure to recognize that even the weak “but for” test contains a normative theory of responsibility. The reason that necessity is a minimum requirement for legal responsibility is that without necessity the defendant cannot control the situation enough to avoid the harm. If the defendant’s choices were not necessary to the result –if sounding the horn would not have protected a deaf person – the defendant is powerless to do anything about the harm. To hold a person responsible for that harm would violate the fundamental notion that people ought not to be responsible for matters over which they have no effective control. When I do not sound my horn for a deaf person I have no responsibility because I am not responsible for the person’s deafness and cannot control it by blowing my horn. This is a normative notion about the extent of responsibility.

Because any causal concept has a normative basis, the law should have been looking for the normative justification for the results in proximate cause cases. It did not. Instead, it relied on legal reasoning to provide explanations (not justifications) for results, and those explanations hid the normative basis of the results. Responsibility depended on whether something was foreseeable or whether the result had a direct connection to the defendant’s conduct. But these words were normatively empty because the basis for the conclusion – that is, whether something was foreseeable or direct – was never revealed. The law substituted the empty words of “foreseeable” and “direct” for the empty word of cause. It is true that an actor is not responsible for harms or victims that are not foreseeable – or for effects that are not direct – but these conclusions are meaningless unless we know that the concepts of foreseeability and directness depend on a normative evaluation of the responsibility of the defendant for the circumstance that gave rise to the harm. That determination is contextual and the determination of whether a circumstance was foreseeable or direct is merely the conclusion that the defendant is also responsible for that circumstance.

In fact, the proximate cause cases reflect the important normative principle that a person ought not to be responsible for harms to another over which the person has no effective control. This bedrock principle reflects the autonomy of the individual that is inherent in Kantian conceptions and the notion that holding someone responsible for consequences over which a person has no effective control cannot address the consequences. The bedrock principle is why when lightening strikes another I am not responsible unless I was in a position to control the lightening. It is why I am not responsible for blowing my horn to warn a deaf driver. The proximate cause cases take this principle and extend it to situations in which the defendant’s negligence set in motion the chain of events that resulted in harm – and therefore caused the harm – but where the defendant did not have, or should not have, effective control over the circumstances that connected the negligence to the victim’s harm.

Analytically, we can operationalize this concept by asking whether the circumstances that combined with the defendant’s negligence to produce harm are the kind of circumstances that a reasonable person ought to have in contemplation when

deciding how careful to be. The reasonable person is one who is willing to take control over the circumstances that will combine with the person's conduct to produce harm, but the reasonable person also recognizes that some circumstances are, or ought to be, beyond the person's control. A reasonable person is allowed to assume that other people will act reasonably and therefore need not take control over them (unless there is a particular reason to take control or to know that the other person will not act reasonably). A reasonable person knows that some percentage of potential victims have preexisting conditions that will exacerbate harm and will take control over that situation by using that knowledge to increase precautions. A reasonable person deciding how to handle passengers getting on a train will not think about whether the package might contain fireworks and therefore need not take that circumstance into account when deciding how careful to be.