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The Grounds and Extent of Legal Responsibility, in Symposium, What Do Compensatory Damages Compensate?

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The Grounds and Extent of Legal Responsibility

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I. INTRODUCTION

The question that is the title of this symposium, What Do Compensatory Damages Compensate?, requires consideration of the basic grounds and purposes of legal responsibility. The question is usefully brought into sharper focus by the specific questions and puzzles posed to the contributors to stimulate thought and discussion, which include the following:

Consider the plaintiff whose leg the defendant tortiously broke—thus preventing him from getting on the plane that crashed. Consider the plaintiff whom defendant tortiously fails to warn of high voltage wires, resulting in plaintiff's electrocution while—and a second before—falling to his death. Consider the plaintiff whose loss of legs due to defendant's tortious conduct caused her to give up her career as a professional athlete—with the result that she is now much happier and has no regrets about losing her former career.¹

These are questions about the proper extent of legal responsibility. To properly answer these questions, we must first understand the grounds of legal responsibility: As has often been stated, the reasons for creating liability should also govern the extent of that liability. We therefore need to know how compensatory damages promote the basic purposes of the law in general and of the relevant specific areas of law in which compensatory damages are awarded. Backtracking further, we need to know what those purposes are.

In Part II, I focus on the grounds and purposes of legal responsibility. It is generally assumed that the sole or primary purpose of law is the implementation of justice. Thus, in Part II, I briefly describe the basic principles of substantive justice (distributive justice and interactive justice), identify interactive justice as the primary purpose of tort law,

1. Attachment to Letter from Larry A. Alexander, Heidi M. Hurd & Michael S. Moore to invited participants in the conference Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate? (Oct. 9, 2001) (on file with author).

contract law, criminal law, and other areas of law that regulate human interactions, and explain and justify compensatory damages as an aspect of the remedial component of interactive justice.²

In Parts III–V, I identify the three principal limitations on the extent of legal responsibility for tortiously caused harm and explain and justify them by reference to the interactive justice grounds of liability that are elaborated in Part II. I focus on tort law, and within tort law primarily on negligence law, due to knowledge and space limitations, respectively. The three principal limitations prevent liability for a tortiously caused harm when (1) the harm would have occurred anyway in the absence of any tortious conduct or condition (the “no-worse-off” limitation, discussed in Part III), (2) there was a superseding cause of the harm (the “superseding cause” limitation, discussed in Part IV), or (3) the harm did not occur as part of the realization and playing out of one of the foreseeable risks that made the person’s conduct tortious, before the hazards created by the realization of that risk had dissipated (the “risk payout” limitation, discussed in Part V).³ The courts often treat the first limitation as a defense to be alleged and proved by the defendant rather than as part of the plaintiff’s *prima facie* case.⁴ Some courts similarly treat the second limitation as a defense to be pled and proved by the defendant when the alleged superseding cause is an “act of God.”⁵ It would be reasonable to treat all the limitations on the extent of legal responsibility for tortiously caused harm as defenses that must be pled

2. The discussion in this Article focuses on legal responsibility for harmful interactions, which is the subject of interactive justice. Legal responsibilities under distributive justice are quite different. See Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 691–710 (1992) [hereinafter Wright, *Substantive Corrective Justice*]; Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1883–92 (2000) [hereinafter Wright, *The Principles of Justice*]; *infra* text accompanying notes 12–13.

3. I listed these three limitations, without elaboration, in a previous article. See Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1131–32 (2001).

4. See *infra* notes 32–33 and accompanying text. The same cause in fact and extent of responsibility doctrines apply when determining either the defendant’s or the plaintiff’s legal responsibility for the plaintiff’s injury. To avoid repetitive, awkward writing, I will discuss these doctrines only in the context of the defendant’s legal responsibility.

5. See DAN B. DOBBS, *THE LAW OF TORTS* § 191, at 474 nn.1 & 2 (2000) (discussing the “act of God” defense); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 626–27, 665 (2002) (setting forth Alabama and Ohio jury instructions that explicitly treat an “act of God” claim as a defense).

and proved by the defendant, with the plaintiff's prima facie case being complete upon proof that he suffered harm as a result of tortious conduct by the defendant.

I do not claim that these three limitations are absolute or that they are the only limitations on the extent of legal responsibility for tortiously caused harm.⁶ As will be discussed, some of these limitations may not apply or may apply less broadly to some intentional torts or some strict liability actions.⁷ I also note but will not discuss the limitations that exist on legal responsibility for certain types of losses, such as pure emotional distress, pure economic loss, and wrongful birth, which are more appropriately handled as categorical limitations on the scope of a person's duty.⁸ All I am claiming here is that the three stated limitations exist and are consistent with the interactive justice grounds of legal responsibility and the results in the cases.⁹

None of the three limitations match the usual academic prescription for limiting the extent of legal responsibility for tortiously caused harm, which would rely solely on a harm-matches-the-risk ("harm risked") limitation that is often confused with, but which differs significantly from, the risk playout limitation. However, the results reached by the courts are consistent with the three stated limitations rather than the harm-risked limitation, despite the longstanding efforts of the drafters of the *Restatements* to install the harm-risked limitation as the sole, comprehensive limitation on the extent of legal responsibility for tortiously caused harm.

6. See, e.g., *infra* note 84 (discussing the de minimis contribution limitation).

7. Similarly, some of these limitations may not be applicable or may be structured differently in criminal law or contract law. For example, the first limitation would rarely be applicable in criminal law given the different (nondiscrete, public) nature of the wrong in criminal law.

8. See DOBBS, *supra* note 5, § 182, at 450–51, § 195, at 486–89; Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 950–53 (2001).

9. The efficiency theory cannot explain the actual cause requirement or the various limitations on the extent of legal responsibility. See Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 445–48, 453–54 (1985) [hereinafter Wright, *Economic Analysis*]; Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 571–75 & n.112 (1987) [hereinafter Wright, *Efficiency Theory*]; *infra* note 309. Nor can it explain other fundamental aspects of tort law, such as the distinction between the intentional torts and the negligence action, the meaning of negligence, or the defense of consent. See Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145, 180–238 (2003) [hereinafter Wright, *Hand Formula*]; Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 143–47, 150–58, 185–89 (2002); Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425 (2002) [hereinafter Wright, *Negligence in the Courts*]; Richard W. Wright, *Principled Adjudication: Tort Law and Beyond*, 7 CANTERBURY L. REV. 265, 282–93 (1999) [hereinafter Wright, *Principled Adjudication*].

II. THE GROUNDS OF LEGAL RESPONSIBILITY

It is generally assumed that the basic purpose of law is or should be the implementation of justice: the creation and maintenance of those conditions that are properly specifiable by law for the flourishing and fulfillment of each person in the community as a free and equal rational being. This flourishing depends upon the promotion of each person's equal freedom, which has an internal aspect and an external aspect. The internal aspect, which law cannot and should not attempt to control, is a matter of personal virtue—one's shaping and living one's life by choosing and acting in accordance with the morally proper ends. The external aspect, which is the proper concern of justice and law, is one's practical exercise of one's freedom in the external world, which must be consistent with the equal external freedom of every other person.¹⁰ As Kant put it in his supreme principle of Right: "[S]o act *externally* that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."¹¹

The external exercise of freedom depends on sufficient access to instrumental goods and sufficient security against interferences by others with one's person and whatever instrumental goods one happens to possess. Distributive justice defines the scope of persons' positive freedom—their access to the instrumental goods needed to go about their lives. Interactive justice, which is usually misleadingly referred to as "corrective" or "rectificatory" justice,¹² defines the scope of persons' negative freedom—the security of their persons and of their existing stocks of resources in interactions with others. Together, distributive

10. See Wright, *The Principles of Justice*, *supra* note 2, at 1871–83.

11. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* *231 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) (emphasis added).

12. The usual terms, "corrective justice" or "rectificatory justice," erroneously imply (and have misled many into assuming) that this type of justice is only concerned with correcting or rectifying wrongs after they have occurred, and not with preventing them beforehand or with defining the nature of the wrong being corrected. Indeed, prominent scholars have erroneously assumed that this type of justice is not distinct from but rather is merely a corollary of distributive justice—that corrective justice merely corrects deviations from the entitlements mandated by distributive justice. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 297–309 (1986); JOHN RAWLS, *A THEORY OF JUSTICE* 10–11 (1971); Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 *YALE L.J.* 1441, 1450–53 (1990) (reviewing JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* (1988)). The term "interactive justice" most clearly indicates the distinct nature and focus of this division of substantive justice. See Wright, *The Principles of Justice*, *supra* note 2, at 1883–90.

justice and interactive justice seek to assure the attainment of the common good (the realization, to the extent practicable, of each person's humanity) by providing each person with her fair share of the social stock of instrumental goods (distributive justice) and by securing her person and her existing stock of instrumental goods from interactions with others that are inconsistent with her right to equal external freedom (interactive justice).¹³

Compensatory damages play an important role in interactive justice. They are the most common remedy in tort law and contract law. However, although this is sometimes forgotten by those who view tort law and contract law as merely setting prices for (allegedly efficient) nonconsensual interactions, they are not the only remedy available in these areas of the law. Courts provide equitable, nonmonetary relief much more often than is usually understood.¹⁴ For example, in tort law, a plaintiff may obtain repossession of property of which she has been wrongfully dispossessed, and, with sufficient advance notice of imminent or ongoing tortious injury, she may obtain an injunction to avert such injury.¹⁵

All of these remedies are part of the remedial component of interactive justice. They are all concerned with regulating and remedying unjust harmful interactions—harmful interactions that are inconsistent with others' equal external freedom. This is the purpose of tort law and contract law. It is also the purpose of criminal law.¹⁶ Tort law and contract law deal with "private wrongs," unjust discrete injuries to the persons or property of specific individuals. Criminal law deals with "public wrongs," unjust nondiscrete injuries to the dignity and security of each member of society that result from (or are constituted by) criminals' acting in disregard of the society's norms of public peace and order, thereby declaring themselves to be outside the law ("outlaws").¹⁷

An actual (or imminent) invasion of another's rights, by causing (or currently threatening) harm to the other's legally protected interests through an interaction that is inconsistent with the right to equal external freedom, is a prerequisite to liability under interactive justice. There is no liability in tort law, no matter how dangerous or heinous one's conduct may have been, unless that conduct not only was tortious—foreseeably inconsistent with others' right to equal external freedom—but also set

13. See Wright, *The Principles of Justice*, *supra* note 2, at 1883–87.

14. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE passim* (1991).

15. See DOBBS, *supra* note 5, § 56, at 112–13, § 67, at 153, § 377, at 1047 & n.5, § 468, at 1338–39.

16. Additionally, it is the purpose of the law of restitution and many other areas of the law. See Wright, *Substantive Corrective Justice*, *supra* note 2, at 708–10 & nn.380–81.

17. See Wright, *Principled Adjudication*, *supra* note 9, at 291–92.

back another's external freedom by causing a discrete, legally recognized injury to the other's person or property. The injury ordinarily must be some actual harm, but also includes certain types of dignitary injuries, such as intentional invasions of another's bodily or proprietary autonomy.¹⁸

Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries. When a person harms another through a deliberate disregard of the other's rights, then in addition to any nondignitary harm that was inflicted on the victim, the victim has also suffered a discrete dignitary injury, which can be rectified through the imposition of private retribution in the form of punitive damages in tort law. These punitive damages, being private retribution for a discrete private dignitary injury, are distinct and separate from any criminal punishment that may be imposed for any nondiscrete "public wrong" that was caused to each member of the community as a result of the same conduct. This is how punitive damages once were understood in the United States¹⁹ and seem to be coming to be understood (albeit not clearly or consistently) by the U.S. Supreme Court.²⁰ It is how they generally continue to be understood in common-law and civil-law jurisdictions outside the United States—for example, as "aggravated damages" in England, Australia, and New Zealand and as "satisfaction damages" in a number of countries in

18. See DOBBS, *supra* note 5, § 29, at 54–55, § 42, at 79–80, § 52, at 102–03, § 56, at 112–13, § 377, at 1047. Contract law treats any unexcused failure to perform one's legally binding promise to another as a legal wrong, for which nominal damages can be obtained in the absence of proof of any actual damage. See RESTATEMENT (SECOND) OF CONTRACTS § 346 & cmt. b (1981).

19. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 613–36 (2003); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 180–204 (2003). Unfortunately, in all but a few states in the United States, the "private wrong" conception of punitive damages in tort law has given way to a "public wrong" conception, which views such damages solely as a backstop to criminal law. Under the latter conception, the tort plaintiff acts merely as a "private attorney general" in redressing the wrong to the public as a whole (rather than any discrete wrong to himself) and should therefore turn over most of the punitive damage award to the state. This conception has resulted in an unprincipled law of punitive damages that is beset by a host of constitutional and theoretical problems. See Colby, *supra*, at 584–613, 637–78; Wright, *Principled Adjudication*, *supra* note 9, at 293.

20. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519, 1523 (2003) (requiring that the punitive award focus on the harm to the plaintiff rather than to others, while still viewing such awards as being based on public retribution and deterrence rather than on rectification of any injury to the plaintiff).

continental Europe.²¹

Although criminal law often imposes liability in the absence of any discrete harm to any individual, it assumes that the criminal's blameworthy disregard of the rules of social order produces or constitutes a breach of social order and security that is a nondiscrete harm to every member of the community. Criminal conduct that actually causes discrete harm to one or more individuals is generally punished more severely than unsuccessful attempts to cause harm, for good reason. Such discretely harmful criminal conduct creates a greater nondiscrete harm to the security, order, and peace of the members of society than an unsuccessful criminal attempt. The difference in harmful impact is dramatically illustrated by comparing the effects of the successful terrorist attacks on the twin towers of the World Trade Center or on various communities in Israel with similar unsuccessful attempts.

Since the nondiscrete harm to everyone in society results from or is constituted by the criminal's blameworthy disregard of the rules of social order, one of the usual basic elements of a crime is the mens rea requirement, which focuses on the state of mind of the criminal defendant. Criminal liability generally is not imposed if the defendant did not have the required culpable state of mind.²² This is not true in tort law (or contract law). Unlike the typical crime, the typical tort is a "wrong" not in the sense of a morally blameworthy deed, but rather in the sense of having harmed another's person or property as a result of conduct that failed to conform with some objectively specified standard of conduct that was established to promote everyone's equal external freedom.

It is necessary to use such objectively specified standards for assessing

21. See JOHN G. FLEMING, *THE LAW OF TORTS* 271–74 (9th ed. 1998); WALTER VAN GERVEN ET AL., *THE COMMON LAW OF EUROPE CASEBOOKS: TORT LAW* § 8.1, at 740–69 (2000). As these sources note, distinct "exemplary" damages are also awarded in Great Britain and the British Commonwealth in a few limited types of situations, but unlike in the United States, such exemplary damages focus on the wrong to the particular plaintiff. Much has been made of the German Supreme Court for Civil Matters's reference to deterrence considerations when it included a defendant publisher's unjust profits as part of the satisfaction damages required to vindicate a plaintiff's personality rights, but the court's deterrence discussion focused on adequate protection of the particular plaintiff's personality rights, rather than on general deterrence. See VAN GERVEN ET AL., *supra*, § 8.1, at 741, 761–64; Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 136 (2003). Shifting the unjust profits obtained by violation of the plaintiff's rights from the defendant to the plaintiff is an appropriate interactive justice remedy.

22. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 83–84 (1995). Criminalizing conduct that is not considered morally blameworthy undermines criminal law's ability to achieve its basic purpose of specifying and obtaining compliance with the basic rules of social order. See *id.* at 6–7, 201–03.

wrongful conduct in tort law, and other areas of law governing private wrongs, in order for people to be sufficiently secure in their persons and property. If the security of your person and property depended on the virtuous or vicious quality of the conduct of others with whom you interacted, such “security” would be ephemeral. It would be subject to the subjective knowledge and (dis)abilities of those with whom you (often involuntarily) interact. To have sufficient security, each individual’s person and property must be secured not merely against harm caused by the subjectively blameworthy conduct of others, but also against harm caused by objectively specifiable conduct by others that, if generally allowed to occur, would (contrary to the supreme principle of Right) foreseeably reduce, rather than enlarge, everyone’s equal external freedom. Such conduct that causes harm to others gives rise to moral and legal *responsibility* for that harm, whether or not the conduct was morally *blameworthy*.²³ Thus, when assessing legal responsibility for an individual’s harmful interactions with others, tort law, unlike criminal law, generally does not recognize excuses such as mental deficiency or mistake, but rather evaluates the individual’s conduct using the objective standard of the ideal reasonable or prudent person with normal physical and mental abilities.²⁴

In sum, all of the remedies in tort law, criminal law, and contract law are compensatory or rectificatory in nature, in the sense that they all seek to rectify harms to others’ persons or property that have occurred or are imminently about to occur as a result of interactions that are inconsistent with others’ right to equal external freedom. Compensation in this broad sense—rectification—is the basic and limiting remedy in interactive justice. While deterrence of harmful interactions is not ruled out and indeed is desirable (for example, through injunctions to stop specific imminent harmful interactions, if there is sufficient advance warning), such deterrence is always subsidiary to and limited by its consistency

23. See Wright, *The Principles of Justice*, *supra* note 2, at 1881–82. As Kant states, an action’s *legality* (justice or rightness) is judged by its external conformity with the objective requirements of the relevant moral duty, while its *morality* (virtuous or vicious character) is judged by the actor’s internal subjective capacity and efforts to ascertain and conform her conduct to those objective requirements. See KANT, *supra* note 11, at *214, 218–32, 312, 379–80, 381–83 & n.*, 389–94, 401, 404–05, 446–47, 463.

24. See RESTATEMENT (SECOND) OF TORTS § 283 & cmt. c (1965); Wright, *Negligence in the Courts*, *supra* note 9, at 466–82. However, consistent with the rights involved, a more subjective perspective is applied when evaluating the conduct of plaintiffs who put only themselves at risk and defendant land occupiers with respect to risks to trespassers on their land. *Id.* at 471–82.

with the remedies deemed appropriate as a matter of the just rectification of wrongs, based on an individual's legal responsibility for such wrongs.

III. THE FIRST LIMITATION ON THE EXTENT OF LEGAL RESPONSIBILITY: THE NO-WORSE-OFF LIMITATION

Interactive justice seeks to secure individuals against harms to their persons or property that result from unjust interactions—interactions that are inconsistent with persons' right to equal external freedom. In the absence of such harm, there is no interactive justice liability. Thus, defendants are not liable in tort law, no matter how risky or blameworthy their conduct is, unless and until their tortious conduct has caused discrete harm to another's person or property.²⁵ Moreover, they are not liable if that harm almost certainly would have occurred anyway in the absence of their or anyone else's tortious conduct. In those circumstances, the plaintiff's interactive justice claim, which is based on the plaintiff's external freedom having been impaired by the unjust conduct of others, fails since the plaintiff would have suffered the same harm anyway in the absence of any unjust conduct by others.

For example, in *Kingston v. Chicago & Northwestern Railway Co.*,²⁶ the defendant's negligently set fire and another fire of unknown origin, each of which was independently sufficient to destroy the plaintiff's property, merged together and destroyed the property.²⁷ The Supreme Court of Wisconsin stated that the defendant would not be liable for the destruction of the plaintiff's property if it proved that the other fire had a natural (and thus nontortious) origin:

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability, because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense

25. Similarly, a person is not criminally liable unless and until his conduct has become a sufficiently acted upon disregard of—and hence disruption of—the rules of social order and security, which constitutes a nondiscrete harm to everyone in society regardless of whether anyone suffers a discrete injury to her person or property.

26. 211 N.W. 913 (Wis. 1927).

27. *Id.* at 914. "Independently sufficient" does not mean that the condition is sufficient all by itself for the occurrence of the harm, in the absence of any other contributing conditions. Few if any conditions are sufficient in this strong sense for any result. Rather, a condition is independently sufficient if it is sufficient independently of the other competing conditions at issue (for example, the other fire) but in conjunction with the other causally relevant "background" factors (for example, oxygen and fuel to feed the fires). For a discussion of the different (weak, strong, and strict) senses of necessity and sufficiency, see Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1020–21 (1988).

of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin . . . is available as a defense the burden is on the defendant to show that, by reason of such union with a fire of such character, the fire set by him was not the proximate cause of the damage.²⁸

The other fire in *Kingston* was a (duplicative) actual cause of the destruction of the plaintiff's property. However, it need not have been an actual cause in order to prevent the defendant from being liable. It would still preclude the defendant's liability if it were a noncausal, preempted, nontortious condition that almost certainly would have caused the destruction of the plaintiff's property in the absence of the defendant's (or anyone else's) tortious conduct—for example, if it arrived immediately after the defendant's fire had already destroyed the plaintiff's property.²⁹

A defendant who tortiously caused the plaintiff's injury should not be able to avoid liability upon a mere possibility, or even a probability, that the injury would have happened anyway as a result of some nontortious condition. Rather, the defendant should be able to avoid liability only if the injury *almost certainly* would have happened anyway as a result of one or more nontortious conditions. The principle for concurrent conditions is the same as the one that has been stated for future conditions: "[W]e must take into account risks of future harm from other sources only if those risks 'are so far advanced and so nearly certain at the time of the accident that any attempt to ignore their functional identity with pre-existing conditions would seem dishonest.'"³⁰

Moreover, one must be careful to make sure that the nontortious condition actually was or would have been independently sufficient for the occurrence of the loss that the plaintiff suffered. For example, assume the defendant's negligently constructed dam burst during an ordinary storm and the resulting flood destroyed the plaintiff's house, but the house would have been destroyed anyway by a fire set by lightning that had almost reached the house but which the flood extinguished. The

28. *Kingston*, 211 N.W. at 915.

29. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1798 (1985).

30. DOBBS, *supra* note 5, § 177, at 434 (quoting David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1798 (1997)); see David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1136, 1142-43 (1999).

defendant's negligence was an actual cause of the destruction of the house, and the lightning fire was a preempted (would have been sufficient but not actually sufficient) condition. If the plaintiff had no insurance against such fires, the plaintiff would have suffered a noncompensable loss even in the absence of the defendant's negligence, and the defendant should avoid liability under the no-worse-off limitation on the extent of legal responsibility. However, if the plaintiff had insurance against such fire damage, the plaintiff would not have suffered the same loss. Although the plaintiff's house would have been destroyed by the lightning fire if the defendant dam owner had not been negligent, the plaintiff would have been compensated for his loss by the fire insurer. In this case, unlike the situation in which the plaintiff had no fire insurance, the defendant's negligence has made the plaintiff worse off, by depriving the plaintiff of the insurance compensation, and thus the interactive justice claim remains intact.

This type of situation existed in a famous old English case, the *Tithe Case*.³¹ The defendant removed corn, which had been set aside by a third party in the third party's field as tithe to the plaintiff parson, to the plaintiff's barn to prevent it from being eaten by trespassing cattle. The corn perished from unspecified but apparently nontortious causes. However, the owner of the trespassing cattle would have been liable for any damage the cattle caused to the corn. The court, while recognizing the defendant's good intentions, held him liable in trespass for the value of the corn, because he had made the plaintiff worse off by moving the corn from a situation where it was at risk of *compensable* loss to a situation where it was at risk of, and suffered, noncompensable loss.

Since this limitation relieves the defendant of liability for an injury that was caused by his tortious conduct and for which he therefore bears prima facie legal responsibility, the limitation should be treated as a defense, which the defendant has the burden of pleading and proving. This, indeed, is how this limitation seems to be applied by the courts. In both *Kingston* (discussed above) and *Piqua* (discussed immediately below), the courts, while discussing the issue as an issue of "proximate causation" by the defendant, explicitly described the limitation as a *defense* that the defendant had the burden of pleading and proving.³²

31. Y.B. Trin. 21 Hen. 7, fol. 27, pl. 5 (1506), *reprinted in* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 197-98 (1949).

32. *See supra* text accompanying note 28; *infra* text accompanying note 40. Similarly, in *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981), the court states:

[W]hen a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but the burden of proof in such cases is upon the defendant to prove the extent of the damages that the

Several states have jury instructions that relieve the defendant of liability if the plaintiff's harm was caused "solely" by an unforeseeable and unpreventable "act of God"; some of these instructions explicitly refer to this limitation as a defense.³³

All of the situations discussed so far have involved actively operating forces. Much more common are cases in which the defendant's causal contribution was passive in nature and combined with an "overwhelming" nontortious force of nature. In the latter type of case, the courts always hold that the defendant is not liable.³⁴ However, they often do not

preexisting condition would inevitably have caused.
Id. at 100 (citation omitted).

33. See Kelley & Wendt, *supra* note 5, at app. 626–27, 652, 661–62, 665. Kelley and Wendt's survey encompassed instructions on negligence, rather than on the extent of responsibility for tortiously caused harm. They nevertheless ran across act of God instructions (some of which, like *Piqua*, use "sole cause" language) intermixed with the basic negligence instructions in Alabama, Mississippi, North Carolina, and Ohio. The Alabama and Ohio instructions explicitly describe the act of God claim as a defense. *Id.* at 626–27, 665.

34. See, e.g., ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES § 9(2), at 90–95 (1961); LEON GREEN, RATIONALE OF PROXIMATE CAUSE 150–51 (1927); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265–66 & n.16 (W. Page Keeton ed., 5th ed. 1984); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 27 cmt. i & reporters note to cmt i (Tentative Draft No. 2, 2002) [hereinafter RESTATEMENT (THIRD), TENT. DRAFT NO. 2]. I am not aware of any case in which the defendant was held liable in this type of situation. In a previous article, I negligently relied on the representations of others that three such cases existed, without reading them myself. See Wright, *supra* note 29, at 1800 n.272. I have now read the three cases, and none of them are inconsistent with the no-worse-off limitation. In *O'Connor v. Chicago, Milwaukee & St. Paul Railway Co.*, 158 N.W. 343 (Wis. 1916), *aff'd*, 248 U.S. 536 (1918), the plaintiff was injured when an unsound tree that the defendant negligently left in place on the edge of its right-of-way was blown down onto the tracks during an extraordinary storm and subsequently derailed a train. There was no evidence that the tree would have been blown down even if it were sound, due to the extraordinary nature of the storm, but rather that due to its unsound condition it would have been blown down by an ordinary storm. *Id.* at 343–44. Moreover, the defendant was found negligent not only for allowing the unsound tree to remain in place, but also for failing to inspect the tracks for trees or other obstacles that might have been blown onto the tracks by the storm. *Id.* at 344–45. If the defendant had either removed the tree prior to the storm or inspected the tracks after the storm, the derailment would not have occurred and the plaintiff would not have been injured. In *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.*, 9 Ch. D. 503 (C.A. 1878), the English Court of Appeal did state, contrary to the trial judge, that the defendant would be liable for the flooding damage to the plaintiff's land even if the same damage would have been caused by the extraordinary tide if the defendant's retaining bank had not been negligently built a few inches too low. *Id.* at 526–27. However, this was dicta since the trial judge found that there was insufficient evidence that the same damage, or indeed any damage, would have been caused if the defendant had not been negligent.

clearly distinguish the issue of actual causal contribution from the issue of the extent of legal responsibility.

Probably the best known passive condition case is *City of Piqua v. Morris*.³⁵ The plaintiff alleged that the defendant city negligently provided insufficient drainage outlets in an embankment and improperly maintained the existing outlets, thereby risking flooding of the plaintiff's land due to water overflowing or bursting the embankment during a normal storm. The plaintiff's land was flooded as a result of an unforeseeably severe storm, the "most extraordinary" in the history of the state, which would have overflowed and burst the embankment even if the defendant had not been negligent.³⁶ The jury found that the defendant was not liable, and the Ohio Supreme Court upheld that finding.³⁷ Although at a couple of points the court stated that the defendant would be liable unless it proved that the extraordinary storm was "the sole cause" of the plaintiff's injury,³⁸ these statements seem to have been referring to the issue of "proximate causation" (the extent of legal responsibility) rather than mere causal contribution. The trial court's instructions and the Ohio Supreme Court's discussion of those instructions were filled with numerous references to concurring causes, proximate causes, efficient causes, and "the one cause that necessarily set in operation said causes contributing to plaintiffs' injury."³⁹ Indeed, as in *Kingston*, the Ohio Supreme Court noted that "the burden of sustaining its defense that the 'act of God' was the direct and proximate cause of the injury rested on the defendant."⁴⁰

Cases like *Piqua* are often erroneously cited as cases that involve a lack of actual causation by the defendant's negligence.⁴¹ The first and second *Restatements* support this misunderstanding of *Piqua* and other similar passive condition cases in their frequently criticized discussion of "legal causation," which fails to distinguish the issue of actual

See id. at 519–20. In *Johnson v. Town of Dundas*, [1945] O.R. 670 (Can.), the court agreed with the no-worse-off limitation, but found that there was insufficient proof that the flooding damage to the plaintiff's property would have occurred anyway if the defendant had not been negligent. *See id.* at 678, 687.

35. 120 N.E. 300 (Ohio 1918).

36. *Id.* at 301–02.

37. *Id.* at 301, 303.

38. *Id.* at 302–03.

39. *Id.* at 301–02 (emphasis added) (citation omitted).

40. *Id.* at 302.

41. *See, e.g.,* DOBBS, *supra* note 5, § 191, at 475 n.3 ("[I]ntervening forces of nature are said to bar the plaintiff's claim only when the injury would have occurred even without the defendant's activity. That means the defendant's activity was not a cause in fact under the but-for rule.") (citation omitted); KEETON ET AL., *supra* note 34, § 41, at 265–66 ("The presence of a railroad embankment may be no cause of the inundation of the plaintiff's land by a cloudburst which would have flooded it in any case.") (footnote omitted).

causation of harm from the issue of the extent of legal responsibility for tortiously caused harms, and thus makes a mess of both issues.⁴² The *Restatements'* basic section on legal cause, section 431, states:

- The actor's negligent conduct is a legal cause of harm to another if
- (a) his conduct is a substantial factor in bringing about the harm, and
 - (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.⁴³

Section 432 states the minimum, nonexclusive requirements for a condition to be a "substantial factor":

- (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
- (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.⁴⁴

Subsection (1) states the familiar "but-for," "made a difference," necessary condition test of causal contribution.⁴⁵ Subsection (2) states that a condition "may" be found to be a "substantial factor" if it is one of two *actively operating*, independently sufficient conditions for the occurrence of the injury.⁴⁶ By negative implication, a *passive* condition, such as the defendant city's negligent maintenance of the embankment in *Piqua*, can be a substantial factor in producing some harm only if it satisfies subsection (1)—that is, only if it is a necessary (but-for) condition for the occurrence of the harm. Comment b to section 432(1) confirms this negative implication. It states that the but-for test in section 432(1) "is most frequently . . . applicable where the actor's tortious conduct consists in a [passive] failure to take some precautions which are required for the protection of another's person or land or chattels"

42. See, e.g., RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 26 cmts. a, j & reporters' note to cmts. a, j; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 cmt. g (Tentative Draft No. 3, 2003) [hereinafter RESTATEMENT (THIRD), TENT. DRAFT NO. 3]; Stapleton, *supra* note 8, at 944–45, 957–58, 969–81; Wright, *supra* note 3, at 1073–80, 1097–1101.

43. RESTATEMENT OF TORTS § 431 (1934); RESTATEMENT (SECOND) OF TORTS § 431 (1965). Hereafter I will only cite the *Restatement (Second)*, unless there is a significant difference in wording between it and the first *Restatement*, which generally contains identical language in the cited sections and comments.

44. RESTATEMENT (SECOND) OF TORTS § 432 (1965).

45. See *id.* § 432 cmt. a (interpreting section 432(1) as a "necessary antecedent" test).

46. *Id.* § 432(2).

and that if the but-for test is not satisfied the actor's failure "is not even a perceptible factor" in causing the harm.⁴⁷ Immediately following this comment, it uses facts very similar to those in *Piqua* to illustrate the application of the but-for test, and it concludes, based on the but-for test, that the defendant's "negligent construction of the dam is not a cause of the inundation of [the plaintiff's] land."⁴⁸

The *Restatement* inadvertently puts its finger on the likely reason for the common but erroneous conclusion that the defendant's negligence in *Piqua* and similar cases did not contribute to the flooding of the plaintiff's land. Unlike active forces, the causal operation of passive conditions is not directly *perceptible*. Yet, in *Piqua* and similar cases, the passive conditions nevertheless did contribute, indeed often in a way that is (indirectly) perceptible to the careful observer. In *Piqua*, the buildup of water behind the embankment, which eventually overflowed and burst the embankment, occurred more rapidly because of the insufficient and clogged outlets, which may even have been but-for causes of its bursting although not of its being overflowed. In any event, the causal effect of the city's negligence, which reduced the embankment's capacity to handle flood water, was not preempted, but rather was reinforced, by the extraordinary aspect of the storm. The city's negligence and the extraordinary—unforeseeably greater than normal—magnitude of the storm were duplicative independently sufficient conditions, in conjunction with the quantity of water normally produced by a storm, for the flooding of the plaintiff's land, as I have previously explained using the necessary element of a sufficient set (NESS) test of causal contribution:

The unremoved debris [in the insufficient outlets] is a necessary element in a sufficient set of actual antecedent conditions that includes an at least normal storm, and the sufficiency of this set is not affected [that is, not preempted, but rather reinforced] by the fact that the storm was larger than normal.⁴⁹

Causal judgments are based on the belief that a certain succession of events fully instantiates one or more causal laws or generalizations, which in turn are induced from empirical observation and experimentation. A causal law would list in the antecedent (the "if" part of the causal law) all of the conditions that together are sufficient for the occurrence of the consequent (the "then" part of the causal law). A causal generalization is an incompletely described causal law. To avoid including causally

47. *Id.* § 432 cmt. b.

48. *Id.* § 432 illus. 2.

49. Wright, *supra* note 29, at 1800; *see id.* at 1794, 1799–1800; *see also* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 92–94 (1956) (noting the erroneous denial of actual causation in the passive condition, overwhelming force cases).

irrelevant conditions in the antecedent, the conditions included in the antecedent must be restricted to those that are necessary for the sufficiency of the antecedent.⁵⁰

This basic concept of causation, which we all intuitively employ, is formalized in the NESS test, which in its full form states that a condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence. The relevant notion of sufficiency is not merely logical or empirical, but rather requires that each element of the applicable causal generalization, in both the antecedent (“if” part) and the consequent (“then” part) must have been in actual existence (concretely instantiated) on the particular occasion. If and only if such complete instantiation exists, each of the instantiated conditions specified in the antecedent of the causal generalization is a cause of (contributed to) the occurrence of the instantiated condition specified in the consequent.⁵¹

As John Stuart Mill noted in his thorough discussion of causation, there may be a plurality of distinct (yet usually overlapping) sets of conditions that are each sufficient to produce the consequence on a particular occasion.⁵² The NESS test reduces down to the necessary condition (but-for) test if there was only one set of conditions that was or would have been sufficient for the occurrence of the consequence on the particular occasion—or, if there was more than one such set, if the condition was necessary for the sufficiency of each of the sets. Yet the NESS test is more inclusive than the but-for test. A condition was a cause under the NESS test if it was necessary for *the sufficiency of any actually sufficient set*, even if, due to other duplicative (actually sufficient) or preempted (would have been sufficient) sets of conditions, it was not—as required by the but-for test—necessary for *the consequence*.

The NESS test can be used, and implicitly is used, to confirm the obvious causal contribution of each fire in multiple-sufficient-fire cases such as *Kingston*, while the but-for test would implausibly conclude that neither fire was a cause of the destruction of the plaintiff’s property

50. See H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 10–11, 14–22 (2d ed. 1985); Wright, *supra* note 29, at 1789–90, 1823; Wright, *supra* note 27, at 1019–20, 1031–34, 1045–46.

51. See Wright, *supra* note 3, at 1102–03 & nn.112–13.

52. See JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE bk. III, ch. X, § 1 (8th ed. 1872); Wright, *supra* note 29, at 1790.

since, absent either, the property still would have been destroyed by the other. Under the NESS test, each fire was necessary for the sufficiency of a set of existing antecedent conditions that contained it but not the other fire. The two sets overlap to a considerable extent, since they share such existing necessary conditions as oxygen, fuel to burn on the route to the property, lack of a downpour, the fire's reaching the property while the property still exists in an unburnt state, and so on. Since the set containing each fire was fully instantiated, the two fires are duplicative, independently sufficient causes of the destruction of the plaintiff's property.

On the other hand, if one of the fires arrived first and burned the property down before the second fire arrived, the first fire was independently sufficient (and hence a cause), since it was necessary for the sufficiency of an actually sufficient set that contains it but not the second fire, but the second fire was not independently sufficient, since the set containing it but not the first fire was not fully instantiated. Remember that sufficiency means complete instantiation of the applicable causal generalization for destruction of the property by a fire. That causal generalization includes, as a necessary element, the fire's reaching the property while the property still exists in an unburnt state. That element was instantiated, along with all the other elements of the causal generalization, for the set that includes the first fire but does not include the second fire, and the complete instantiation of this set was not prevented by the existence of the second fire. However, that element was not instantiated for the set that includes the second fire but does not include the first. When the second fire arrived, the property was already burnt down, due to the existence of the first fire. The second fire would have been sufficient if the first fire had not existed, but it was not actually sufficient since the first fire did exist and preempted the potential causal effect of the second fire.⁵³

It is often assumed in cases like *Kingston* that the defendant's negligence was independently sufficient for the occurrence of the plaintiff's injury. Two often cited cases are *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*,⁵⁴ another multiple fires case, and *Corey v. Havener*,⁵⁵ a case in which two motor tricycles, emitting steam, simultaneously roared noisily and at a high rate of speed by either side of the plaintiff's wagon, startling the horse pulling the wagon with resulting injuries to both the plaintiff and the wagon.⁵⁶ However, the

53. See Wright, *supra* note 29, at 1794–98 (discussing preemptive causation).

54. 179 N.W. 45 (Minn. 1920).

55. 65 N.E. 69 (Mass. 1902).

56. See, e.g., RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 26 reporters' note to cmt. j; DOBBS, *supra* note 5, § 171, at 415 & n.5; KEETON ET AL., *supra*

independent sufficiency of the defendant's negligence seems to have been established only in *Kingston*. The plaintiff in *Anderson* was not required to prove that the defendant's fire was either necessary or independently sufficient for the destruction of the plaintiff's property, but rather only that it was "a material or substantial factor in causing plaintiff's damage."⁵⁷ Similarly, the plaintiff in *Corey* was not required to prove that each defendant's noisy, steam-emitting motorcycle was either necessary or independently sufficient to startle the plaintiff's horse with resulting damage to the plaintiff and his wagon, but rather only that each defendant's motorcycle "contributed to the injury."⁵⁸

Moreover, in many cases a condition is correctly found to be a cause of the plaintiff's injury even though it clearly was neither necessary nor independently sufficient for the occurrence of the injury. A good example is *Warren v. Parkhurst*,⁵⁹ in which each of twenty-six defendant mill owners discharged "sewage and other foul matters" into a creek above the plaintiff's land.⁶⁰ The court stated that the amount discharged by each defendant was itself "merely nominal" and would not have caused any injury to the plaintiff. However, the court noted, the stench from the combined discharges had destroyed the usefulness of the plaintiff's property.⁶¹ The court concluded: "No one defendant caused that injury. All of the defendants did cause it."⁶² Although none of the defendants' individual discharges, by themselves, were necessary or independently sufficient for the plaintiff's injury, it would be absurd, as the court recognized, to conclude that none of the discharges contributed to the plaintiff's injury.

The NESS test explains and justifies the common judgment in each of these cases that the defendant's negligence was a cause of the plaintiff's injury. For example, in *Warren*, some total number of discharges, *N*, much greater than one but less than twenty-six, was necessary and sufficient for the plaintiff's injury. Each defendant's discharge was

note 34, § 41, at 266–67 & nn.24 & 26; David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1344–45 & nn.33 & 34 [Fischer, *Causation in Fact*]; Fischer, *supra* note 30, at 1129–30 & nn.6–9.

57. See *Anderson*, 179 N.W. at 46.

58. See *Corey*, 65 N.E. at 69.

59. 92 N.Y.S. 725 (Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

60. *Id.* at 725.

61. *Id.* at 725–26.

62. *Id.* at 728.

necessary for the sufficiency of a set of existing antecedent conditions that includes the defendant's discharge and $N-1$ of the other defendants' discharges, and the sufficiency of that set was not preempted, but rather was reinforced, by the leftover discharges of the $(26-N)$ other defendants that were not included in the description of the sufficient set.⁶³

As a matter of factual causation, it clearly would not matter if the twenty-six discharges came from only two defendants rather than one each from twenty-six separate defendants; each discharge would continue to be a cause of the plaintiff's injury. For example, if a single discharge came from one defendant and (the equivalent of) the twenty-five other discharges came from a second defendant, the second defendant's overwhelming discharge would be both necessary and independently sufficient for the plaintiff's injury, and thus clearly would be a cause of the injury. But the first defendant's single discharge would also still be a cause; it would be a duplicative or reinforcing cause rather than a noncausal, preempted condition. In NESS terms, the first defendant's single discharge would be necessary for the sufficiency of a set of existing conditions that is accurately described as also containing a discharge by the second defendant that is at least large enough, when combined with the first defendant's single discharge, to be sufficient for the occurrence of the plaintiff's injury. The leftover portion of the second defendant's total discharge that exceeds the amount required to complete the described sufficient set did not preempt, but rather reinforced, the sufficiency of the described set.

The same method of analysis can be used to establish that the defendant's fire in *Anderson* and each of the two defendants' noisy motorcycles in *Corey* were causes of the plaintiffs' injuries in each of those cases, even if (as might have been true) the particular defendant's negligence was neither necessary nor independently sufficient for the occurrence of the injury, while the competing fire or noisy motorcycle was independently sufficient.⁶⁴ This analytic method is not a verbal sleight-of-hand. The description of the overwhelming discharge as *at least* so large, the competing fire as *at least* so big, or the competing motorcycle noise as *at least* so loud is a factual description of an antecedent condition that was concretely instantiated on the particular occasion.⁶⁵ The excess, leftover portion of the discharge, fire, or noise is not ignored or treated as if it did not exist; it simply is not included in the description of the minimally sufficient set, just as each of the two independently sufficient fires in *Kingston* is not included when

63. See Wright, *supra* note 29, at 1792–93.

64. See *id.* at 1793–94.

65. *Id.*; see Wright, *supra* note 27, at 1035–38 & n.194.

describing the minimally sufficient set containing the other fire.⁶⁶ Indeed, in each situation, care must be taken to make sure that the existing conditions not included in the description of the alleged minimally sufficient set do not prevent it from actually being sufficient by undermining one of the conditions necessary for the sufficiency of the set.⁶⁷

As we have seen, the same type of analysis applies in *Piqua*.⁶⁸ There is no analytical difference between the causal issue in *Piqua* and the causal issue in *Anderson, Corey*, and the many other multiple-active-condition cases in which causation is generally conceded. Thus, the denial of liability in *Piqua*—and the many similar cases in which tortious *passive* conditions combine with nontortious overwhelming forces to cause injury⁶⁹—cannot correctly be based on a lack of actual causation, but rather must be based on the no-worse-off limitation on the extent of legal responsibility for tortiously caused harm.

Restatement section 432's confused treatment of "legal causation" correctly avoids holding defendants liable in situations like *Piqua*, but it does so in a way that confuses the issues of actual causation and the extent of legal responsibility and is both underinclusive and overinclusive. As we have seen, it improperly denies causation and liability when the defendant's tortious, causal, *passive* condition combines with an

66. See *supra* text following note 52.

67. See *supra* text accompanying note 53. Although the necessary element part of the NESS test might seem to suggest a counterfactual inquiry into all the things that might have occurred if the condition at issue had not existed, it is only a heuristic to emphasize the need to be very careful (1) to avoid including causally irrelevant conditions (such as the color of the gun used to shoot someone) when specifying the allegedly sufficient set of actual conditions and (2) to make sure that all the specified conditions were completely instantiated. We hypothetically eliminate only the condition at issue from the allegedly sufficient set of actual conditions and ask whether the remaining conditions would still be sufficient for the occurrence of the result. However, the condition at issue is not really eliminated. Rather, we attempt to fit it in as part of the complete instantiation of the possibly applicable causal generalization. The hypothetical elimination of the condition is merely a technique for mentally separating the condition at issue from the other existing conditions when matching the conditions with the possibly applicable causal generalization, to make sure that the condition at issue is not causally irrelevant or treated as part of a supposedly sufficient set that actually is insufficient due to a preemptive cause. Although counterfactual language is employed, we are dealing solely with actual conditions in the actual world while employing a "covering law" analysis of actual causation. See Wright, *supra* note 29, at 1803–13; Wright, *supra* note 27, at 1039–42.

68. See *supra* text accompanying note 49.

69. See *supra* note 34.

independently sufficient *tortious* condition, rather than a nontortious condition, to produce the plaintiff's injury. Conversely, as we will now discuss, it properly acknowledges causation but improperly affirms liability when a defendant's tortious, causal, *active* condition combines with an independently sufficient *nontortious* condition to produce the plaintiff's injury. Comment d to section 432 states:

The statement in Subsection (2) [which treats each of two actively operating, independently sufficient conditions as a "substantial factor"] applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown.⁷⁰

Thus, contrary to the court's statement in *Kingston* and similar statements and holdings in other multiple fires cases,⁷¹ illustration 4 states that if "one fire is set by the negligence of the A Company and the other is set by a stroke of lightning or its origin is unknown[, it] may be found that the negligence of the A Company is a substantial factor in bringing about C's harm."⁷²

This conclusion would be correct if being a "substantial factor" merely meant being a cause in fact and did not address the issue of legal responsibility. Regardless of whether the second fire was tortious or

70. RESTATEMENT (SECOND) OF TORTS § 432 cmt. d (1965).

71. See, e.g., *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 74 N.W. 561, 565–67 (Wis. 1898); *Miller v. N. Pac. Ry.*, 135 P. 845, 848–49 (Idaho 1913). David Fischer cites *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 179 N.W. 45 (Minn. 1920), as a case in which the defendant railway company was held liable even though the other fire was "of innocent origin." Fischer, *Causation in Fact*, *supra* note 56, at 1345 n.36; see Fischer, *supra* note 30, at 1130 & n.9. However, as in *Kingston*, the other fires at issue in *Anderson* were at best of *unknown* origin:

Defendant introduced evidence to show that [other] fires were burning west and northwest of, and were swept by the wind towards, plaintiff's premises. It did not show how such fires originated, neither did it clearly and certainly trace the destruction of plaintiff's property to them. By cross-examination of defendant's witnesses and by his rebuttal evidence plaintiff made a showing which would have justified the jury in finding that the fires proved by defendant were started by its locomotive

Anderson, 179 N.W. at 46. In the quoted extract, the court observes that not only was it not proven that the other fires were nontortious, but also it was not "clearly and certainly" proven that they even contributed to (much less were independently sufficient for) the destruction of the plaintiff's property. In dicta, the court stated that it was "not prepared to adopt the doctrine" that there would be no liability if the other fires were "of no responsible origin," but it did not distinguish situations in which the other fires were *proven* to be of no responsible origin from those in which they were of "unknown origin," and it ended its discussion of this issue by stating, consistently with *Kingston*, that it rejected (what it took to be) "the doctrine of the Cook Case [that if] one of the fires is of *unknown origin*, there is no liability." *Id.* at 49 (emphasis added); see *Kingston v. Chi. & N.W. Ry. Co.*, 211 N.W. 913, 915 (Wis. 1927) (distinguishing the *Cook* case on this ground).

72. RESTATEMENT (SECOND) OF TORTS § 432 illus. 4 (1965) (emphasis added).

innocent in origin, the defendant's fire in *Kingston* clearly was a cause in fact of the destruction of the plaintiff's property, even though it was not a necessary (but-for) condition for such destruction.⁷³ However, comment d and illustration 4 were meant to be statements about the extent of legal responsibility. The phrase "*substantial factor*" inevitably implies, and is explicitly intended by the first and second *Restatements* to imply, more than the mere existence of cause in fact.⁷⁴ Indeed, both *Restatements* list essentially all of the "legal cause" limitations on the extent of legal responsibility as considerations that are "important in determining whether the actor's conduct is a substantial factor in bringing about harm to another."⁷⁵

73. See *supra* text accompanying notes 51–53. For discussion of the *Restatement's* failure properly to handle the actual causation issue, see Wright, *supra* note 3, at 1073–80, 1082–84, 1097–1101.

74. The *Restatement* declares:

The word "substantial" [in the phrase "substantial factor"] is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

RESTATEMENT OF TORTS § 431 cmt. a (1934); RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965); see *Vincent v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851 & n.7 (Alaska 1993) (noting the noncausal, policy-laden, responsibility element in the *Restatement's* substantial factor test).

75. Section 433 of the first *Restatement* states:

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;

(c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(d) lapse of time.

RESTATEMENT OF TORTS § 433 (1934). Section 433 and section 431 comment a, which is quoted in the previous note, directly contradict the draft *Restatement (Third)*'s claim that it was not the intent of the first and second *Restatements* to have the "substantial factor" requirement for legal cause address the "proximate cause" (extent of legal responsibility) issue. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmt. a & reporters' note to cmt. a. A revision of the first *Restatement* in 1948 moved subsection (b) of section 433 to section 435, on the ground that the "substantial factor" requirement supposedly deals solely with causation in fact, so that subsection (b), which states a

The draft *Restatement (Third)* greatly improves the prior *Restatements'* treatment of cause in fact by distinguishing the empirical issue of causal contribution from the normative issue of the extent of legal responsibility for tortiously caused harm and by replacing the "substantial factor" language with a (flawed)⁷⁶ NESS-like analysis of causal contribution.⁷⁷ However, it waffles on the causal contribution issue in the overwhelming force cases, for situations involving active conditions as well as passive conditions:

Sometimes, one candidate for a multiple sufficient cause appears de minimis, as when a match is thrown into an already raging fire. Another such situation occurs when an element of a potentially sufficient set . . . requires additional elements [to be actually sufficient] and the additional contribution that occurs is greater than necessary to cause the harm, as when a negligently constructed dam that would have collapsed in an ordinary flood is overwhelmed by a flood so large and unforeseeable that no dam would have controlled it. . . .

Both the match and the dam could be characterized as causes if one conceptualizes them as combining with something less than the actual events that occurred. Thus, a fire that needed just the additional amount of heat of a match to destroy a home and a flood of normal proportions make the match and dam factual causes. Nevertheless, courts often decline to hold the de minimis candidate to be a cause and dismiss the dam as not a cause of any flooding damage. . . .

One response to these cases is that they are wrongly decided and that any necessary element of a set of conditions sufficient to bring about an injury is a cause of that injury. That response, however, would be contrary to the well-settled rule . . . about preempted causes; from a purely conceptual perspective, a person who negligently runs over a dead body would be sufficient (with the appropriate background conditions) to account for the body not being alive from that point forward. . . . Unlike negligently running over a dead body, in which preemption is clear, the special cases addressed in this Comment present much more ambiguous instances of preemption.⁷⁸

reason for limiting liability for tortiously caused harm, was inappropriate in section 433. See RESTATEMENT OF THE LAW, 1948 SUPPLEMENT, Torts § 433, at 733–34, § 435, at 736 (1949) [hereinafter RESTATEMENT 1948 SUPPLEMENT]; Wright, *supra* note 3, at 1077–78 & n.17. Yet the remaining subsections of section 433, which were preserved by the 1948 revision and carried forward in the *Restatement (Second)*, all similarly state reasons for limiting liability for tortiously caused harm. See RESTATEMENT (SECOND) OF TORTS § 433 (1965). Former subsection (c), which is subsection (b) in the *Restatement (Second)*, refers to the limitation of liability due to intervening causes, which are treated as superseding (liability precluding) causes only if their occurrence was "highly extraordinary." See *infra* text accompanying notes 167–69. The comment on this subsection states:

As to the effect of the fact that the actor's negligent conduct has merely created a situation which is harmless unless acted upon by other forces for which the actor is not responsible, but which has been made injurious by the subsequent active operation of an intervening force, see §§ 440–461.

RESTATEMENT (SECOND) OF TORTS § 433 cmt. e (1965). Sections 440 to 461 of the *Restatement* encompass almost all of the *Restatement's* sections on the extent of legal responsibility for tortiously caused harm, including all the sections on superseding causes. See *infra* text accompanying notes 159–78.

76. See *infra* notes 81, 86 and accompanying text.

77. See RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, §§ 26–27.

78. *Id.* § 27 cmt. i.

As should be clear from our prior discussion, in the match and dam hypotheticals and other similar situations, the overwhelming force does not preempt the causal contribution of the de minimis or passive condition, but rather the de minimis or passive condition combines with and reinforces the overwhelming force in producing the relevant harm. To argue otherwise is to reject the results in the many analytically indistinguishable cases like *Anderson* and *Corey*⁷⁹ and the multiple defendant asbestos and nuisance cases cited by the reporters for the draft *Restatement (Third)*,⁸⁰ in which the defendant's negligence is held to be a legally responsible cause even though it was not proven to be either necessary or independently sufficient for the occurrence of the plaintiff's injury.

The draft *Restatement* errs in viewing these overwhelming force situations as being similar to the running-over-a-dead-body situation, which is quite different empirically and analytically. Here and in many other places in the draft *Restatement*, the draft's language (and sometimes, as here, its analysis) reflects or at least invites confusion by failing to distinguish *actually sufficient* sets of conditions from sets of conditions that *would have been sufficient* in the absence of some preemptive cause but that were *not actually sufficient* due to the existence of the preemptive cause.⁸¹ A sufficient set of conditions for killing a person by running over her obviously must include the person's being alive when she is run over, a condition which the hypothetical assumes did not exist. Thus, as the draft acknowledges (while unfortunately using a misleading oxymoron, "preempted cause": a preempted condition cannot be a cause), the person's running over the dead body was a preempted condition rather than a duplicative cause.

No such preemption occurs in the match and dam hypotheticals, which involve duplicative causation rather than preemption by the overwhelming force. Thus, if liability is to be denied in the match and dam hypotheticals,

79. See *supra* text accompanying notes 54–69.

80. See RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 27 cmts. f, g & reporters' note to cmt. g.

81. The reporters describe all overdetermined causation situations, including those involving preemption as well as duplication or reinforcement, as situations involving "multiple sufficient causal sets." See *id.* § 27 *passim*. They seem to have been misled by David Fischer's similar error in his articles on causation. See *id.* § 27 reporters' note to cmt. b. (citing Fischer, *Causation in Fact*, *supra* note 56); Fischer, *Causation in Fact*, *supra* note 56, at 1337 n.5, 1349–50; cf. Fischer, *supra* note 30, at 1127–30 (describing preempted conditions as "individually sufficient" "successive causes" of "duplicated harm").

the denial must be based not on a lack of factual causation, but rather on a normative conclusion that the defendant should not be liable despite having tortiously contributed to the plaintiff's injury, due to the no-worse-off limitation (in the dam hypothetical), a de minimis contribution limitation (in the match hypothetical), or some other limitation on the extent of legal responsibility for tortiously caused harm. The draft *Restatement* itself emphasizes, in a different comment that discusses multiple exposures to a toxic substance, none of which can be proven to be necessary or independently sufficient for a contracted disease caused by such exposures, that: "Whether there are some exposures that are sufficiently de minimis that the actor should not be held liable is a matter not of factual causation, but rather of policy, and is addressed in § 29, Comment q."⁸² Section 29, comment q specifies a de minimis contribution limitation on the extent of legal responsibility for "trivial and insubstantial contributions to overdetermined outcomes,"⁸³ which subsequently was broken out as a separate section.⁸⁴

The draft *Restatement* also confuses the causal contribution issue with the extent of responsibility issue in its discussion and rejection of the no-worse-off limitation. Comment d to section 27, which is meant to address the causal contribution issue rather than the extent of responsibility issue, states (when read in conjunction with section 27) that a defendant's tortious conduct that is not a necessary (but-for) cause of an injury only because of the existence of another set of conditions that was "also sufficient to cause the [injury] at the same time," is nevertheless a "factual cause" of the injury "regardless of whether the other causal set includes tortious conduct or is devoid of such conduct."⁸⁵ There are many problems with the wording of section 27.⁸⁶ However, comment d, literally interpreted,

82. RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 27 cmt. g.

83. *Id.* § 29 cmt. q.

84. Section 36 of the draft *Restatement (Third)* contains a limitation on the extent of legal responsibility for "trivial and insubstantial" contributions to an injury, which would not apply if the de minimis contribution was a necessary condition for the injury. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 36 & cmts. a, b. The limitation should not apply if the comparatively minimal contribution was either necessary or sufficient. Moreover, the evaluation of "trivial and insubstantial" should be done through a comparison with the other contributions considered separately, rather than in the aggregate. For example, if each of 100 defendants contributed two percent of the pollution necessary to harm the plaintiff's property, none of their contributions should be considered trivial or insubstantial, even though none of them were individually necessary or sufficient. Otherwise no one would be liable, even though each tortiously contributed to the plaintiff's injury. See *Warren v. Parkhurst*, 92 N.Y.S. 725 (Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906), which is discussed *supra* text accompanying notes 59–63.

85. RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 27 & cmt. d.

86. Section 27, which is entitled "Multiple Sufficient Causal Sets," states:

When an actor's tortious conduct is not a factual cause of physical harm

is clearly correct: The tortious or nontortious nature of a competing condition is irrelevant in determining whether the condition at issue (or the competing condition itself) was a factual cause of the injury.

Indeed, this proposition is so obviously correct that it does not seem worth special mention. However, although comment d itself does not say so, the reporters' notes to comment d indicate that the comment was inserted to affirm the prior *Restatements'* rejection of the no-worse-off limitation on the extent of legal responsibility for tortiously caused harm, which is still improperly described as a "factual causation" issue rather than as an extent of responsibility issue:

Comment d. One cause tortious, the other innocent. Both the first and Second Restatements of Torts provided that when an innocent and tortious cause were each active and concurred to cause the plaintiff's harm, the tortious cause could be found to be a substantial factor and therefore a legal cause of the plaintiff's harm. This situation provides a less compelling case for modifying the but-for standard and treating the single tortfeasor's conduct as a factual cause of harm than when both sufficient causes are tortious; the debate on this matter has raged in legal circles for decades.

Nevertheless, the argument in favor of liability is that the fortuity of some other innocent cause should not absolve a tortfeasor whose conduct was fully sufficient to cause the plaintiff's harm. And unlike objections to a tort world without a causal requirement in which an injured plaintiff would be free to sue any negligent party who created risks of the kind of harm suffered by the plaintiff—a plainly troublesome prospect—extending causation to the innocent other cause situation does not open a comparable Pandora's Box. Despite some academic commentary in favor of limiting the application of this section to instances when both series of forces involve tortious conduct, the courts have not agreed.⁸⁷

In contrast to the reporters' otherwise admirable effort to clearly distinguish the factual cause issue from the extent of legal responsibility

under the [but-for test] in § 26 only because another causal set exists that is also sufficient to cause the physical harm at the same time, the actor's tortious conduct is a factual cause of the harm.

Id. § 27. If "also sufficient" is interpreted literally, section 27 only encompasses situations involving multiple actually sufficient conditions that separately or together would have caused the same harm at the same time. It erroneously fails to recognize as causes duplicative conditions that separately would have caused the same harm at a different time or any preemptive condition. If "sufficient" includes would-have-been-sufficient preempted conditions, section 27 erroneously treats as causes preempted conditions that would have caused the same harm at the same time and fails to treat as causes duplicative or preemptive conditions that by themselves would have caused the same harm at a different time. Under either interpretation, section 27 fails to recognize causes that were neither necessary nor independently sufficient, such as those in *Piqua*, *Warren*, *Anderson*, and *Corey*.

87. *Id.* § 27 reporters' note to cmt. d (citations omitted).

issue, they inexplicably use factual cause language in their statement and elaboration of comment d to section 27—a section that supposedly is limited to addressing the factual cause issue—in order to discuss and reject the no-worse-off limitation on the extent of legal responsibility for tortiously caused harm. There is no question that multiple actually sufficient conditions are factual causes. Indeed, the reporters' discussion of the (mis)labeled issue, in the extract quoted immediately above, describes both the innocent and tortious conditions as “*cause[s]* [that] were each active and *concurred to cause* the plaintiff's harm” and as being “both sufficient causes.” The issue being discussed is not the issue of factual causation, but rather the issue of “legal causation” and “liability”: the extent of legal responsibility for tortiously caused harm.

The reporters quote David Fischer's claim that the “weight of modern authority rejects the innocent/culpable origin distinction and holds a wrongdoer liable without regard to the culpability of the other [independently sufficient] party,”⁸⁸ without noting that Fischer subsequently abandoned this claim.⁸⁹ Moreover, of the (only) seven cases that the reporters cite as “invoking this rule,”⁹⁰ which include all but two of the cases that Fischer cited in support of his initial claim,⁹¹ only one case actually invokes the rule, in dicta. Rather than rejecting the no-worse-off limitation, the holdings in all of the cases that are cited by Fischer or the reporters are consistent with it.

Two of the cases are from Montana. In the earlier case, *Kyriss v. State*,⁹² the plaintiff prisoner suffered from undiagnosed arteriosclerosis (thickening and narrowing) of the blood vessels of his legs, particularly his right leg, which restricted the blood supply to the lower portions of his legs. His right foot became red, swollen, and very painful. The big toe on his right foot was red, inflamed, and very sore and tender. A prison doctor removed the ingrown toenail on the big toe and then sent the plaintiff back from the infirmary into the unsanitary prison environment. The toe became infected and was desultorily inspected and treated by prison nurses and doctors as the infection spread up the plaintiff's leg. His right foot became gangrenous, and, two-and-a-half months after the removal of

88. *Id.* (quoting Fischer, *Causation in Fact*, *supra* note 56, at 1346).

89. *See infra* text accompanying note 147.

90. RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 27 reporters' note to cmt. d.

91. *See* Fischer, *Causation in Fact*, *supra* note 56, at 1346 n.41, 1351–52; Fischer, *supra* note 30, at 1130 n.9. Fischer cites two older cases that are not cited by the reporters, *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 179 N.W. 45 (Minn. 1920), which is discussed *supra* note 71, and *Geuder, Paeschke & Frey Co. v. City of Milwaukee*, 133 N.W. 835, 840 (Wis. 1911), which is discussed *infra* note 148. *See* Fischer, *supra* note 30, at 1130 n.9.

92. 707 P.2d 5 (Mont. 1985).

the toenail, he was transferred to a Veterans Administration hospital where clots blocking the arteries were discovered and removed. However, this did not reverse the gangrenous condition, and one month later the lower portion of his right leg had to be amputated.⁹³

The defendant State of Montana claimed that the preexisting arteriosclerosis had caused the blockage of the blood supply that caused the gangrene that necessitated the amputation of the leg.⁹⁴ It also claimed that the usual Montana “proximate cause” instruction, which states that a “proximate cause is one which in a natural and continuous sequence and unbroken by any new independent cause produces the injury and without which the injury would not have occurred,” should have been given.⁹⁵ Instead, the trial court instructed the jury as follows:

Instruction No. 13

There may be more than one legal cause of an injury. When negligent conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each said persons is a legal cause of the injury regardless of the extent to which each contributes to the injury.

Instruction No. 14

A legal cause of an injury is a cause which is a substantial factor in bringing about the injury.

Instruction No. 18

If you find that any negligent medical practice on the part of the Defendants substantially reduced the chances for saving Plaintiff's leg, then such a reduction in chance can be a part of the legal cause as defined in this instruction.⁹⁶

The Supreme Court of Montana upheld the trial court's instructions. It did not discuss the reduced chance instruction, No. 18. Instead, concentrating on instruction No. 14, it reaffirmed its recent decision that a “substantial factor” instruction should be used instead of the usual “proximate cause” instruction (which incorporates the but-for test) in situations, such as the one in this case, that possibly involve multiple independently sufficient conditions.⁹⁷ However, it did not distinguish situations involving multiple but-for causes from those involving multiple independently sufficient conditions, it did not distinguish the actual cause issue from the “proximate cause” (extent of responsibility) issue, and it

93. *Id.* at 7, 9–11.

94. *Id.* at 7.

95. *Id.* at 7–8.

96. *Id.* at 7.

97. *Id.* at 8 (quoting *Rudeck v. Wright*, 709 P.2d 621, 628 (Mont. 1985)).

did not consider whether the tortious or innocent nature of a competing, independently sufficient condition should make a difference in deciding whether a defendant's tortious actual cause was a "proximate cause."

Addressing the defendant's contention "that there was not sufficient competent evidence of proximate cause to justify a verdict," the court discussed a lengthy history of admittedly negligent diagnosis and treatment of the plaintiff by the defendant's medical staff.⁹⁸ It noted that the Veterans Administration surgeon who discovered and removed the blood clots found that the clots, rather than the thickened artery walls, had caused the blockage of the arteries and that the clots had developed relatively recently, while the arteriosclerosis had existed for at least two years.⁹⁹ It discussed medical experts' testimony that the vascular condition should have been dealt with by surgery before removing the toenail, since

surgery to an extremity where there is a significant vascular lessening presents a greater risk and the tissue is more prone to complications due to the possibility of infection. An infection in an area where blood supply is lessened will produce complications more grave than if there are no vascular problems.¹⁰⁰

The court noted the great importance of insuring sanitary conditions to prevent infection, closely monitoring and promptly and properly treating any infection, and consulting earlier with a vascular surgeon: "The time loss of two months almost certainly lessened the chance of preventing amputation, and may have led to the necessity of taking a larger part of the leg than earlier treatment would have allowed."¹⁰¹

In sum, contrary to the claims of Fischer and the reporters, *Kyriss* is not a case in which the court held the defendant liable despite proof of an independently sufficient, nontortious condition that almost certainly would have caused the plaintiff's injury in the absence of tortious conduct by the defendant or anyone else. There was no proof that the plaintiff's lower leg would almost certainly have had to be amputated, at the same time or a later time, due to the preexisting arteriosclerosis even if the defendant had not negligently failed to diagnose and treat the arteriosclerosis prior to removing the toenail, failed to take precautions to avoid infection after removing the toenail, failed to properly monitor and treat the infection, and failed to consult earlier with a vascular surgeon. Indeed, the proof went the other way.

Similarly, in the cited Idaho case, *Fussell v. St. Clair*,¹⁰² the plaintiff alleged two distinct instances of negligent conduct by the defendant

98. *Id.* at 9–11.

99. *Id.* at 11.

100. *Id.*

101. *Id.*

102. 818 P.2d 295 (Idaho 1991).

doctor that allegedly caused the death of the plaintiff's baby child: (1) negligence during the delivery of the baby that caused a prolapsed umbilical cord and (2) negligent mismanagement of the delivery when the prolapsed cord was discovered. The defendant doctor denied any negligence and claimed that the prolapsed umbilical cord occurred independently of any negligence on his part.¹⁰³ The court held that, under these circumstances, the instructions on "proximate cause" should include a "substantial factor" test but not a but-for test.¹⁰⁴ The court's opinion, as well as the opinions of the concurring and dissenting justices, displayed considerable confusion over "sole" versus multiple concurrent causes and did not distinguish between actual causation and the extent of legal responsibility for tortiously caused harm. Although some of the court's statements, if interpreted literally and in isolation, would apparently allow recovery even if the plaintiff's injury would have occurred in the absence of any tortious conduct by the defendant or anyone else, the court's discussion of the facts did not focus on that possibility. Rather, the court was concerned that the defendant not be able to escape liability if it were found that the prolapse of the umbilical cord was due to natural causes rather than the defendant's negligence, if the defendant nevertheless was negligent in managing the delivery to avoid injury to the baby as a result of the prolapsed cord once it was discovered:

Although the evidence presented by the Fussells indicated that Dr. St. Clair's negligence was the sole cause of the brain damage and death of the child, the evidence submitted by Dr. St. Clair indicated that there was a cause for which Dr. St. Clair was not responsible—an occult (hidden) prolapsed umbilical cord. Dr. St. Clair's evidence would have supported a finding by the jury that the prolapsed umbilical cord occurred without any negligence of the doctor. If the jury had accepted this evidence *and yet had found that Dr. St. Clair was negligent in responding to the prolapsed cord when it was discovered*, the jury might have been misled by the proximate cause instruction given by the trial court. The jury might have concluded that the doctor's negligence could not have been a proximate cause because even if the doctor had not been negligent, the brain damage and death of the child would have occurred.¹⁰⁵

103. *Id.* at 296.

104. *Id.* at 295, 296–97.

105. *Id.* at 297 (emphasis added). Similarly, a concurring justice, who argued that the but-for test should never be used in any case because of its tendency to produce confusion and erroneous conclusions regarding causation, and who also made statements that, interpreted literally and in isolation, would be inconsistent with the no-worse-off limitation, argued:

In the instant case, as noted by the Court, Dr. St. Clair is alleged to have been negligent in two ways Therefore, unlike *Hilden*, the plaintiffs in this

The *Fussell* court distinguished a prior case, *Hilden v. Ball*,¹⁰⁶ in which the plaintiff alleged that a doctor's negligent failure to preoxygenate the plaintiff's decedent prior to a surgery caused the patient's death, and the court upheld the use of the but-for test.¹⁰⁷ The court's opinion in *Fussell* distinguished *Hilden* on the ground that "*Hilden* involved only a single force or cause."¹⁰⁸ However, as each of the concurring and dissenting justices in *Fussell* pointed out, *Hilden* actually involved multiple alleged causes: the doctor's negligent failure to preoxygenate the patient, and one or more nontortious conditions that allegedly would have caused the patient's death even if the patient had been properly oxygenated.¹⁰⁹ Thus, the different holdings in *Fussell* and *Hilden* cannot be explained in terms of "sole" versus multiple causes, but rather only by the alleged existence in *Hilden*, but not in *Fussell*, of a nontortious condition that would have caused the same injury to the plaintiff in the absence of tortious conduct by the defendant or anyone else. This distinction was overlooked by the justices in *Fussell*, all of whom failed to distinguish the extent of responsibility issue from the actual cause issue. Nevertheless, the holdings in *Fussell* and *Hilden* are not inconsistent with, but rather support, the no-worse-off limitation.

In the other cited Montana case, *Kitchen Krafters, Inc. v. Eastside Bank*,¹¹⁰ which was decided five years after *Kyriss*, the defendant bank

case alleged and introduced evidence at trial of two causes that contributed to the ultimate death of the infant. Accordingly, in my view, this is clearly a "multiple cause" case and the "but for" instruction should not have been given. *Id.* at 302 (Boyle, J., concurring).

[T]he fact that there is only one defendant is not conclusive on this issue [of whether the but-for test is applicable] and should not be a factor because a single defendant may be negligent in more than one way, giving rise to multiple causes or forces such as clearly illustrated in the instant action.

Id. at 303. "In this instant case the theory of the defense was that the occult or hidden prolapsed cord made the brain damage and death unavoidable. Regardless of whether or not this is medically accurate, this theory represents the only cause which exonerated the defendant physician from liability." *Id.* at 305.

Whether the baby would have died anyway due to an occult prolapsed cord is not the primary or correct issue of the instant case. Rather, the key issue to be answered is whether the defendant physician's failure to meet the standard of care in rupturing the membrane caused the prolapsed cord and once it was discovered, whether the physician contributed to the baby's harm by failing to meet the standard of care in attempting to manage the delivery.

Id. at 306

106. 787 P.2d 1122 (Idaho 1989).

107. *Id.* at 1125.

108. *Fussell*, 818 P.2d at 299.

109. *Id.* at 300-01 (Bistline, J., concurring); *id.* at 303-04 (Boyle, J., concurring); *id.* at 309-10 (Bakes, C.J., dissenting).

110. 789 P.2d 567 (Mont. 1990), partially overruled by *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 139 (Mont. 1996) (rejecting use of "proximate cause" language in jury instructions and requiring foreseeability instruction only in situations involving intervening causes).

breached its fiduciary duty to disclose its wrongful failure to apply escrow funds to reduce the debt on property purchased by the plaintiff corporation.¹¹¹ The plaintiff alleged that the defendant's breach, along with a poor economy, contributed to the plaintiff's subsequent financial losses by causing a major officer to leave the corporation. The bank argued that the plaintiff's loss of business was not caused by its breach but instead by external factors such as the poor economy.¹¹² The jury held the defendant liable under a pair of consecutive instructions that, first, defined a "legal cause" as "a cause which is a substantial factor in bringing [the damage] about" and, second, stated that "[t]he defendant's conduct is a cause of the damage if it helped produce it and if the damage would not have occurred without it."¹¹³ Not content with the statement of the but-for test in the second instruction, the defendant challenged the "substantial factor" language in the first instruction. The Montana Supreme Court criticized the "legal cause" language in the first instruction but upheld the "substantial factor" language, which it emphasized referred only to the issue of actual causation and should be used instead of the but-for test in cases that might involve independently sufficient causes.¹¹⁴ However, contrary to Fischer's and the reporters' claims, it reversed the judgment for the plaintiff due to the lack of any instruction on "proximate" (legally responsible) causation.¹¹⁵

The *Kitchen Krafters* court stated that it was applying the principles of causation previously stated in a 1988 Montana case, *Young v. Flathead County*.¹¹⁶ Citing *Kyriss*, *Young* noted that: "In Montana, the distinction between causation in fact and proximate cause, now occasionally referred to as legal cause, has not generally been made."¹¹⁷ *Young* attempted to draw that distinction and insisted on satisfaction of both

111. *Id.* at 569, 574.

112. *Id.* at 569–70, 575–76.

113. *Id.* at 568, 575.

114. *Id.* at 574–75.

[C]ause-in-fact is determined in one of two ways—either through the "but for" test or the "substantial factor" test. Once either one of these tests is satisfied, the plaintiff has established that the defendant's conduct was the cause in fact of his injury. It is now incumbent upon him to move to the second tier of the causation analysis and prove that the defendant's conduct *proximately caused* his damages.

Id. at 574; *id.* at 575 ("[T]he substantial factor test . . . is part of causation-in-fact, not proximate cause.").

115. *Id.* at 574–76.

116. 757 P.2d 772 (Mont. 1988) (cited in *Kitchen Krafters*, 789 P.2d at 574).

117. *Id.* at 777 (citations omitted).

requirements. It stated that the “substantial factor” test is an alternative test of *causation in fact* that “has been designed to deal with problems where application of the ‘but for’ test would allow each of a number of defendants to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.”¹¹⁸ The court noted the confusion between the actual cause issue and the “proximate cause” issue as a result of the use of but-for language (not supplemented by any “substantial factor” language) in the accepted definition of proximate causation: “In Montana, [a] proximate cause is one which in a natural and continuous sequence, unbroken by any new, independent cause, produces injury, and without which the injury would not have occurred.”¹¹⁹ “Nonetheless,” the court stated, “prior to analyzing proximate cause, a claimant must satisfy cause in fact.”¹²⁰ The court reversed the trial court’s judgment in favor of the plaintiff developer on the ground that, even though the developer “present[ed] a reasonable argument that but for the representations of the County they would not have proceeded with the project,”¹²¹ those representations, even if reasonably relied upon, were not a “proximate cause” of the failure of the development:

[S]ince other factors—the economy, failure to secure additional financing, and especially the inability to secure approval of the sewer system—had an impact on the resulting damage, Developers cannot claim the County’s representations alone “proximately caused” the damage. Where more than one possible cause of damage appears, the plaintiff must eliminate causes other than those for which the defendant is responsible. . . .

Regardless of whether the County made any representations that condominiums were or were not subject to subdivision review, the fact is that it is likely the project would not have been completed because sanitary approval could not be secured. The County also points out that in addition to the above mentioned factors, the testimony of Developers’ accountant was that a number of occurrences combined to cause the demise of the development.¹²²

Although the *Young* court’s discussion of “proximate causation” is not a model of clarity, it clearly did not reject the no-worse-off limitation on the extent of responsibility for tortiously caused harm, but rather applied an even stricter limitation.

118. *Id.* (citations omitted).

119. *Id.* (citations omitted). The draft *Restatement*, in a “But cf.” citation at the end of its list of citations to cases that supposedly reject the no-worse-off limitation, incorrectly describes this statement as “dicta” that would allow liability (only) “when the competing causal set involves ‘the conduct of one or more [*defendants* that] would have been sufficient to produce the same result’.” See RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 27 reporters’ note to cmt. d (alteration in original) (emphasis added).

120. 757 P.2d at 777.

121. *Id.*

122. *Id.* at 777–78 (citations omitted).

In *Thomsen v. Rexall Drug & Chemical Co.*,¹²³ the disputed issue was the *factual* cause of the plaintiff's vasculitis, the causes of which had not yet been established by medical science, rather than any limitation on the extent of legal responsibility for tortiously caused harm. The plaintiff argued that the "primary suspect" was unknown drugs erroneously supplied by the defendants when filling the plaintiff's prescription. The defendants argued that the cause was the prescribed cortisone medications that the plaintiff had been taking and that the plaintiff's theory of causation was speculative and unsupported by the evidence.¹²⁴ The court (liberally) ruled that there was sufficient evidence for the jury to find that the erroneously supplied drugs were a factual cause,¹²⁵ under the "substantial factor" test rather than the but-for test:

Defendants contend first that plaintiff has failed to establish a *cause in fact*, that is, one but for whose action or omission the injury would not have been sustained. . . . [I]t is well recognized that the [but-for] rule serves to explain the greater number of cases but fails in the type of situation where several causes concur to bring about an event and either one of them operating alone would have been sufficient to cause the result.

This case appears to fall into that category since [under the conflicting testimony] apparently plaintiff's vasculitis could have been caused by the cortisone or as well, the ingestion of the erroneous prescription. In such situations, it is recognized that neither cause can be absolved from responsibility on the ground that the identical harm would have occurred without it.¹²⁶

The no-worse-off limitation was not discussed and, in any event, clearly would not have been applicable. Not only was it not proven that the plaintiff almost certainly would have suffered the vasculitis in the absence of the defendants' negligence due to the cortisone medication—indeed, the odds of its occurring due to the cortisone medication were quite low—but also the prescribing of the cortisone medication may itself have been tortious, especially since it apparently was prescribed in excessive quantity.¹²⁷

The court also focused on actual causation rather than the extent of legal responsibility in *Vincent v. Fairbanks Memorial Hospital*.¹²⁸ The plaintiff, Vincent, alleged that her debilitating heart attack was caused by various negligent acts and omissions by the defendant hospital's

123. 45 Cal. Rptr. 642 (Ct. App. 1965).

124. *Id.* at 643–47.

125. *Id.* at 647–48.

126. *Id.* at 646–47 (emphasis added) (citation omitted).

127. *See id.* at 644.

128. 862 P.2d 847 (Alaska 1993).

employees, including allegedly negligent diagnosis and monitoring of the plaintiff's condition and negligent administration of a drug to which the plaintiff had a severe adverse reaction. The defendant claimed that the plaintiff's adverse reaction was extraordinary and highly unforeseeable and due to the plaintiff's allegedly unknown extra-sensitive nature and preexisting severe acidosis, which allegedly would have caused the heart attack in the absence of any treatment (but presumably not in the absence of correct diagnosis and treatment).¹²⁹ The court, erroneously assuming that a but-for instruction on causation is always inappropriate when there are multiple concurrent causes (there are always multiple concurrent *but-for* causes of any event), nevertheless upheld as harmless error the trial judge's instruction and the defense lawyer's argument that emphasized the necessity of but-for causation.¹³⁰ The court noted that the defense counsel "never argued that even if some act of negligence on the part of [the hospital] was otherwise sufficient to cause Vincent's heart attack, such negligence was not the legal cause because the heart attack was going to happen anyway."¹³¹

In *Cipollone v. Liggett Group, Inc.*,¹³² the plaintiff's wife, who died from cancer in 1984, had smoked cigarettes from 1942 until shortly before her death. The cigarettes she smoked from 1942 until 1968 were manufactured by the defendant, Liggett.¹³³ In a previous opinion,¹³⁴ the court had held that the plaintiff's negligence claims against the cigarette manufacturers, including Liggett, that were based on failure to warn about the health risks of smoking were preempted by the Federal Cigarette Labeling and Advertising Act for any such failures that occurred after 1965.¹³⁵ In its discussion of the "proximate causation" issue, which did not distinguish actual causation from the extent of legal responsibility, the court stated:

129. *Id.* at 848–49 & nn.2 & 4–5.

130. *Id.* at 852–53.

131. *Id.* at 853. The court reiterated:

At no time did counsel for the defendant suggest that even if some aspect of the care given Vincent was negligent and might otherwise have caused her seizure, her seizure would have occurred in any case from independent causes and therefore defendant's conduct could not be the legal cause of Vincent's injuries under the court's instructions.

Id. at 850 n.6. The court's entire discussion focused on the actual cause aspect of its *Restatement*-based substantial factor test, which the court correctly noted encompasses not only the empirical issue of actual causation but also the further policy-laden issue of legal responsibility. *See id.* at 851–52 & n.7; *supra* notes 74–75 and accompanying text.

132. 893 F.2d 541 (3d Cir. 1990).

133. *Id.* at 546.

134. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986).

135. 15 U.S.C. §§ 1331–41 (2000).

Our preemption decision makes this case quite comparable to a concurrent cause situation. Liggett's pre-1966 behavior might have been enough, by itself, to cause Mrs. Cipollone's cancer, and its post-1965 behavior might also have been enough to cause the cancer. Thus, just as it is unfair to let one tortfeasor completely escape liability for his fire merely because *another tortfeasor* caused another fire, so it is unfair to let Liggett completely escape liability for its pre-1966 behavior merely because its post-1965 behavior (or that of its codefendants), which was immunized from scrutiny at the trial, *might* also have caused enough damage, by itself, to kill her.¹³⁶

This statement is completely consistent with the no-worse-off limitation: The defendant cannot escape liability under that limitation if some other condition merely *might* have been independently sufficient to cause the plaintiff's injury, but rather only if the defendant proves that it was *almost certainly* independently sufficient. Moreover, even if the other condition was almost certainly independently sufficient, the court's statement that the defendant nevertheless should be held liable is limited to situations in which the other condition was *tortious*. The court states, "[J]ust as it is unfair to let one tortfeasor completely escape liability for his fire merely because *another tortfeasor* caused another fire, so it is unfair to let Liggett completely escape liability for its [negligent] pre-1966 behavior merely because its [negligent] post-1965 behavior (or that of its codefendants)" was immunized from liability by the preemptive effect of the federal statute.¹³⁷ In either situation, it is not true, as required by the no-worse-off limitation and the underlying principle of justice, that the plaintiff would have suffered the same injury anyway in the absence of any tortious conduct by the defendant or others. The federal statute did not make Liggett's post-1965 failure to warn nontortious under the applicable state tort law, but rather provided a federal immunity defense for any post-1965 failure to warn. A condition should be treated as a tortious condition for purposes of the no-worse-off limitation if it is a condition that normally would give rise to legal liability, even if in the particular case the person who is responsible for the condition cannot be held liable because of immunity or some similar excuse.

The only cited opinion that explicitly addressed and rejected the no-

136. *Cipollone*, 893 F.2d at 561 (emphasis added).

137. *Id.* (emphasis added); see *supra* text accompanying note 136. The court's reference to the *Anderson* case, which is discussed *supra* note 71, assumes that *Anderson* involved two independently sufficient fires (negligently) started by two different defendants. See *Cipollone*, 893 F.2d at 561 n.16.

worse-off limitation is *Basko v. Sterling Drug, Inc.*,¹³⁸ which, however, did so in dicta. Mrs. Basko suffered from lupus erythematosus, which was treated from 1953 to 1961 by three different drugs manufactured by the defendant drug company: Aralen, Atabrine, and Triquin. She developed retinopathy (retinal damage), as a result of which her vision deteriorated badly from 1961 to 1965. By 1969 she was almost totally blind. She claimed that the retinopathy was due to chloroquine in the Aralen, which she had taken from April 1953 to January 1957, and the Triquin, which she had taken from November 1959 to October 1961. The Atabrine contained no chloroquine. Although chloroquine was known to be capable of causing reversible blurring of vision, reports of its causing retinopathy did not appear until 1957 or 1959. Nevertheless, the court stated that a jury might find that the retinopathy risk was knowable or reasonably foreseeable and that the defendant negligently failed to warn about that risk while the plaintiff was still taking Aralen. More likely, however, was that the jury might find a negligent failure to warn with respect to Triquin but not Aralen.¹³⁹ The court stated:

On these facts, plaintiff would be entitled to recover if the jury found that either Aralen or Triquin alone would have been sufficient to produce chloroquine retinopathy, and that Triquin was a "substantial factor" in producing her injury. The jury should have been so instructed, and indeed, the court's failure to give explicit instructions may have created the erroneous impression that defendant would not be liable under such circumstances unless there was a breach of the duty to warn with respect to both drugs.¹⁴⁰

In the discussion that followed, the court assumed that Connecticut, whose law it was applying, would agree with the *Restatement's* position that the plaintiff should be able to recover even if the plaintiff's injury would have occurred anyway due to an independently sufficient, nontortious cause.¹⁴¹ However, the court's discussion of this issue is dicta, since the evidence in the case would not support a finding, as required by the no-worse-off limitation, that the plaintiff almost certainly would have suffered the injury even if she had not taken any Triquin, solely as a result of taking the Aralen. There was no scientific basis for attributing the plaintiff's retinopathy to only the Aralen—or only the Triquin. According to the evidence in the case, retinopathy is a rare, idiosyncratic occurrence among those taking chloroquine, and it occurs only after taking chloroquine over an extended period. Moreover, the frequency and severity of retinal damage increases with the length of treatment

138. 416 F.2d 417 (2d Cir. 1969).

139. *Id.* at 419, 421–22, 426–27.

140. *Id.* at 429 (footnote omitted).

141. *See id.* at 429–30.

with and the dosage of chloroquine.¹⁴²

The no-worse-off limitation, by requiring the defendant to prove that the injury almost certainly would have occurred anyway in the absence of any tortious conduct or condition, is consistent with and indeed motivated by the sentiment expressed in a statement by Judge Learned Hand that was quoted by the *Basko* court: “[T]he single tortfeasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong.”¹⁴³ On the other hand, rejection of the no-worse-off limitation, by holding the defendant liable even when he is able to unravel the casuistries by proving that the plaintiff’s injury almost certainly would have occurred in the absence of any tortious conduct by him or anyone else, oddly results in the plaintiff’s being benefited, rather than being made worse off, by the defendant’s tortious conduct, as Peaslee long ago noted.¹⁴⁴

142. *Id.* at 419, 422. At the end of its opinion, the court noted that the defendant had argued, with supporting evidence, that the plaintiff’s preexisting lupus erythematosus “was capable of producing blindness ‘with or without any drugs,’” but that the supporting evidence involved a type of lupus different than the plaintiff’s. *Id.* at 430 n.17. In any event, the no-worse-off limitation would not come into play unless the defendant proved that the plaintiff’s blindness almost certainly would have occurred without any drugs, due to the preexisting lupus.

143. *Id.* at 429 (quoting *Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co.*, 98 F.2d 694, 697 (2d Cir. 1938)).

144. The *Basko* court noted Peaslee’s often-cited argument in favor of the no-worse-off limitation, which unfortunately is seriously weakened by his erroneous and implausible treatment of the issue as one of actual causation rather than the extent of legal responsibility for tortiously caused harm:

[W]here one of the causes is innocent and the other culpable in origin, as of the two fires uniting before reaching and burning the plaintiff’s house, must the negligent actor pay the whole loss, or is he responsible for none of it? On the one hand is sufficient wrongful causation of a physical result, and on the other, inevitable loss not increased by the defendant’s wrong. Recovery would make the plaintiff better off than he would have been if the defendant had done no wrong. So long as the innocent cause is in actual, inescapable operation before the wrongful act becomes efficient, it is not apparent how the latter can be considered the cause of the loss. Causation is matter of fact, and that which is not in fact causal ought not to be deemed so in law.

Id. at 429 n.16 (quoting Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1130 (1934)) (alteration in original). The argument in favor of the no-worse-off limitation was made more cogently by Edgerton:

[The defendant’s] act stands in the same *logical* relation to the result, whether the other actor is a wrongdoer, an innocent person, or a thunderstorm. . . . But our sense of justice demands the imposition of liability when the harm would not have happened but for the wrongful action of human beings, while it does not make the same demand when the harm would have been produced by an innocent person, or a natural force, if there had been no wrongful human action.

In sum, none of the handful of opinions that are cited by Fischer and the reporters held the defendant liable despite the proven existence of an independently sufficient, nontortious condition that almost certainly would have caused the plaintiff's injury in the absence of any tortious conduct or condition. On the other hand, there are a great many cases that have applied the no-worse-off limitation by refusing to hold the defendant liable for harm that she tortiously caused when it is almost certain that the harm would have occurred anyway in the absence of any tortious conduct or condition. As we have seen, these cases include the multiple fires cases and the many overwhelming force cases involving passive conditions.¹⁴⁵ They also include, as Fischer acknowledges, the many preemptive causation cases (which Fischer erroneously describes as "successive cause," "duplicated harm" cases) in which the courts, for interactive justice reasons, limit the damages for which the defendant is legally responsible, despite his having tortiously caused the plaintiff's injury, because all or part of the injury would have occurred anyway as a result of a nontortious, preempted condition.¹⁴⁶ Indeed, Fischer's study of the preemptive causation cases caused him to completely reverse his position regarding the existence and desirability of the no-worse-off limitation, which he now strongly supports:

Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 346-47 (1924).

145. See *supra* notes 34, 71 and accompanying text.

146. See Fischer, *supra* note 30, at 1131-32, 1133-34 & nn.19 & 20, 1136, 1141-42, 1145, 1152-57, 1159-60, 1162; *supra* note 32; cf. RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 26 cmt. k ("[T]he [preempted condition] may be relevant to the measure of damages for which the [defendant] is liable, as courts may, when equitable and appropriate, adjust the damages recoverable to reflect that defendant has deprived plaintiff of less than a full measure of damages for the harm.") (citing RESTATEMENT (SECOND) OF TORTS § 924 cmt. e (1965)). Fischer claims that "virtually all tort cases involve duplicated harm of some kind" due to "successive causes." Fischer, *supra* note 30, at 1131. The harm is never duplicated. It occurs only once. In preemptive causation cases, the limitation of legal responsibility is not based on the existence of a second, "successive cause" that "duplicates" the harm, but rather, as Fischer understands despite his misleading terminology, on the existence of (1) a preexisting tortious or nontortious condition that has already caused a certain harm (such as disability, lowered life expectancy, or lesser earning capacity) prior to the defendant's tortious conduct, thus making the defendant's tortious conduct a cause only of any new, additional harm, or (2) a preexisting or subsequent independently sufficient, nontortious condition that almost certainly would have caused the same harm if its potential causal effect had not been preempted by the defendant's tortious conduct, but which did not cause any harm because its potential causal effect was preempted. See DOBBS, *supra* note 5, § 177, at 433-34; Wright, *supra* note 29, at 1796-1801 & n.260. In addition to disagreeing with Fischer's misleading terminology, I disagree with some of his interactive justice analyses and almost all of his efficiency analyses. See Wright, *supra* note 29, at 1798-1801; sources cited *supra* note 9.

In [duplicative causation] cases, in which one of the forces was innocent, courts are split on the question of whether the [defendant] should be liable. . . . The corrective justice argument for imposing liability is . . . quite weak because liability places the plaintiff in a better position than she would have occupied if the tort had not occurred. . . .

In [preemptive causation] cases, courts hold at least one tortfeasor liable for [overdetermined] harm when all [the] forces are tortious. The unfairness of denying recovery to an innocent plaintiff by allowing each wrongdoer to assert the wrong of the other is manifest. Imposing liability places the plaintiff in the position she would have occupied if no tort had occurred. When one force is innocent, however, the usual damage rule applies and the plaintiff bears the burden of the duplicated losses. This is fair because the tort leaves the plaintiff no worse off than if the tort had not occurred. . . .

The near universality of the principle that applies in [preemptive causation] cases involving an innocent force, and the pervasiveness of such cases, suggests that fairness considerations do not warrant liability in [duplicative causation] cases involving an innocent force. . . . Tortfeasors should be liable only if all duplicating forces are tortious. When one of the forces is innocent in the [duplicative causation] cases, the plaintiff has no better fairness argument for suspending the normal rules of causation [responsibility] than do plaintiffs in the [preemptive causation] cases. From a policy perspective, the [preemptive causation] scenario and the [duplicative causation] scenario are indistinguishable.¹⁴⁷

As we discussed above, the courts are not even split on the duplicative causation cases. The merged fires cases and similar merged floods cases, the overwhelming force cases, and the cases that Fischer and the reporters cite as having rejected the no-worse-off limitation are all consistent with the limitation.¹⁴⁸

Perhaps the best-known preemptive causation case is *Dillon v. Twin State Gas & Electric Co.*,¹⁴⁹ which is the basis of one of the questions posed for this conference.¹⁵⁰ In *Dillon*, the decedent child lost his balance while playing with friends on the superstructure of a bridge, grabbed the defendant's negligently placed and uninsulated electric wire in an attempt to avoid falling, but was electrocuted by the current in the

147. Fischer, *supra* note 30, at 1164–65.

148. See *supra* notes 34, 71; *supra* text accompanying notes 26–49, 92–144; see also *Pluchak v. Crawford*, 100 N.W. 765, 766–67 (Mich. 1904) (finding no liability if the flooding of the mill caused by the defendant's dams would have occurred anyway due to natural springs); *Dep't of Env'tl. Prot. v. Jersey Cent. Power & Light Co.*, 351 A.2d 337, 340–42 (N.J. 1976) (finding no liability for fish killed due to a drop in the temperature of water discharged from a nuclear power plant since the fish would have been killed anyway by river water of the same temperature); *Geuder, Paeschke & Frey Co. v. City of Milwaukee*, 133 N.W. 835, 840 (Wis. 1911) (finding no liability for a basement flooded by the bursting of the defendant's sewer if the flooding would have occurred even if the sewer had not burst due to flood waters from an extraordinary storm).

149. 163 A. 111 (N.H. 1932).

150. See *supra* text accompanying note 1.

wire and thrown back onto the superstructure of the bridge.¹⁵¹ The court correctly observed that, although the child may well have fallen to his death or serious injury if he had not been electrocuted by the current in the wire, his death clearly resulted from the contact with the defendant's negligently placed or uninsulated wires, which preempted the possible occurrence of his falling to his death or serious injury. However, the court stated that if it were found that, in the absence of the defendant's negligence, the child would have fallen to his death, the defendant would not be liable for his death. Similarly, if the child would have fallen to his serious injury, the defendant would only be liable for the value of his life in that seriously injured condition.¹⁵² These results follow from the no-worse-off limitation, since the child's own negligence (being on the superstructure and losing his balance) is a nontortious condition. You cannot sue yourself.

In other cases, the plaintiff suffers successive injuries or disabilities, the second of which would have caused a specific harm if that harm had not already been caused by the first, which was tortiously caused by the defendant. If the second injury or disability is due to a nontortious condition, the defendant will be relieved of liability for any harm that would have been caused anyway by the second injury or disability.¹⁵³ But if the second injury or disability was tortiously caused, the defendant will not be relieved of liability.¹⁵⁴ The difference in result can only be explained by the no-worse-off limitation on the extent of responsibility.

However, the defendant should not be relieved of liability if the specific harm would not have occurred anyway, even if the tortious conduct that caused that harm also provided some (allegedly offsetting) benefit to the plaintiff. This is the sort of situation encompassed by the other two questions that were posed for this conference, which I quoted at the beginning of this article:

Consider the plaintiff whose leg the defendant tortiously broke—thus preventing him from getting on the plane that crashed. . . . Consider the plaintiff whose loss of legs due to defendant's tortious conduct caused her to give up her career as a professional athlete—with the result that she is now

151. 163 A. at 111–12, 115.

152. *Id.* at 114–15.

153. *E.g.*, *Jobling v. Associated Dairies Ltd.*, 1982 A.C. 794, 820–21 (H.L. 1981) (holding the defendant not liable for tortiously caused disability beyond the time when such disability would have occurred anyway due to a nontortious injury or illness).

154. *E.g.*, *Baker v. Willoughby*, 1970 A.C. 467, 494 (H.L. 1969) (holding the defendant liable for the plaintiff's permanent disability caused by the defendant's tortiously injuring the plaintiff's leg, despite subsequent amputation of the leg necessitated by a thief's subsequent shooting of the same leg).

much happier and has no regrets about losing her former career.¹⁵⁵

Although the plaintiff may have benefited from the defendant's tortious conduct, she nevertheless still has suffered a tortiously inflicted harm to her person, with consequent disability, medical costs, physical pain, and perhaps mental suffering, and she is entitled to be compensated for that harm. As a matter of interactive justice, one who tortiously causes such harm is responsible for it. On the other hand, one who accidentally or even intentionally confers an unsolicited benefit on another, especially when the other has no opportunity to reject the benefit, generally has no interactive justice claim to be paid for having conferred the benefit. It would be strange if a tortfeasor would have such an interactive justice claim, while a person who simply conferred a benefit without also causing harm would not.¹⁵⁶ Moreover, one generally is not allowed to inflict harms on others for their supposed benefit without their consent.¹⁵⁷

IV. THE SECOND LIMITATION ON THE EXTENT OF LEGAL RESPONSIBILITY: THE SUPERSEDING CAUSE LIMITATION

Under the principle of interactive justice, one's legal responsibility to another is based on one's having unjustly interfered with the other's external freedom, by causing (or being imminently about to cause) harm to the other's person or property as a result of conduct that is inconsistent with others' right to equal freedom. A minimum condition for conduct to be inconsistent with others' right to equal freedom is that the conduct must involve a foreseeable risk of harming another's person or property.¹⁵⁸ Consistently with this minimum condition, legal responsibility properly extends outward along the chain or net of causation only insofar as a sufficient relationship is maintained with the foreseeable risks that made the conduct inconsistent with others' right to equal freedom. The second and third limitations on the extent of legal responsibility for tortiously caused harm encompass two distinct types of situations in which this sufficient relationship does not exist.

155. *Supra* text accompanying note 1.

156. See DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.6, at 182, § 4.9, at 298–99 (1973); Fischer, *supra* note 30, at 1160–62.

157. See DOBBS, *supra* note 5, § 29, at 54–55, § 50, at 95–96.

158. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 76–78, 116–18 (Mark DeWolfe Howe ed., The Belknap Press of Harvard Univ. Press 1963) (1881).

The second limitation on the extent of legal responsibility for tortiously caused harm is the existence of a superseding cause. The existence of this second limitation is generally explicitly acknowledged,¹⁵⁹ even by those, including the drafters of the various editions of the *Restatement*, who would like to be rid of it.¹⁶⁰ Its exposition occupies many sections in the first and second *Restatements*, which, however, are sometimes confusing and even contradictory.¹⁶¹ In this Part, I present a concise synthesis of the *Restatement's* provisions that is consistent with the results in the cases.

A superseding cause is an actual cause of the plaintiff's injury that (1) intervened between the defendant's tortious conduct and the plaintiff's injury, (2) was a necessary (but-for) cause of the plaintiff's injury, and (3) was highly unexpected. The second and third factors are the critical ones. The defendant should not be liable, even though her tortious conduct contributed to the plaintiff's injury, if the injury occurred only because of the intervention of some highly unexpected ("extraordinary" or "highly extraordinary") condition that disrupted and radically shifted the flow of events. On the other hand, there would be little reason (at least as a matter of justice) to absolve the defendant of liability because of the existence of an intervening cause, no matter how unexpected the intervention was, if the injury would have occurred as a result of the defendant's tortious conduct regardless of the intervention.

It is usually stated that, to be an intervening cause, the conduct or event at issue must have *temporally* intervened between the occurrence of the defendant's tortious conduct and the plaintiff's injury. For example, *Restatement (Second)* section 441(1) states: "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."¹⁶² All preexisting conditions, no matter how unknown and unforeseeable at the time of the defendant's tortious conduct, are treated as part of the "set stage" upon which the defendant's tortious conduct plays itself out.¹⁶³ However, the *Restatement* adds an enigmatic qualification that seems to gut the temporal intervention element:

159. See, e.g., RESTATEMENT (SECOND) OF TORTS § 440 (1965) ("A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.").

160. See *infra* notes 272–73 and accompanying text.

161. See RESTATEMENT OF TORTS §§ 440–53 (1934); RESTATEMENT (SECOND) OF TORTS §§ 440–53 (1965).

162. RESTATEMENT (SECOND) OF TORTS § 441(1) (1965).

163. See FLEMING, *supra* note 21, at 246; HART & HONORÉ, *supra* note 50, at 172; KEETON ET AL., *supra* note 34, § 44, at 301–02.

It is not necessary that an intervening force have been set in motion subsequent to the time when the actor's negligent conduct was committed. A force set in motion at an earlier time is an intervening force if it first operates after the actor has lost control of the situation and the actor neither knew nor should have known of its existence at the time of his negligent conduct.¹⁶⁴

As I previously noted, the other two requirements for a superseding cause—that it must have been a highly unexpected, but-for cause of the injury—are the crucial ones. The first (highly unexpected) requirement is explicit in many of the *Restatement's* provisions, while the second (but for) requirement is implicit. *Restatement (Second)* section 442 states:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.¹⁶⁵

The but-for requirement is implicit in subsection (a) of section 442, which states that an important consideration in determining whether an intervening cause is a superseding cause is whether it “brings about harm different in kind from that which would otherwise have resulted from the actor's negligence.” The requirement is more apparent, although still not crisply stated, in other sections and comments. For example, comment b to section 441(1) states:

The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation

164. RESTATEMENT (SECOND) OF TORTS § 441 cmt. a (1965).

165. *Id.* § 442.

injurious.¹⁶⁶

Subsection (b) of section 442 explicitly states that, in order for an intervening cause to be a superseding cause, it is important that the occurrence of the intervening cause, or the consequences thereof, “be extraordinary rather than normal.”¹⁶⁷ The analysis focuses on the occurrence of the intervening cause, rather than the final result—the plaintiff’s injury. Moreover, the focus is on the occurrence of an intervening cause of the same general class or type, rather than the particular details of the intervening cause as it actually occurred.¹⁶⁸ Although courts often describe the issue as being whether the occurrence of the intervening cause was a “natural,” “normal,” “ordinary,” or “probable” consequence of the defendant’s tortious conduct, it is clear from the cases that these words should not be interpreted literally. As is

166. *Id.* § 441(1) cmt. b. Similarly, section 433(b) states that one of the important considerations in determining whether an actor’s conduct is a substantial factor in bringing about some harm is “whether the actor’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible.” *Id.* § 433(b). Comment e to section 433(b) states:

As to the effect of the fact that the actor’s negligent conduct has merely created a situation which is harmless unless acted upon by other forces for which the actor is not responsible, but which has been made injurious by the subsequent active operation of an intervening force, see §§ 440–461.

Id. § 433(b) cmt. e. Sections 440 to 453 encompass the sections on superceding causes. The but-for requirement, although usually implicit rather than explicit in the cases, is sometimes explicitly stated. *See, e.g.,* *Anderson v. Minneapolis, St. P. & S. Ste. M. Ry.*, 179 N.W. 45, 48 (Minn. 1920).

[A] wrongdoer may escape liability by showing that a new cause of plaintiff’s injury intervened between the wrongful act and the final injurious result thereof, provided such intervening cause was not under the wrongdoer’s control, could not by the exercise of reasonable diligence be anticipated as likely to occur, and except for which the injury would not have been done to plaintiff.

Id.

167. *See supra* text accompanying note 165.

168. In *Mauney v. Gulf Refining Co.*, 9 So. 2d 780 (Miss. 1942), the court focused on absurdly minute details of an intervening cause. While delivering gasoline to a filling station, the defendant negligently started a fire that rapidly spread to the gasoline tank truck and the filling station itself. People nearby ran away, shouting that the tank truck and the filling station were about to blow up. The plaintiff, who was in her husband’s café about fifty feet away across the street, turned and rushed to her two-year-old son to pick him up to flee the expected explosion, but “fell over a misplaced chair” and subsequently suffered a miscarriage. *Id.* at 780. The Mississippi Supreme Court affirmed a directed verdict for the defendant:

If appellant didn’t see a chair in her way in her own place of business, it would impose an inadmissible burden upon appellees to say that they should have foreseen from across the street and through the walls of a building on another corner what appellant didn’t see right at her feet and in an immediate situation entirely familiar to her.

Id. at 782.

stated in comment b to section 443 of the *Restatement*, “The word ‘normal’ is not used in this Section in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary.”¹⁶⁹ Generally, a consequence is considered “natural,” “normal,” “ordinary,” and “probable” unless it was highly unexpected or extraordinary.

Subsection (c) of section 442 lists as an important consideration whether “the intervening force is operating independently of any situation created by the actor’s negligence, or, on the other hand, is or is not a normal result of such a situation.”¹⁷⁰ Comment c to section 441(1) distinguishes an “independent” intervening cause from a “dependent” one as follows:

A dependent, intervening force is one which operates in response to or is a reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct. An independent force is one the operation of which is not stimulated by a situation created by the actor’s conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act.¹⁷¹

However, apart from one oblique reference, the *Restatement* does not indicate why it should matter whether the occurrence of the intervening cause is causally dependent on or independent of the situation created by the defendant’s tortious conduct or, if it is causally dependent, why it should matter if it is or is not a normal result of such a situation. Fortunately, the single reference, which occurs near the end of the *Restatement*’s most extensive discussion of its hindsight, step-by-step

169. RESTATEMENT (SECOND) OF TORTS § 443 cmt. b (1965); *see, e.g.*, *Britton v. Wooten*, 817 S.W.2d 443, 451 (Ky. 1991) (stating that an intervening cause is not a superseding cause unless it is “highly extraordinary”).

170. *See supra* text accompanying note 165.

171. RESTATEMENT (SECOND) OF TORTS § 441(1) cmt. c (1965). Usually only human or animal conduct (whether dependent or independent) or independent natural events are treated as intervening causes. If there is no such intervening cause, but rather only an unbroken physical chain of events set off by the defendant’s tortious conduct, the harm is said to be a “direct consequence” of the defendant’s tortious conduct and, in the absence of some other limitation on the extent of legal responsibility, the defendant is liable. *See, e.g.*, *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560, 570–72 (C.A.) (holding that the destruction of a ship by fire, which occurred when a dropped plank unforeseeably caused a spark that ignited petrol vapors and caused an explosion, was a direct consequence of the negligent dropping of the plank, for which the defendant was liable); *cf.* *Christianson v. Chi., St. P., M. & O. Ry.*, 69 N.W. 640, 641 (Minn. 1896) (“Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate.”).

approach to analyzing unexpectedness, in comment d to section 435, suggests an answer:

The court's judgment as to whether the harm is a highly extraordinary result is made after the event with the full knowledge of all that has happened. This includes those surroundings of which at the time the actor knew nothing but which the course of events discloses to the court. . . .

In addition, the court knows not only the stage setting which existed at the time of the defendant's negligence and which may or may not have persisted throughout, but it also follows the effects of the actor's negligence as it passes from phase to phase until it results in harm to the plaintiff. In advance, the actor may not have any reason to expect that any outside force would subsequently operate and change the whole course of events from that which it would have taken but for its intervention. None the less, the court, knowing that such a force has intervened, may see nothing extraordinary either in its intervention or in the effect which it has upon the further development of the injurious results of the defendant's conduct. This is particularly important where the intervening force is supplied by the act of a human being or animal, which is itself a reaction to the stimulus of a situation for which the actor is responsible.¹⁷²

Under this hindsight, step-by-step approach to assessing whether an intervening cause was "highly extraordinary," the unfolding of the sequence of events between the defendant's tortious conduct and the plaintiff's injury is retraced, step-by-step, asking at each step whether the next step is highly unexpected given all that has occurred in the prior steps. Some scholars have criticized the *Restatement* for adopting the hindsight, step-by-step approach to analyzing unexpectedness, rather than an approach that considers the foreseeability of the entire chain of causation viewed as a whole.¹⁷³ In the last sentence of the quoted extract from section 435, comment d, the *Restatement* provides a reply to these critics. It states that the hindsight, step-by-step approach "is particularly important where the intervening force is supplied by the act of a human being or animal, which is itself a reaction to the stimulus of a situation for which the actor is responsible"—that is, when the intervening cause was dependent on—a result of or reaction to—the risky situation created by the defendant rather than a causally independent event.¹⁷⁴

The *Restatement's* position reflects a judgment about appropriate legal responsibility that is often apparent in the cases. There is less reason to let a defendant who tortiously caused the plaintiff's injury escape liability due to an intervening cause if the intervening cause was a "dependent" reaction or response to the risky situation created by the defendant rather than something that occurred independently of the risky situation created by the defendant. Using the hindsight, step-by-step

172. RESTATEMENT (SECOND) OF TORTS § 435 cmt. d (1965).

173. See, e.g., DOBBS, *supra* note 5, § 183, at 452 n.2; Stapleton, *supra* note 8, at 1003 n.159.

174. RESTATEMENT (SECOND) OF TORTS § 435 cmt. d (1965).

approach rather than the foresight approach in such situations makes it more difficult for the defendant to avoid liability due to an intervening cause, since the intervening cause has to be an extraordinary, dramatic shift between one step and the next in the course of events, rather than a sequence of less dramatic shifts that seems extraordinary only when considering the sequence as a whole.¹⁷⁵

However, this rationale does not apply to all dependent intervening causes, but only to those that were *ameliorative* in nature: attempts to avoid or mitigate the risky situation created by the defendant. It does not apply to wrongful attempts to exploit the situation created by the defendant, thereby making the situation even worse than it was before. (This partially explains the relevance of subsections (e) and (f) in section 442 of the *Restatement*, which refer to the wrongfulness of the intervening cause.) Nor does the rationale apply, at least as strongly, to dependent intervening causes that were neutral—for example, the conduct of a bystander merely observing the risky situation. So the relevant distinction is not simply between dependent and independent intervening causes, but rather between ameliorative intervening causes and nonameliorative (exploitative, neutral, or independent) intervening causes.

Although use of the more precise terminology (“ameliorative” or “nonameliorative”) would be preferable, the terms “dependent” and “independent” are usually used to distinguish between ameliorative and nonameliorative intervening causes in both the *Restatement* and in practice. For example, after describing the difference between dependent and independent intervening causes, the *Restatement* provides the following illustrations:

175. This rationale is reflected in a comment to section 447(c) of the *Restatement*. Section 447(c) states that negligent intervening conduct will not be treated as a superseding cause if “the intervening act is a normal consequence of a situation created by the actor’s conduct and the manner in which it is done is not extraordinarily negligent.” *Id.* § 447(c). The comment explains:

The words “extraordinarily negligent” denote the fact that men of ordinary experience and reasonable judgment, *looking at the matter after the event* and taking into account the prevalence of that “occasional negligence, which is one of the incidents of human life,” would not regard it as extraordinary that the third person’s intervening act should have been done in the negligent manner in which it was done. *Since the third person’s action is a product of the actor’s negligent conduct, there is good reason for holding him responsible for its effects, even though it be done in a negligent manner, unless the nature or extent of the negligence is altogether unusual.*

Id. § 447 cmt. e (emphasis added).

[I]f A carelessly exposes B to danger, the act of C in going to B's rescue, being C's reaction to B's peril, is a dependent intervening force. So too, if A carelessly allows his horse to run away, the act of B, who in attempting to check the speed of the horse diverts its course, is a dependent act, being done to check the harmful consequences of the defendant's negligence. On the other hand, if A so loads his truck that any slight jolt may cause a part of its heavy contents to fall and, while B is trying to pass the truck, his car skids and sideswipes the truck so slightly that, were the truck properly packed, no harm would be done by it, but because of the careless packing of the truck, it causes a heavy piece of machinery to fall on a pedestrian, the act of B is an independent intervening force.¹⁷⁶

Similarly, although the *Restatement* often refers to the hindsight approach to analyzing unexpectedness, the references generally seem to assume that the intervening cause is an ameliorative intervening cause.¹⁷⁷ In the section that refers to intervening causes that are criminally or tortiously seeking to exploit the risky situation created by the defendant, the *Restatement* uses a foresight test, rather than the hindsight test, looking forward from the time of the actor's negligent conduct.¹⁷⁸

The courts, unlike the *Restatement*, often use foresight language when discussing intervening causes. However, when the intervening cause is part of an ameliorative response to the risky situation created by the defendant's tortious conduct, the foresight language often overlays an implicit hindsight, step-by-step analysis.¹⁷⁹ In some cases, the hindsight,

176. *Id.* § 441(1) cmt. c.

177. *See, e.g., id.* § 435 cmt. d, § 435(2), § 443 & cmts. a–c, § 445 & cmt. b, § 447 & cmts. c, e.

178. Section 448 states:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. § 448. A caveat expresses no opinion on whether the vantage point for looking forward should be moved up to the time when the negligence creates the situation that provides the opportunity for the exploitation. *Id.*

179. *See, e.g., In re Guardian Cas. Co.*, 2 N.Y.S.2d 232 (App. Div.), *aff'd*, 16 N.E.2d 397 (N.Y. 1938) (discussed *infra* note 252 and text accompanying notes 248–54). John Fleming discusses two Australian cases that implicitly used the hindsight, step-by-step analysis while supposedly applying a foreseeable consequences test:

[A] worker operating a winch was negligently hit by a falling object. Seeing him stagger back, a fellow employee sought to turn off the winch but in doing so let go of a rope which held a load under tension, with the result that the rope pulled away and caused him to lose a leg. It was held that a jury could conclude that this was “in a general sense a happening of a kind that could be foreseen as possibly occurring if a worker was suddenly disturbed by the fall of an object”. [Quoting *Castellan v. Electrical Power* (No. 2), 69 N.S.W. St. R. 159, 170 (C.A. 1967).] But by focusing (with hindsight) on each link in a

step-by-step analysis is explicit. A well-known example is *Lynch v. Fisher*,¹⁸⁰ in which the defendants' employee negligently parked a truck on a roadway at night without warning lights or flares, blocking the right-hand lane. A car driven by Mr. Gunter crashed into the truck, was badly damaged, and caught fire with Mr. and Mrs. Gunter trapped inside. The plaintiff, a bystander, ran to the scene of the crash and, with the help of another bystander, extricated the Gunters. While attempting to pull a floor mat out of the car to use as a pillow for Mrs. Gunter, who was fatally injured, he found a pistol on the floor of the car and handed it to Mr. Gunter, "who, being delirious and temporarily mentally deranged by reason of the shock of the accident, fired the pistol at plaintiff" and seriously wounded him.¹⁸¹ The court, while acknowledging that "no Court could reasonably hold that the driver of a vehicle, no matter how gross his negligence, could have contemplated the shooting of a third party [especially of a rescuer by the rescuee!] as a normal and natural result of such negligence,"¹⁸² nevertheless held that there was no superseding cause:

Any attempt to determine at what point, with relation to the actual injury to plaintiff, the negligence of the original actor, namely, the driver of the truck, ceased and a new and independent tortious act intervened and superseded the original negligence, conclusively impresses us with the impossibility of such a severance of causes. The chain is complete and whole, link by link, and though tested with the utmost care no break is revealed in the succession of circumstances.

The consecutive order of the related circumstances and events may be briefly outlined:

- (1). Negligence of the truck driver in parking his truck on the highway, resulting in
- (2). Collision, superinduced by the concurrent negligence of the defendant Gunter, resulting in

chain of events one after another, it is easy to fall into the error of concluding that, because each link made the next foreseeable, the last was therefore also the foreseeable consequence of the first. This effect is well illustrated by a case which argued that entrusting to an inexperienced the job of repairing a wheel bearing made it foreseeable that the wheel might come off, that the axle bouncing on the road would strike sparks, that the sparks on a hot Australian summer day would ignite the grass verge and eventually burn down a building 12 kilometres away. [Citing *Haileybury College v. Emanuelli*, [1983] V.R. 323.]

To credit the defendant with such foresight overstretched that notion unduly.

FLEMING, *supra* note 21, at 242. Note that the *Haileybury College* case was a "direct consequence" case, since there was no intervening cause but only a (bizarre) sequence of natural physical events. See *supra* note 171.

180. 34 So. 2d 513 (La. Ct. App. 1947).

181. *Id.* at 515.

182. *Id.* at 516.

- (3). (a). attempted rescue by the plaintiff.
 - (b). Temporary mental derangement of the defendant Gunter as a result of the shock of the collision, resulting in
 - (4). The shooting of plaintiff and the injury sustained thereby.
- If there is any break in the continuity of the incidents flowing from the original act of negligence, we are unable to point out such a circumstance.¹⁸³

A case with similar facts and a similar result is *Brown v. Travelers Indemnity Co.*¹⁸⁴ In *Brown*, the plaintiff's husband negligently failed to keep a proper lookout while driving and struck a cow on the highway. The cow, severely injured and unconscious, lay upon the highway. The plaintiff, an uninjured passenger in the car, left the car to inform the farm family of the injury to the cow. When she returned to the road, the cow, which had regained consciousness but was still stunned, arose and attacked her or ran into her while trying to get away, causing her serious injury. The trial court held that the cow's running into or attacking the plaintiff "was a normal response of an injured animal" and thus not a superseding cause.¹⁸⁵ The Wisconsin Supreme Court affirmed:

It was not necessary to create liability on the part of [Mr.] Brown that he should have anticipated the precise course of events which followed as a result of his negligent act. Being negligent, if his negligent act caused the injuries complained of in a natural sequence, the mere fact that the injured cow unexpectedly regained consciousness and in an attempt to escape from the place injured the plaintiff is not a superseding cause of the harm which resulted from the collision. . . . [Similarly,] [t]he act of the plaintiff in leaving the car to notify the family of the accident was a natural and probable result of the collision which was due to [Mr.] Brown's negligence.¹⁸⁶

The *Restatement* uses the facts in *Brown* to illustrate the application of the hindsight, step-by-step approach to assessing unexpectedness:

When a negligently driven automobile hits a cow, it is scarcely to be regarded as usual, customary, or foreseeable in the ordinary sense in which that word is used in negligence cases, that the cow, after lying stunned in the highway for five minutes, will recover, take fright, and make a frantic effort to escape, and that in the course of that effort it will charge into a bystander, knock [her] down, and injure [her]. But in retrospect, after the event, this is not at all an abnormal consequence of the situation which the driver has created. It is to be classified as normal [not extraordinary], and it will not operate as a superseding cause which relieves the driver of liability.¹⁸⁷

183. *Id.* at 518.

184. 28 N.W.2d 306 (Wis. 1947).

185. *Id.* at 307.

186. *Id.* at 309. Language referring to "natural and probable" results or a "natural and continuous sequence" of events remains prominent in jury instructions and judicial opinions. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 reporters' note to cmt. b; DOBBS, *supra* note 5, § 183, at 453. As *Brown* illustrates, courts using this language often employ, explicitly or implicitly, the hindsight, step-by-step analysis of "natural" and "probable."

187. RESTATEMENT (SECOND) OF TORTS § 443 cmt. b (1965); see Petolicchio v.

A well-known case in which the intervening cause was not ameliorative is *Watson v. Kentucky & Indiana Bridge & Railroad Co.*¹⁸⁸ The defendant railroad's tank car full of gasoline derailed and spilled gasoline onto the surrounding streets and into the gutters, causing large quantities of gasoline vapors to accumulate in the air. Three hours later the vapors were lit by a match dropped or thrown by Duerr, which caused a violent explosion that threw the plaintiff from his bed, seriously injuring him and leaving his house in ruins. Duerr, who claimed not to have been aware of the gasoline spill or the gasoline vapors, said that he had simply dropped the match after using it to light a cigar. However, witnesses testified that Duerr, who had been fired that morning by the defendant, had had no cigar, but rather had struck a match on a fence and thrown it into plainly visible vapor arising from the gasoline, after having stated to his friends twenty minutes earlier, "Let us go and set the damn thing on fire."¹⁸⁹ The court held that if Duerr's action was inadvertent or negligent, it would not be a superseding cause, because it was quite foreseeable that the gasoline would be ignited by such inadvertent or negligent conduct; however, if Duerr's action was deliberate and malicious, it would be "so unexpected and extraordinary" that it would be a superseding cause that would relieve the defendant of liability for plaintiff's harm.¹⁹⁰

Ordinary negligence is usually foreseeable, or at least not highly unexpected, and thus is almost never treated as a superseding cause.¹⁹¹ As *Watson* intimates and the *Restatement* declares,¹⁹² even intervening criminal conduct, if foreseeable, will not be deemed a superseding cause.¹⁹³ This principle was affirmed by a recent Kentucky case, *Britton*

Santa Cruz County Fair & Rodeo Ass'n, 866 P.2d 1342, 1349 (Ariz. 1994) ("An event is superseding only if it 'was both unforeseeable and when with the benefit of 'hindsight' it may be described as abnormal or extraordinary.'") (citation omitted).

188. 126 S.W. 146 (Ky. 1910).

189. *Id.* at 147, 149.

190. *Id.* at 150–51. Even if Duerr's action was deliberate, malicious, and highly unforeseeable, it should not have been treated as a superseding cause unless it was also a necessary condition for the plaintiff's injuries. However, the court's discussion focused solely on the foreseeability of Duerr's intervention. It did not consider whether the possibility or probability that the gasoline would have been ignited anyway by someone or something else, if it had not been ignited by Duerr, should prevent Duerr's igniting the gasoline from being a superseding cause that would prevent the defendant from being held liable.

191. *See supra* note 175.

192. *See* RESTATEMENT (SECOND) OF TORTS §§ 448–49 (1965); *cf. id.* § 302B. Section 448 is quoted *supra* note 178.

193. *See, e.g.,* Brauer v. N.Y. Cent. & Hudson River R.R., 103 A. 166, 167 (N.J.

v. *Wooten*,¹⁹⁴ which is sometimes described as having overruled the *Watson* case, but which actually only rejected the supposed rule (which it seems to have attributed incorrectly to the *Watson* opinion) that intervening criminal conduct is always a superseding cause, even if the intervening criminal conduct was not highly unexpected.¹⁹⁵

The superseding cause limitation applies to all tort actions, including the intentional torts. However, it does not apply to the intentional tort of conversion or to the similar tortious exercise of dominion and control over persons or land. A defendant is treated as an insurer with regard to harm that occurs to intentionally misappropriated property, or persons, and thus is liable no matter how unexpected the intervening cause. Thus, a defendant who steals a car for a joyride is legally responsible for any damage that occurs to it (but not for damage to some other car with which it nonnegligently collides), no matter how unforeseeable the damage to the stolen car—for example, the car's malicious destruction or vandalism by some third party, or, as stated in a hypothetical by Clarence Morris, the car's being squashed by a runaway circus elephant.¹⁹⁶ Similarly, under the better view (not followed in all U.S. jurisdictions), a defendant is strictly liable for the escape or loss of control of an ultrahazardous entity or activity no matter how unexpected the cause of the escape or loss of control.¹⁹⁷ However, the defendant should be able to avoid liability if a highly extraordinary, but-for cause intervened *after* the escape or loss of control.

V. THE THIRD LIMITATION ON THE EXTENT OF LEGAL RESPONSIBILITY:

1918) (holding that a train's negligent collision with the plaintiff's wagon was a proximate cause of the foreseeable theft by third parties of goods spilled from the wagon as a result of the collision); *Hines v. Garrett*, 108 S.E. 690, 691, 695 (Va. 1921) (holding that a railroad's negligent carrying of the nineteen-year-old plaintiff almost a mile past her stop in an unsettled area at night was a proximate cause of her foreseeably being raped by a soldier and a hobo as she walked back to the stop); cf. *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 948, 952 (Cal. 1983) (finding that the negligent placement of a telephone booth in a parking lot fifteen feet from a major thoroughfare, where it had previously been hit by a car backing up in the lot, coupled with negligent maintenance so that the door was difficult to open, was a proximate cause of the plaintiff's being injured when a car negligently or recklessly driven by a third party foreseeably careened out of control and struck the booth, which the plaintiff was unable to escape in time due to the jammed door).

194. 817 S.W.2d 443 (Ky. 1991).

195. See *id.* at 449.

196. CLARENCE MORRIS, MORRIS ON TORTS 178 (1953).

197. See, e.g., *Baker v. Snell*, [1908] 2 K.B. 825, 830–31 (C.A.); *Fletcher v. Rylands*, [1866] 1 L.R.-Ex. 265, 279–80, *aff'd*, *Rylands v. Fletcher*, [1868] 3 L.R.-H.L. 330; RESTATEMENT (SECOND) OF TORTS §§ 510, 522 (1977). But see *id.* § 504(3)(c) & cmt. i (stating that strict liability for trespassing livestock does not extend to intrusions “brought about by the unforeseeable operation of a force of nature (commonly called an ‘act of God’) or by the unforeseeable action of another animal or by the unforeseeable intentional, reckless or negligent conduct of a third person”).

THE RISK PLAYOUT LIMITATION

The most popular limitation on the extent of legal responsibility among academics is one variously known as the “foreseeable consequences,” “risk,” “hazard,” or “harm within the risk” rule. This limitation prevents liability if the person injured, or the type of injury suffered, fails to match the general description of the persons and types of injury that were encompassed by the foreseeable risks that made the defendant’s conduct tortious. It thus is more descriptively accurate to call this limitation the “harm *matches* the risk” rule or, for brevity’s sake, the harm-risked rule, which are the terms that I will use.

The phrases “harm matches the risk” and “harm risked” also more clearly distinguish this limitation from a quite different limitation with which it is often confused, the “harm *results* from the risk” rule, which, for brevity’s sake, I will call the risk payout rule. The latter rule does not require any matching between the actual harm and the foreseeable harms or hazards that made the defendant’s conduct tortious. It rather requires that the actual harm result from the (actual or imminent) realization and playing out of one of the foreseeable risks that made the defendant’s conduct tortious, before the hazards created (or threatened) by the realization of that risk have dissipated. To put it another way, the harm-risked rule focuses on the description of the actual harm and seeks to match it with the foreseeable harms or hazards that made the defendant’s conduct tortious, with no (or little) interest in whether the foreseeable tortious risks were realized and remained in play until the occurrence of the actual harm, while the risk payout rule focuses on the foreseeable tortious risks and seeks to determine whether they were realized and remained in play until the occurrence of the actual harm, with no interest in the description of the actual harm.

The harm-risked rule has been strongly advocated by prominent academics, and through their efforts it has been adopted in each of the *Restatements*, initially in the first and second *Restatements* as a duty limitation and currently in the draft *Restatement (Third)* as a limitation on the extent of legal responsibility for tortiously caused harm. It has also been supported by some prominent courts. However, as is discussed below, its underlying rationale misconceives the grounds of legal responsibility and hence is fatally flawed. Not surprisingly, therefore, from the very beginning, the harm-risked rule has been riddled with exceptions that are inconsistent with its underlying rationale, and it has been rejected, ignored, or gutted by broad

interpretations even in those jurisdictions that are most closely identified with its creation.

On the other hand, while it has been given little explicit recognition, especially by academics, the risk playout rule is consistent with both the grounds of legal responsibility and almost all the decisions of the courts. Thus, it is the risk playout rule, rather than the harm-risked rule, that constitutes the third general limitation on the extent of legal responsibility for tortiously caused harm. As we will see, the extent of legal responsibility under the risk playout rule is both broader and narrower than the extent of legal responsibility under the harm-risked rule.

A. *The Troubled Birth of the Harm-Risk Rule*

Prior to the second quarter of the twentieth century, arguments for a harm-risked limitation on the extent of responsibility for tortiously caused harm had been rejected by many courts.¹⁹⁸ However, the limitation was given a major boost by two intimately related events in the late 1920s and early 1930s in the United States, when leading academics' advocacy of the harm-risked rule finally bore fruit with its adoption, as a duty limitation rather than a limitation on the extent of responsibility for tortiously caused harm, in the first *Restatement of the Law of Torts* and in Chief Judge Cardozo's opinion for a bare 4–3 majority of the New York Court of Appeals in the *Palsgraf* case.¹⁹⁹

The *Palsgraf* case had been tried and appealed through the various levels of the New York courts during the period that the relevant parts of the first *Restatement* were being drafted by the American Law Institute (ALI). The facts in *Palsgraf* apparently did not enter into the ALI discussions until immediately after *Palsgraf* was decided by the New York Court of Appeals. However, Cardozo was an active participant in

198. See, e.g., *Spade v. Lynn & Boston R.R.*, 52 N.E. 747, 748 (Mass. 1899) (Holmes, J.) ("The measure of the defendant's duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another."); *Christianson v. Chi., St. P., M. & O. Ry.*, 69 N.W. 640, 641 (Minn. 1896) ("Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."); *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560, 577 (C.A.) (Scrutton, L.J.) ("[T]he fact that the damage [an act] causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes . . ."); GREEN, *supra* note 34, at 177–85; Jeremiah Smith, *Legal Cause in Actions of Tort* (pts. 1–3), 25 HARV. L. REV. 103, 105, 114, 127–28, 223, 223–52, 303, 308–09, 321–27 (1911–1912).

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

the discussions of the relevant issues by the ALI reporter and his advisers, and his opinion in *Palsgraf* clearly was strongly influenced by the ALI discussions.²⁰⁰ The provisions eventually published in the first *Restatement* mirror in almost every detail Cardozo's discussion in *Palsgraf*, and a variation of the facts in *Palsgraf* constitutes the third illustration in the first *Restatement*'s basic section on the negligence cause of action.²⁰¹

Cardozo's opinion in *Palsgraf* described the facts as follows:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from

200. See 2 RESTATEMENT OF TORTS, NEGLIGENCE xii-xiii (1934) ("Benjamin N. Cardozo of the Council, formerly Chief Judge of the Court of Appeals of New York, prior to his appointment February, 1932, to the Supreme Court of the United States, attended a very considerable number of the [advisers'] conferences relating to the subject-matter of the present Volume . . ."); ANDREW L. KAUFMAN, CARDOZO 173-75, 287-95, 630 nn.48 & 49, 652-54 nn.7 & 14 (1998); Robert E. Keeton, A *Palsgraf* Anecdote, 56 TEX. L. REV. 513 (1978).

201. See RESTATEMENT OF TORTS § 281(b) & cmts. c, e, g & illus. 3 (1934). The actual facts in *Palsgraf* constitute the first illustration in the same section of the *Restatement (Second)*. See RESTATEMENT (SECOND) OF TORTS § 281 illus. 1 (1965). The first and second *Restatements* clearly agree with Cardozo's opinion in *Palsgraf*, including his treatment of the harm-risked rule as a duty limitation. See Wright, *supra* note 3, at 1092-96; *infra* note 255; *infra* text accompanying notes 270-73, 280, 331. Yet the initial reporter for the *Restatement (Third)*, Gary Schwartz, asserted that the prior *Restatements* endorse a broad "general duty" owed to the world at large, rather than the harm-risked limited duty rule. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 reporter's note to cmt. a (Discussion Draft, 1999); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 6 reporters' note to cmt. d (Tentative Draft No. 1, 2001). The current reporters leave Schwartz's assertion intact in the notes that he drafted and describe the prior *Restatements*' treatment of this issue as "coy" and "ambiguous" in their own notes, but they ultimately acknowledge the prior *Restatements*' adoption of the harm-risked limited duty rule. Compare RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 6 reporters' note to cmt. f, with *id.* § 29 reporters' note to cmt. d, and *id.* § 29 reporters' note to cmt. f (describing Schwartz's criticism of *Palsgraf*'s harm-risked limited-duty rule as an implicit criticism of the first and second *Restatements*), and RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 reporters' note to cmt. f. Heidi Hurd and Michael Moore misinterpret my prior criticism of Schwartz's assertions as being support for the harm-risked limited duty rule, despite my rejection of that rule in the pages that they cite as well as in previous articles. See Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 346 & n.52 (2002); Wright, *supra* note 29, at 1773-74; Wright, *Efficiency Theory*, *supra* note 9, at 574-75; Wright, *supra* note 3, at 1096.

behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.²⁰²

Focusing on the guards' helping the teetering man stay on the train as the supposed negligence, Cardozo expressed substantial doubt about whether there had been any negligence at all, toward anyone.²⁰³ Readers of his opinion are often misled into agreeing with his expressed doubt. They apparently overlook a significant fact that Cardozo included in his description of the facts, but subsequently ignored: The guard on the train held the door of the train car open to allow the men to attempt to jump on the moving train. That act would surely be negligent today, and it reasonably could have been (and apparently was) found negligent at the time. In any event, Cardozo assumed that the defendant's employees were negligent in helping the men to board the train and turned to the arguments that have made *Palsgraf* such a famous case.

Cardozo set forth a seemingly powerful rights-based argument on behalf of the harm-risked rule as a component of the negligent conduct (duty-breach) analysis:

Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to [the plaintiff], did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

. . . .
The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. . . .²⁰⁴

Negligence, like risk, is thus a term of relation. . . . If the harm was not willful, [the victim] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. . . . The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He

202. *Palsgraf*, 162 N.E. at 99.

203. *Id.* at 100–01; accord KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 126 (2d ed. 2002); DOBBS, *supra* note 5, § 184, at 455.

204. *Palsgraf*, 162 N.E. at 99–100 (citations omitted).

sues for breach of a duty owing to himself.²⁰⁵

Cardozo's argument draws on the moral theory underlying the principles of justice. Contrary to Heidi Hurd and Michael Moore's interpretation of his argument,²⁰⁶ he does not conceive of legal wrongs as the mere creation of (unreasonable) risks to others. Rather, those risks must result in a harmful impact on the legally protected interests of another. In the passage quoted immediately above, Cardozo emphasized that negligence does not become an actionable legal wrong "unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.'"²⁰⁷ Conversely, contrary to what seems to be Hurd and Moore's own argument,²⁰⁸ the mere causation of harm to another does not constitute a wrong, morally or legally. Causation of harm is not required for a moral wrong, which is a matter of internal virtue, and it is necessary but not sufficient for a legal wrong.²⁰⁹ In order for there to be a legal wrong, the harm must be caused by conduct that, at a minimum, created foreseeable risks to others. "The risk reasonably to be perceived defines the duty to be obeyed."²¹⁰ So far, so good. But then Cardozo adds the final, crucial point for the harm-risked theory: Conduct supposedly is wrongful toward, and thus harms caused by such conduct are wrongs to, only those specific persons who are foreseeably put at risk of such harms:

[A]n act innocent and harmless, at least to outward seeming, with reference to [the plaintiff], did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

. . . .
. . . [The victim] must show that the act as to him had possibilities of danger

205. *Id.* at 101 (citation omitted).

206. *See* Hurd & Moore, *supra* note 201, at 348.

207. *Palsgraf*, 162 N.E. at 99 (citations omitted).

208. *See* Hurd & Moore, *supra* note 201, at 348–52. Hurd (and possibly Moore) claim that "the objects of our [categorical] moral duties are causings and not either intendings or riskings," because, for example, "[w]e can justify risking another's death . . . in a way that we cannot justify intentionally causing it." *Id.* at 349–50 (footnote omitted). Given the claim in the first quote, the word "intentionally" should not be in the second quote. In any event, there is no categorical moral obligation not to cause death, no matter how accidentally or unforeseeably. Conversely, intentionally causing a person's death can be and often is justified when necessary to defend oneself or another from a deadly attack by that person.

209. *See supra* text accompanying notes 10–11, 18, 23.

210. *See supra* text accompanying note 204.

so many and apparent as to entitle him to be protected against the doing of it²¹¹

Why is unreasonable risk-creating conduct wrongful only to those who are foreseeably put at risk, rather than being wrongful to all who suffer harm as a result of such conduct? Here we come to the crux of Cardozo's argument: "Affront to personality is still the keynote of the wrong."²¹² The defendant's conduct is wrongful only to those whom he disrespects. The only persons he disrespects are those whom he knows or should know will be exposed to (unreasonable) risk by his conduct. In this opinion, on this issue, Cardozo employs a moral blame conception of wrongful conduct and thus also (when harm to another results from such conduct) of a legal wrong. Moreover, since the defendant's conduct is morally wrongful only with respect to the specific foreseeable (unreasonable) risks, only harms to the interests that were foreseeably put at risk constitute wrongs:

In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order [as those that were foreseeably put at risk]. . . . If there was a wrong to [the person carrying the package] . . . it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else.²¹³

211. See *supra* text accompanying notes 204–05.

212. See *supra* text accompanying note 205. One of the principal defenders of the harm-risk rule, former professor and now Judge Robert Keeton, agrees that "the policy justification for the Risk Rule . . . is essentially one of blameworthiness, resting distinctly on moral judgment." ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 23 (1963). He quotes approvingly from an opinion by Judge Learned Hand:

But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded.

Id. at 22 (quoting *Sinram v. Pa. R.R.*, 61 F.2d 767, 770 (2d Cir. 1932)).

213. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928). Cardozo's opinion in *Palsgraf* is usually viewed as supporting both parts of the harm-risk rule—the foreseeable-person-injured requirement and the foreseeable type of injury requirement. However, he actually only adopted the foreseeable-person-injured requirement. As the quoted passage indicates, he also favored a foreseeable-interest-affected requirement, but he deferred a definite ruling on that issue since it was unnecessary to the decision of the case. See *id.* at 101. Although his arguments, which focus on limiting liability to the foreseeable risks and hazards, would seem to require that the actual harm match all the significant aspects of the foreseeable risks and hazards, including especially the type of harm or hazard, his opinion in *Palsgraf* focuses only on the persons and interests foreseeably put at risk, which are also the only two aspects of the foreseeable risks with which he was concerned during the relevant discussions of the advisers to the reporter for the first *Restatement*. See *infra* note 230.

Judge Andrews's dissent took a much broader view of the relevant rights and duties. Rather than viewing negligent conduct as a morally wrongful "affront to personality" that exists only for those whose interests the defendant knew or should have known would be exposed to unreasonable risk by her conduct, Judge Andrews viewed negligence as a legally wrongful failure to comply with the standards of reasonable care established to protect the interests of each person in society, which results in a legal wrong to anyone whose interests are harmed by such legally wrongful conduct:

[M]ay [the plaintiff] recover the damages she has suffered in an action brought against the [defendant]? The result we shall reach depends upon our theory as to the nature of negligence. . . .

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others

. . . .
. . . Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. . . . The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. . . .

Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure. . . .

. . . .
The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. . . .

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself. . . .

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the

latter may be said to be the proximate cause of the former.²¹⁴

Under Judge Andrews's conception of negligence, everyone has the right not to have her person or property injured as a result of conduct that should not have been engaged in because it created unreasonable foreseeable risks to others. It does not matter that the foreseeable risks that made the defendant's conduct negligent did not encompass the plaintiff's person or property. What matters is that the defendant's conduct was negligent, which means that it should not have occurred. If the defendant behaved negligently, he is legally at fault, and he therefore legally wrongs not only those whose persons or property that are foreseeably injured as a result of his negligent conduct, but all those whose persons or property are injured as a "proximate" result of the defendant's negligence.

Andrews expressed skepticism about the existence of any definite rules limiting the extent of legal responsibility for negligently caused harm.²¹⁵ However, in doing so, he employed an analogy that captures the spirit of the risk payout limitation:

Should analogy be thought helpful, . . . I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.²¹⁶

214. *Palsgraf*, 162 N.E. at 101, 102–03 (Andrews, J., dissenting). Note Andrews's reference to the tortious aspect causation requirement: "We are not liable if all this happened because of some reason other than the insecure foundation." *Id.* at 103. This requirement, which focuses on the actual causation issue, is distinct from, but often confused with, the harm-risked and risk payout rules, which focus on the extent of responsibility issue. See *infra* note 246; *infra* text accompanying notes 243–54.

215. Andrews stated: "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." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

216. *Id.* Compare the court's explanation of the "proximate cause" requirement in a recent Alaska case, which more closely captures the idea behind the risk payout rule, although "force" should be replaced by "hazard":

If the force [the defendant] set in motion, has become, so to speak, merged in the general forces that surround us, [or has] 'exhausted itself' like a spent cartridge, it can be followed no further. Any later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him.

Vincent v. Fairbanks Mem'l Hosp., 862 P.2d 847, 851 n.8 (Alaska 1993) (quoting Smith, *supra* note 198, at 112 (alterations in original) (citations omitted)). The quotation in *Vincent*, which focuses on the forces generated by the defendant's tortious conduct, tracks Joseph Beale's theory of proximate causation. See Joseph H. Beale, *The Proximate*

In the end, Andrews employed a superseding cause analysis, “trac[ing] the consequences” to see if there was any highly unexpected intervening cause, and finding a “natural and continuous sequence—direct connection,” with no volitional or causally independent intervening causes.²¹⁷ However, he finessed the problem by beginning his search for intervening causes after the explosion of the fireworks, rather than at the earlier time when the defendants’ employees negligently allowed (indeed, encouraged) the two running men to attempt to board the moving train.²¹⁸ The dissenting judges in the intermediate appellate court had argued that the fact that one of the men was carrying “explosives” was an intervening, independent, highly unusual occurrence, but the majority stated that it was “no answer or defense” that the defendant’s employees were not chargeable with knowledge that the package “contained an explosive.”²¹⁹ The majority did not elaborate, but presumably they either treated the man’s carrying the fireworks as part of the “set stage”—and thus as a “concurring cause” rather than an intervening cause—or reasonably believed that it was not highly unexpected for a person to be carrying “explosives” that actually were fireworks.

Which conception of negligence is better analytically, normatively, and descriptively—Cardozo’s or Andrews’s? From its inception, the harm-risked rule has suffered from serious conceptual difficulties. One

Consequences of an Act, 33 HARV. L. REV. 633, 651 (1920). Warren Seavey replaced Beale’s focus on forces with a focus on the risks or hazards that made the defendant’s conduct negligent to produce a “termination of risk” rule, which Seavey identified with the harm-risked rule. See KEETON, *supra* note 212, at 74 (citing Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 93 (1942)). However, as Robert Keeton has explained, Seavey’s termination-of-risk rule, which is very similar to the risk payout rule, is actually distinct from and inconsistent with the harm-risked rule:

[T]hough negligence is judged from the point of view of foresight at the time and place of the conduct under scrutiny, [under the termination-of-risk rule] it is appropriate to take another look, as of any point of time thereafter that may be suggested, to see whether the once unreasonably dangerous situation appears then to be reasonably safe. . . .

Use of such a new appraisal of risk appears to be inconsistent with the proposition that the test for fact of liability should also be the test for scope of liability. The concept of risk used in the test for fact of liability is one based on reasonable foresight from the time and place of the conduct under scrutiny, whereas the concept of termination of risk is based on a new appraisal as of a subsequent time.

KEETON, *supra* note 212, at 75; see *id.* at 73–78.

217. *Palsgraf*, 162 N.E. at 105.

218. See *id.*

219. *Palsgraf v. Long Island R.R.*, 225 N.Y.S. 412, 413–14, 414–15 (App. Div. 1927), *rev’d*, 162 N.E. 99.

of the most serious involves Cardozo's "affront to personality" argument. Cardozo argues that the plaintiff "must show that the act *as to him* had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong."²²⁰ Yet often, indeed usually, the foreseeable risk created by the defendant's conduct to any particular person (for example, another driver on the highway), considered all by itself, is insufficient to make that conduct unreasonable and hence negligent,²²¹ much less an affront to that person's personality. As the *Restatements* recognize, to limit negligence liability to situations in which such personal affront existed, because of sufficient subjectively (or even objectively) foreseeable risks to the particular plaintiff, would make negligence law a wholly inadequate means for securing persons' interests in their persons and property.²²² Therefore, the *Restatements* focus on risks to classes of persons rather than to the particular plaintiff.²²³ Yet, if a foreseeable plaintiff who is not himself subjected to sufficient foreseeable risk to constitute a personal affront (or an unreasonable foreseeable risk to his person or property considered in isolation) is allowed to point to foreseeable risks to others to make up an aggregate risk that is unreasonable and hence negligent, why can unforeseeable plaintiffs not do the same thing?

From a normative perspective, Cardozo's personal affront conception of negligence ignores the objective nature of justice, law, and legal wrongs. As I previously noted, conduct is legally wrongful, regardless of whether it is morally wrongful, if it fails to comply with an objectively specified standard of care that is consistent with and promotes everyone's equal external freedom. When such legally wrongful conduct causes a harmful interference with another's person or instrumental goods, there is a *prima facie* legal wrong.²²⁴ This is Andrews's conception

220. See *supra* text accompanying note 205 (emphasis added).

221. See Hurd & Moore, *supra* note 201, at 367-68.

222. See *supra* text accompanying notes 23-24.

223. See RESTATEMENT OF TORTS § 281 cmt. c (1934) ("Risk to class of which plaintiff is member."). Moreover, the *Restatement* adds:

There are situations in which the obvious probability of harm to one class of persons may be considered in determining whether an act is negligent to a person of a different class; although the risk of harm to persons of the latter class is so slight that the actor's conduct might otherwise not be negligent as to them (see § 294).

Id. § 281 cmt. d. Section 294 states: "In determining whether the conduct of the actor is negligent towards another, the fact that it involves an unreasonable risk of harm to a third person may in certain situations be considered." *Id.* § 294. The comment and illustration to section 294 involve injury to a third party rescuer. *Id.* § 294 cmt. a & illus. 1. The same provisions appear in the *Restatement (Second)*. See RESTATEMENT (SECOND) OF TORTS § 281 cmts. c, d, § 294 cmt. a & illus. 1 (1965).

224. See *supra* text accompanying notes 23-24.

of negligence, and, as the draft *Restatement (Third)* finally acknowledges,²²⁵ it is the correct conception.

The impoverished nature of the harm-risked rule's conception of rights is evidenced by the many departures from its basic rationale that have had to be made in its practical elaboration to make it seem minimally plausible, normatively or descriptively. Its basic rationale is often stated as it was posed by Warren Seavey, who was one of the foremost academic proponents of the rule and an adviser to the reporter for the first *Restatement*: "Prima facie at least, the reasons for creating liability should limit it."²²⁶ However, this sensible proposition, which I endorsed at the beginning of this Article, begs the crucial question: What are the reasons for creating liability in the first place? Is the underlying conception of rights the narrow one that underlies the harm-risked rule or a more robust one that provides greater security for individuals' persons and property, in furtherance of their equal freedom?

Under the harm-risked rule, individuals' persons and property are protected only to the extent that the actual harm suffered matches the foreseeable harm or hazard. A full commitment to this principle would require that the ex post actual harm match every significant aspect of the ex ante foreseeable harm that made the conduct tortious. This would include, at the very least, the person affected, the type of harm or hazard, the specific manner of occurrence, and the severity of the harm. Yet the harm-risked rule, from its initial adoption by Cardozo and the first *Restatement* to the present time, has only required a matching of the first two of these four aspects of the foreseeable risk, and there are difficulties even with respect to those two aspects.

The harm-risked rule requires that the plaintiff be someone whose legally protected interests were foreseeably put at risk by the defendant's tortious conduct and that the actual injury to those interests match the type of injury the foreseeability of which made the defendant's conduct

225. See RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 6 & cmt. f & reporters' note to cmt. f; *id.* § 7 & cmt. a & reporters' note to cmt. a; RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 & cmt. f & reporters' note to cmt. f; *supra* note 201.

226. Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 386 (1939); see, e.g., DOBBS, *supra* note 5, § 181, at 446; LAURENCE H. ELDREDGE, MODERN TORT PROBLEMS 18–22 (1941); KEETON, *supra* note 212, at 18–19. The advisers to the reporter for the first *Restatement* are listed in 2 RESTATEMENT OF TORTS, NEGLIGENCE xi–xiii (1934).

tortious.²²⁷ The first *Restatement* also adopted Cardozo's suggestion, which is consistent with the underlying rationale of the harm-risk rule, that the actual injury must match the foreseeable injury in terms of the type of interest affected—for example, one's personal property rather than one's real property or one's person.²²⁸

However, if the specific manner of occurrence of the actual injury—all the details, including twists and turns, of the causal sequence that led from the tortious aspect of the defendant's conduct to the plaintiff's injury—had to be foreseeable, few ex post harms would ever match any ex ante foreseeable risk.²²⁹ Thus, the proponents of the harm-risk rule, including Cardozo and the drafters of the first and second *Restatements*, explicitly omit the manner of occurrence from the list of aspects of the ex ante risk that must be matched by the actual injury. If the manner of occurrence is considered at all, it is scrutinized (in a different, nonmatching way) under the superseding cause limitation, which, however, most proponents of the harm-risk rule claim is superfluous.²³⁰

The distinction between the type of injury, which is encompassed by

227. See RESTATEMENT OF TORTS § 281(b) & cmts. c, e, § 430 & cmts. a–c (1934); RESTATEMENT (SECOND) OF TORTS § 281(b) & cmts. c, e, § 430 & cmts. a–c (1965); DOBBS, *supra* note 5, § 180, at 443–44, § 181, at 447, § 184, at 453–57; KEETON, *supra* note 212, at 3–4, 10, 21–22, 48; Seavey, *supra* note 226, at 381–82.

228. See RESTATEMENT OF TORTS § 281(b) & cmt. g (1934); *supra* note 213 and accompanying text. The illustration to section 281 comment g in the first *Restatement* is a variation on the facts in *Palsgraf*, in which the risk injury was to the boarding passenger's packages (which were “obviously fragile” and likely to be dropped) and the dropped package (which unbeknownst to the conductor contained fireworks) exploded and injured the boarding passenger's eyes. RESTATEMENT OF TORTS § 281 illus. 3 (1934). This focus on the particular interests foreseeably put at risk accounts for the wording of clause (b) of section 281 in the first *Restatement*, which states that an actor is liable for an invasion of an interest to another only if, inter alia, “(b) the conduct of the actor is negligent with respect to [the interest invaded] or any other similar interest of the other which is protected against unintentional invasion.” *Id.* § 281; see RESTATEMENT (SECOND) OF TORTS app. §§ 1–309, § 281 reporter's note at 307–08 (1966) (noting the *Restatement (Second)*'s abandonment of the first *Restatement*'s foreseeable-interest-affected requirement, which “was based primarily upon the . . . language of Cardozo, C.J., in *Palsgraf*” but was not supported by the cases).

229. This is demonstrated by *Mauney v. Gulf Refining Co.*, 9 So. 2d 780 (Miss. 1942), which is discussed *supra* note 168.

230. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928); RESTATEMENT OF TORTS § 435 & cmt. a (1934); RESTATEMENT (SECOND) OF TORTS § 281 cmt. f, § 435 & cmts. a, c, § 442B & cmts. a–c (1965); see DOBBS, *supra* note 5, § 184, at 454, § 189, at 466–67, 469; FLEMING, *supra* note 21, at 240–42; KEETON, *supra* note 212, at 10, 21, 49–51, 75–78, 133 n.64; *infra* note 273; *infra* text accompanying notes 272–81. Cardozo was particularly insistent, during the meetings of the advisers to the reporter for the first *Restatement*, that the manner of occurrence was irrelevant, no matter how extraordinary. Indeed, unlike the other advisers, he also thought that the type of injury or hazard should not matter, focusing instead on whether the actual harm was to a foreseeable person and to an interest of that person foreseeably put at risk. See KAUFMAN, *supra* note 200, at 289–93, 299–300; *supra* note 213.

the harm-risked rule, and the manner of its occurrence, which is not, is not obvious,²³¹ and inconsistent interpretations occur frequently in practice. The distinction is clear if the type of injury refers to the type of interest affected and not to the manner in which it is affected. This seems to have been Cardozo's conception of the harm-risked rule.²³² But this interpretation eliminates the core of the harm-risked rule and its underlying rationale, which supposedly focus on, and require a match of the injury with, the foreseeable *risk* or *hazard*. On the other hand, if the specification of the type of injury includes the details of the foreseeable risk or hazard, it will be specifying the manner of occurrence, which supposedly is not encompassed by the harm-risked rule (for good reason as elaborated in the prior paragraph). The uneasy solution to this quandary that is usually attempted is to include the general causal mechanism that ultimately produces the actual injury as part of the description of the type of injury—for example, “death by poisoning” or “destruction by fire”—and, as was stated above, to treat the specific causal chain between the tortious conduct and the actual injury as the manner of occurrence.²³³ But the line between the two is thin and easily manipulable.

The proponents of the harm-risked rule also do not require that the extent or severity of the actual injury must have been foreseeable.²³⁴ This is a necessary concession to the universally recognized “thin-skulled” or “eggshell” plaintiff rule, which states that the defendant must take the plaintiff and the plaintiff's property as the defendant finds them.²³⁵ However, excluding the severity of the injury from the harm-

231. See KEETON ET AL., *supra* note 34, § 43, at 283.

232. See KAUFMAN, *supra* note 200, at 290–93; *supra* notes 213, 230.

233. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmts. i, n; DOBBS, *supra* note 5, § 184, at 453–55, § 189, at 466–67; KEETON, *supra* note 212, at 10, 21, 49–51, 75–78, 133 n.64.

234. See RESTATEMENT OF TORTS § 435, § 461 & cmts. a, b (1934); RESTATEMENT (SECOND) OF TORTS § 435(1), § 461 & cmts. a, b (1965) (*but cf. id.* § 435(1) cmt. a, excluding consideration of the *kind* of harm rather than the *extent* of the harm); DOBBS, *supra* note 5, § 184, at 454, § 188, at 464–65; FLEMING, *supra* note 21, at 240–41; KEETON, *supra* note 212, at 66–67; Seavey, *supra* note 226, at 384–85. Although Cardozo did not explicitly mention the eggshell plaintiff rule in *Palsgraf*, he did not mention the severity or extent of the injury as part of what had to be foreseeable, and his discussions with the ALI advisers indicate that he thought that only the person injured and the interest affected need to have been foreseeable. See *supra* notes 213, 230.

235. See DOBBS, *supra* note 5, § 188, at 464–65; KEETON ET AL., *supra* note 34, § 43, at 291–92. Dobbs attempts to explain cases involving the unforeseeable spread of fires as unforeseeable extent of harm cases, even though the persons to whose property the fire unforeseeably spread would be unforeseeable plaintiffs and thus should be barred from recovery under the harm-risked rule. See DOBBS, *supra* note 5, § 188, at 465–66.

risk rule means that there can be a very significant disparity between the ex post injury and the ex ante risk—for example, the foreseeable injury from a kick or blow may have merely been a bump or bruise on the plaintiff's leg, while the actual injury may be loss of the leg or even death due to the plaintiff's eggshell condition.²³⁶ As Judge Friendly once noted, ignoring the severity of the injury runs counter to the basic rationale of the harm-risk rule limitation:

The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated.²³⁷

Cardozo's opinion in *Palsgraf* notes a number of other common exceptions to the harm-risk rule,²³⁸ including (i) liability for the unforeseeable consequences of certain "imminently dangerous" activities, such as shooting a gun, (ii) liability for the unforeseeable consequences of some or perhaps all intentional torts, especially intentional trespasses on the plaintiff's property or person,²³⁹ and (iii) liability under the doctrine of "transferred intent," according to which a defendant who acted with the wrongful intent to trespass on the person or property of A can be held liable for an unintentional and even unforeseeable trespass to the person or property of B that was caused directly and immediately by the defendant's wrongful intentional conduct.²⁴⁰

Yet another generally recognized exception to the harm-risk rule is the "rescue" doctrine, which was championed by Cardozo himself in a case decided a few years before *Palsgraf*. The intervention of a rescuer,

Similarly, some proponents of the harm-risk rule have suggested that the eggshell plaintiff rule explains the holding in the *Polemis* case. See, e.g., Seavey, *supra* note 226, at 385. However, Lord Bankes in *Polemis* rejected the defendant's attempt to distinguish between the type and extent of harm. *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560, 571–72 (C.A.).

236. See, e.g., *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891); cf. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995) (criticizing various justifications for liability in such situations).

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

238. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100–01 (N.Y. 1928); see KEETON, *supra* note 212, at 24 ("The Risk Rule is a generalized rule to which qualifications must be added to account for deviations from the underlying principle in a number of recurring types of situations.").

239. See RESTATEMENT (SECOND) OF TORTS § 162, § 435A & cmt. a, § 435B & cmt. a (1965); KEETON, *supra* note 212, at 100–03 (intentional torts, wanton misconduct, and gross negligence); KEETON ET AL., *supra* note 34, § 13, at 76–77, § 43, at 293.

240. See RESTATEMENT OF TORTS §§ 16, 20, 32 (1934); RESTATEMENT (SECOND) OF TORTS §§ 16, 20, 32 (1965); KEETON ET AL., *supra* note 34, § 8, at 37–39.

no matter how unforeseeable it may have been in the particular circumstances, is almost always treated as being sufficiently “foreseeable” to make the rescuer a foreseeable plaintiff under the harm-risked rule.²⁴¹ As Cardozo famously stated:

Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.²⁴²

Given the many exceptions and qualifications that even the proponents of the harm-risked rule admit are necessary to make it minimally plausible and practical, all of which fly in the face of its basic rationale, both the rule and its rationale appear fundamentally flawed. Yet the basic principle motivating the rule remains powerful: The initial grounds of liability should limit the extent of the liability. In tort law, the minimum requirement for holding someone liable for a harm is that the harm must have resulted from conduct that created or enhanced a foreseeable risk to others. Thus, liability should extend along the chain or net of causation only as long as the consequences bear a significant continuing relation with the foreseeable risks that made the defendant’s conduct tortious.

The harm-risked rule is a misconceived, deficient attempt to try to ensure that this relationship exists. It is both too stringent and too lenient. It is too stringent in requiring a match between the actual harm and the foreseeable harm. As was discussed immediately above,

241. See RESTATEMENT OF TORTS § 294 cmt. a & illus. 1 (1934); RESTATEMENT (SECOND) OF TORTS § 294 cmt. a & illus. 1 (1965); DOBBS, *supra* note 5, § 184, at 456; KEETON ET AL., *supra* note 34, § 43, at 288–89. Dobbs attempts to describe the rescue cases as being consistent with, rather than exceptions to, the harm-risked rule, but he seems to be invoking the risk payout rule rather than the harm-risked rule. See DOBBS, *supra* note 5, § 185, at 458–59 (“These cases do not seem necessarily counter to the foreseeability [harm-risked] rule. Injury to a rescuer from the forces set in motion by the defendant’s negligence seems to fall easily enough within the scope of the risks created by the defendant.”).

242. *Wagner v. Int’l Ry.*, 133 N.E. 437, 437–38 (N.Y. 1921) (citation omitted). Another exception, somewhat similar to the rescuer exception, is a defendant’s liability for expanded or enhanced injuries suffered by the injured person as a result of subsequent negligent handling or treatment by rescuers or medical personnel. See KEETON, *supra* note 212, at 68–71; *infra* notes 319, 349; *infra* text accompanying note 330.

significant aspects of the foreseeable harm—especially the manner of occurrence and the extent and severity of the injury—have to be excepted from the rule’s matching requirement to make the rule minimally plausible or practical, and it remains too stringent (with respect to both the person injured and the type of injury) even when these aspects are ignored. It is too lenient because the failure to include all of the significant aspects of the foreseeable harm undermines the rule’s coherence and credibility, as well as its ability to achieve its intended purpose. In particular, by focusing solely on whether the person injured and the type of injury match the same aspects of the foreseeable harm, while ignoring the manner of occurrence, the rule fails to ensure that liability extends along the chain or net of causation only as long as the consequences bear a significant continuing relation with the foreseeable risks that made the defendant’s conduct tortious. Yet, as the proponents of the harm-risked rule have clearly understood, requiring a match with the specific foreseeable manner of occurrence would be far too restrictive. The proponents of the harm-risked rule cannot avoid or overcome this dilemma, but can only attempt to paper over it with ad hoc inclusions of the particular manner of occurrence in some cases, while ignoring it in other cases, while also creating numerous exceptions to handle situations involving rescuers, subsequent negligent medical treatment, eggshell plaintiffs, transferred intent, and the intentional exercise of dominion over another’s person or property.

B. The Misunderstood Cousins of the Harm-Risk Rule: The Tortious Aspect Causation Requirement and the Risk Payout Limitation on the Extent of Legal Responsibility

The harm-risked rule draws unwarranted support from its frequent confusion with two different rules: the tortious aspect causation requirement and the risk payout limitation on the extent of legal responsibility. The significant differences among these three rules are discussed in this section.

1. The Tortious Aspect Causation Requirement

The tortious aspect causation requirement is the more precise and correct formulation of the actual causation requirement. As I have previously discussed in other articles, the courts require that the plaintiff prove that the tortious aspect of the defendant’s conduct—the aspect of the conduct that made it tortious, rather than the defendant’s conduct as

a whole—was a cause of the plaintiff’s injury.²⁴³ The requirement is motivated by the same principle that motivates the superseding cause, harm risked, and risk payout limitations on the extent of legal responsibility for tortiously caused harm: ensuring that the reasons for making a person subject to liability govern and limit the extent of her liability. However, unlike the limitations on the extent of legal responsibility, the tortious aspect causation requirement is meant to ensure that a causal connection existed between the tortious aspect of the defendant’s conduct and the plaintiff’s injury, rather than seeking to ensure, as the limitations do (or are meant to do), that there was a significant, continuing relationship between that causal connection and the foreseeable risks that made the defendant’s conduct tortious.

Some of the principal advocates of the harm-risked rule have confused it with, and tried to substitute it for, the tortious aspect causation requirement. They supposedly would avoid all the difficult actual cause and superseding cause problems by merely requiring that the defendant’s conduct as a whole, rather than the tortious aspect of the defendant’s conduct, be an actual cause of the plaintiff’s injury—a trivial requirement that almost always will be satisfied—and they would have the harm-risked limitation do all the work in limiting the extent of legal responsibility. This approach has been elaborated most fully by Robert Keeton, who employs the harm-risked rule as a “legal cause” limitation on the extent of responsibility for tortiously caused harm rather than as a duty limitation.²⁴⁴

Keeton recognizes the courts’ insistence that the plaintiff’s injury must have been caused by the negligent aspect of the defendant’s conduct. The first two formulations of his Risk Rule seem to be successively more explicit statements of this requirement. The first formulation

243. Wright, *supra* note 29, at 1759–60. The tortious aspect of a person’s conduct or activity is a cause of an injury only if each of its necessary constituents (act, omission, condition, or circumstance) contributed to the occurrence of the injury. If a certain constituent did not contribute to the injury, but was necessary to make the conduct or activity tortious, then it cannot be said that the tortious aspect of the conduct or activity was a cause of the injury. *Id.* at 1767–68.

244. See KEETON, *supra* note 212, at viii–ix, 12–13, 18–19. Other proponents of the same approach, who vigorously debated among themselves whether the harm-risked rule should be a duty limitation or an extent of responsibility limitation, are discussed in Wright, *supra* note 29, at 1759–63 & n.105. One of the proponents of the duty approach, Leon Green, argued for a looser, policy-infused version of the risk theory, which would not necessarily require that the actual harm match the foreseeable harm. See JOSEPH A. PAGE, TORTS: PROXIMATE CAUSE 24–26, 74–80 (2003); Wright, *supra* note 29, at 1761–63.

states: “A negligent actor is legally responsible for that harm, and only that harm, of which his *negligence* is a cause in fact”; the second formulation replaces “his *negligence*” with “the *negligent aspect of his conduct*.”²⁴⁵ However, in his third formulation, he eviscerates the tortious aspect causation requirement, while claiming to champion it, by making it clear that he interprets the “negligent aspect” of conduct as a reference to the *risks* that led us to characterize the defendant’s conduct as negligent rather than to the aspects of the *conduct* (the specific acts, omissions, and associated conditions) that created those risks—an error that is repeated in the draft *Restatement (Third)*²⁴⁶—and by replacing the tortious aspect causation requirement with an overall conduct causation requirement and the harm-risked limitation on the extent of legal responsibility:

A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct [as a whole] but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent.²⁴⁷

245. KEETON, *supra* note 212, at 4, 9.

246. The draft *Restatement (Third)* attempts to correct the prior *Restatements*’ failure to state explicitly that the actual-causation inquiry must be focused on the tortious aspect of the defendant’s conduct. See RESTATEMENT (THIRD), TENT. DRAFT NO. 2, *supra* note 34, § 26 cmts. f, g. However, the draft unfortunately repeats Keeton’s errors. When discussing the tortious aspect causation requirement, it states that “the causal inquiry must be framed by the *incremental risk* of the tortious conduct as distinguished from the *risk posed by the entirety of the conduct*,” *id.* § 26 cmt. f (emphasis added), whereas it should state “the causal inquiry must focus on the *aspect of the conduct* (act, omission, and associated state of affairs) that made it tortious by creating the incremental or enhanced risk, rather than on the entirety of the conduct.” Citing the article in which I criticize Keeton for confusing conduct with risk, and thus erroneously equating the tortious aspect causation requirement with the harm-risked limitation, the reporters nevertheless repeat Keeton’s error and erroneously state that I include “the *risk* that made the actor’s conduct tortious . . . as an aspect of the tortious conduct, thereby incorporating the harm-within-the-risk standard into the factual-cause inquiry, similar to Judge Keeton.” RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 reporters’ note to cmt. d (citing Wright, *supra* note 29, at 1768) (emphasis added).

Hurd and Moore similarly fail to distinguish the tortious aspect causation requirement from the harm-risked limitation and thus claim that my support of the former constitutes support of the latter: “We would also classify Richard Wright as a strong, fully relational HWR theorist—even though that classification requires one to overcome Wright’s own protestations that his aspect-causation theory is no kind of HWR analysis.” Hurd & Moore, *supra* note 201, at 346 n.53; see *id.* at 338. Hurd and Moore define a “strong, fully relational” HWR theorist as one who supports the harm-risked rule as a duty limitation that supplants all of the limitations on the extent of legal responsibility. See *id.* at 337–38. As should be clear from this Article as well as my earlier articles, my position is and always has been the reverse of the one that they attribute to me.

247. KEETON, *supra* note 212, at 10. The academic proponents of Keeton’s Risk Rule managed to get it adopted in the *Restatement (Second)*’s unfortunate revision of the first *Restatement*’s sections on the strict liability of ultrahazardous activities, which, after the revision, state: “(1) One who carries on an abnormally dangerous activity is subject

Under Keeton's Risk Rule, the only required causal connection is the one between the defendant's conduct as a whole and the plaintiff's injury. The second part of his rule, which governs the extent of responsibility for harm caused by the defendant's conduct as a whole, requires only that the injury fit the description of one of the risks that led us to characterize the defendant's conduct as negligent. It calls for a *comparison* of the actual injury with the *foreseeable hazard, risk, or harm* (the so-called negligent aspect of the conduct), rather than an inquiry into the *causal connection* between the actual injury and some aspect of the defendant's *conduct* (a particular act, omission, or condition). The same problem exists with respect to the first and second formulations of Keeton's Risk Rule, since Keeton interprets them as also referring to the unreasonable foreseeable risks that were created, rather than the aspects of the defendant's conduct that created those risks. He ignores objections by other proponents of the harm-risk rule, who correctly point out that risks, which are mere abstract mathematical probabilities based on limited empirical information, cannot and do not participate in causation, whereas acts, omissions, and related states of affairs, which are particular concrete conditions, can and do participate in causation.²⁴⁸

to liability for harm to [another] . . . *resulting from the activity* . . . (2) This strict liability is limited to the *kind of harm, the possibility of which* makes the activity abnormally dangerous." RESTATEMENT (SECOND) OF TORTS § 519 (1977) (emphasis added). The first *Restatement*, in addition to having a better definition of "ultrahazardous activities," correctly included the tortious aspect causation requirement: "[O]ne who carries on an ultrahazardous activity is liable to another . . . for harm resulting thereto *from that which makes the activity ultrahazardous* . . ." RESTATEMENT OF TORTS § 519 (1938) (emphasis added); see Wright, *supra* note 29, at 1769–70.

248. See, e.g., KEETON, *supra* note 212, at 7 (defining the defendant's negligence as "that *quality* of his conduct consisting of his placing the poison where it was *likely to be mistaken for something* intended for human consumption") (emphasis added); *id.* at 12–13 (stating that all three versions of his risk rule express the same idea: the harm-risk rule). Keeton distinguishes Becht and Miller's focus on the "negligent segment" of conduct from his focus on the "negligent aspect":

[B]oth the explanation of their distinction and the applications of it in their book indicate that it is a physical, rather than a qualitative, distinction. That is, [for Becht and Miller] a segment of conduct is an act or omission among the many acts and omissions that make up the conduct, rather than an unreasonably risky quality of either the total conduct or some part of it. Thus, their distinction is not directed to the question whether the Risk Rule concerns cause-in-fact relation between harm and the negligent *aspect* of conduct, as that concept is developed here.

Id. at 126–27 n.11 (citing BECHT & MILLER, *supra* note 34, at 25–28). Keeton insists that the harm-risk part of his Risk Rule deals with cause in fact, despite objections

As I have discussed in a previous article, replacing the tortious aspect causation requirement with the harm-risked rule, as Keeton advocates, would lead to improper results. Keeton himself has to smuggle the tortious aspect causation requirement into his risk analyses to obtain results that are consistent with the decisions of the courts.²⁴⁹ The great majority of the cases and hypotheticals that are presented in support of the harm-risked rule as a limitation on the extent of legal responsibility could and should have been resolved earlier and easier, during the actual cause inquiry, by applying the tortious aspect causation requirement,²⁵⁰ and the tortious aspect causation requirement properly resolves additional cases and hypotheticals that cannot be properly resolved under the harmed-risk rule.²⁵¹

Consider the following hypothetical that is used to illustrate the harm-risked rule in both the first and second *Restatements*, which in various versions has probably been the most popular illustration of the harm-risked rule among advocates of that rule:

A gives a loaded revolver to B, a boy of eleven, to carry to C. In handing the revolver to C the boy drops it, crushing the bare foot of D, a comrade. The fall discharges the revolver, wounding C. A is liable to C but not to D.²⁵²

from other proponents of the harm-risked rule that the rule does not deal with cause in fact but rather with normative limitations on the extent of responsibility for caused harm:

[T]he Risk Rule is indeed a rule of causation in a cause-in-fact sense. . . .

[T]he predominant theme represented by the Risk Rule is a theme of causation. It concerns the cause-in-fact relation between the negligent aspect of the conduct and the harm.

This conclusion is supported by only a few of the multitude of authors on legal cause Even [the few who supposedly agree] appear not willing to carry the separation of aspects of the conduct as far as is suggested here.

Id. at 13–14; *see id.* at 127–28 n.16 (quoting a number of proponents of the harm-risked rule who correctly insist that it does not deal with actual causation, including Arthur L. Goodhart, *Liability for the Consequences of a "Negligent Act,"* in CAMBRIDGE LEGAL ESSAYS 101, 105–06 (1926) (“But consequences cannot ‘flow’ from negligence. Consequences ‘flow’ from an act or an omission.”)).

249. Keeton occasionally incorporates the tortious aspect causation requirement into the description of the risk, in order to avoid liability that otherwise would exist under his risk rule. More often, his discussions of specific cases implicitly assume that the injury not only must have been within the broadly stated risk, but also must have been caused by the tortious aspect of the defendant’s conduct or activity. *See Wright, supra* note 29, at 1764–66; *cf.* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 & n.19 (1997) (stating that the overall conduct approach “is a decidedly eccentric view of cause in fact, shared by only a few analysts and having no appreciable judicial influence”).

250. *See Wright, supra* note 29, at 1771–72.

251. *See id.* at 1765–66, 1773–74.

252. RESTATEMENT OF TORTS § 281 illus. 2 (1934); *see* RESTATEMENT (SECOND) OF TORTS § 281 illus. 3 (1965) (using the same illustration with minor changes); RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 illus. 3; ELDREDGE, *supra* note 226, at 18; JOHN G. FLEMING, THE LAW OF TORTS 192 (6th ed. 1983); 2

Applying the harm-risked rule, both *C* and *D* satisfy the foreseeable-person-injured requirement, but only *C* satisfies the foreseeable-type-of-injury requirement, since the foreseeable type of injury was injury by being shot, not injury by being struck by a blunt object. Yet, the same result can and should have been reached earlier, by applying the tortious aspect causation requirement. A necessary condition in the description of the tortious aspect of *A*'s conduct is that *A* handed a *loaded* pistol to *B*; the fact that it was loaded contributed to *C*'s injury but not to *D*'s.²⁵³

Now change the hypothetical so that *A*'s pistol's striking and injuring *D*'s foot does not cause *A*'s pistol to discharge, but rather causes *D* involuntarily to pull the trigger on his own pistol (or to drop his pistol onto the ground), which discharges and wounds *C*. A literal interpretation of the harm-risked rule would continue to hold *A* liable to *C*, because *C* now satisfies both the foreseeable-person-injured and foreseeable-type-of-injury (injury by being shot) requirements, even though it remains true that the crucial fact that made *A*'s conduct tortious—the fact that *A*'s pistol was loaded—had nothing to do with *C*'s injury. The proper result—no liability of *A* to *C*, as a court almost certainly would hold—is reached under the tortious aspect causation requirement, but not under the harm-risked rule.²⁵⁴

2. The Risk Payout Limitation on the Extent of Legal Responsibility for Tortiously Caused Harm

Many proponents of the harm-risked limitation have stated it in language that literally reflects the risk payout limitation rather than the harm-risked limitation, without apparently realizing the difference between the two limitations or considering which is sounder. Language reflecting the risk payout limitation rather than the harm-risked limitation appears in the principal relevant comments in the first

FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 20.5, at 1136–37 (1956); KAUFMAN, *supra* note 200, at 289 (describing discussion of this hypothetical by the reporter and advisers for the first *Restatement*); *infra* text accompanying note 340.

253. FLEMING, *supra* note 21, at 220, 246; Wright, *supra* note 29, at 1771; *see id.* at 1767–68; *supra* note 243. Ignoring or misunderstanding the tortious aspect causation requirement, the draft *Restatement (Third)* erroneously states that *A*'s tortious conduct was a factual cause of the foot injury. *See* RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 illus. 3. This is true only if the causal inquiry is improperly focused on *A*'s overall conduct, rather than on the aspect of *A*'s conduct that made it tortious. *See supra* note 246; *supra* text accompanying notes 245–48.

254. *See* Wright, *supra* note 29, at 1763–66, 1771–74.

Restatement, the *Restatement (Second)*, and the draft *Restatement (Third)*. For example, the principal relevant comment to section 281 in the first and second *Restatements*, comment e, states that the defendant is liable for harms that *result from the foreseeable risk(s) or hazard(s)* that made the defendant's conduct negligent, rather than those that *match the foreseeable harm*.²⁵⁵

Similarly, although the primary extent of responsibility section in the draft *Restatement (Third)*, section 29, uses harm-risked language ("An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious"),²⁵⁶ several of the comments to the section incorporate risk ploy language as well as harm-risked language. For example, comment d states, in part:

Harm different from the harms risked by the tortious conduct. Central to the limitation on liability of this section is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious. . . . This limit on liability serves the purpose of avoiding what might be unjustified or enormous liability by confining liability's scope to the reasons for holding the actor liable in the first place. To apply this rule requires consideration . . . of: a) the risks that made the actor's conduct tortious, and b) whether the harm for which recovery is sought was a *result of* any of those risks.²⁵⁷

255. In the first *Restatement*, comment e states:

Risk of particular harm. Certain forms of conduct are negligent because they tend to subject certain interests of another to a particular hazard or type of hazard or to a limited number of hazards of a definite character. If so, the actor's negligence lies in his subjecting the other to the particular hazard and he is liable only for such harm as *results from the other's exposure thereto*.

RESTATEMENT OF TORTS § 281 cmt. e (1934) (emphasis added); *see id.* § 430 cmt. a ("The actor's conduct, to be negligent toward another, must involve an unreasonable risk of . . . subjecting the other to the *hazard from which the harm results*." (emphasis added); *id.* § 430 cmt. c ("[T]he actor cannot be subject to liability for any harm *occurring otherwise than by the other's exposure to [the] hazard*." (emphasis added); *id.* § 468 ("The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery unless the plaintiff's harm *results from a hazard* because of which his conduct was negligent." (emphasis added); *id.* § 468 cmt. a (employing similar "results from" language).

Similarly, in the *Restatement (Second)*, comment e states:

The hazard problem. Conduct is negligent because it tends to subject the interests of another to an unreasonable risk of harm. Such a risk may be made up of a number of different hazards [T]he duty established by law to refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded by harm *resulting from one or more of this limited number of hazards*.

RESTATEMENT (SECOND) OF TORTS § 281 cmt. e (1965) (emphasis added); *see id.* § 430 cmt. a (using the same "hazard from which the harm results" language as in the first *Restatement*); *id.* § 430 cmt. c (using the same "occurring . . . by . . . exposure to [the] hazard" language as in the first *Restatement*); *id.* § 468 ("The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless his harm *results from one of the hazards* which make his conduct negligent." (emphasis added); *id.* § 468 cmts. a, b (employing similar "results from" language).

256. RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29.

257. *Id.* § 29 cmt. d (emphasis added); *see id.* § 29 cmt. b ("[T]he harm that

The risk payout rule requires that the plaintiff's injury occur as part of the (actual or imminent) realization and playing out of one of the foreseeable risks that made the defendant's conduct tortious, before the hazards created (or threatened) by the realization of the foreseeable tortious risks have dissipated. It does so in a way that accommodates and reconciles the arguments underlying both Cardozo's and Andrews's positions in *Palsgraf*. It is a better elaboration and implementation of the argument that underlies the harm-risked rule: that there should be a significant relationship between the actual injury and the foreseeable risks that made the defendant's conduct tortious. It also is a better elaboration of the argument underlying Andrews's position: that the defendant should be liable, whether or not the actual harm matched a foreseeable tortious risk, because the plaintiff would not have been injured if the defendant had not behaved tortiously. This argument is much stronger where the injury resulted not merely from the defendant's tortious conduct as a whole, or even from the tortious aspect of that conduct, but also from the realization and playing out of one of the risks that made the conduct tortious, before the hazards

occurred must be one that *results from* the hazards that made the defendant's conduct tortious in the first place.") (emphasis added); *id.* § 29 cmt. d ("To apply this rule requires consideration . . . of: a) the risks that made the actor's conduct tortious, and b) whether the harm for which recovery is sought was a *result of* any of those risks.") (emphasis added).

Rationale. Limiting liability to harm *arising from* the risks created by the tortious conduct . . . imposes limits on liability by reference to the reasons for holding an actor liable The risk standard appeals to intuitive notions of fairness and proportionality by imposing liability for harms *resulting from* risks created by the actor's wrongful conduct, but for no others.

Id. § 29 cmt. e (emphasis added); *id.* § 29 cmt. k ("[L]iability is limited in the case of strict liability for abnormally dangerous activity to those harms that *arise from* the risks . . .") (emphasis added); *id.* § 29 cmt. p (applying harm-risked limitation to the defense of contributory negligence "if the risks posed by the plaintiff's negligence are different from the type of risk that *produced* the plaintiff's harm") (emphasis added); *id.* § 32 (affirming liability to rescuer, despite section 29, "so long as the harm *arises from* a risk that inheres in the effort to provide aid") (emphasis added); *id.* § 35 (affirming liability for enhanced harm resulting from intervenor's attempt to aid, despite section 29, "so long as the enhanced harm *arises from* a risk that inheres in the effort to render aid") (emphasis added); *see also infra* text accompanying notes 345–48. *Compare id.* § 29 cmt. d ("[T]he jury should be told that . . . [i]f the harms risked by [the] tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm."), *with id.* § 29 cmt. b ("Courts should craft instructions that inform the jury that, for liability to be imposed, the harm that occurred must be one that *results from* the hazards that made the defendant's conduct tortious in the first place.") (emphasis added).

created by that risk had dissipated.

The risk payout rule is also much more descriptively plausible and coherent. Unlike the harm-risked rule, it does not have to be gutted by numerous exceptions to make it minimally plausible and practical. It does not require a matching between the foreseeable manner of occurrence or seriousness of the injury and the actual manner of occurrence or seriousness of the injury. It has no problem with holding the defendant legally responsible for injury to an unforeseeable rescuer who was trying to help a third party (or the defendant) avoid or mitigate the hazards created by the realization of one of the foreseeable tortious risks. It also is consistent with the transferred intent doctrine, which states that there is liability for trespassory invasions that do not match the consequences tortiously intended by the defendant, as long as the trespassory invasions result from the operation of the forces that were intentionally set in motion by the defendant and there is sufficient literal proximity (spatially and temporally) between the intended consequence and the actual consequence.²⁵⁸

C. *The Schizophrenic Youth of Academia's Harm-Risk Rule*

Despite its prestigious parentage and the attempt to make it more normatively attractive and descriptively plausible by means of numerous exceptions, the harm-risked rule initially found little acceptance in the courts as either a duty limitation or a limitation on the extent of responsibility for tortiously caused harm. For example, in a case decided five years after *Palsgraf* and only a year before the approval by the ALI of the negligence volume of the first *Restatement*, which had been under discussion for ten years,²⁵⁹ the U.S. Court of Appeals for the Sixth Circuit stated: "There is a respectable and growing body of authority for the rule that reasonable anticipation of injury [to whomever] is important only in determining negligence, while the natural course of events is the test of required ['proximate'] causation."²⁶⁰

The lack of contemporaneous judicial acceptance of the harm-risked

258. For example, in *Vandeburgh v. Truax*, 4 Denio 464 (N.Y. Sup. Ct. 1847), the New York Court of Appeals held the defendant liable in trespass (to chattel) for loss of the plaintiff's wine as the result of the overturning of a cask by a third party who was trying to escape the defendant's deadly assault. The result in *Vandeburgh* was subsequently explained as having been based on "[t]he principle . . . that the consequences complained of, naturally and directly resulted from the careless or improper conduct of the defendant." *Ryan v. N.Y. Cent. R.R.*, 35 N.Y. 210, 215 (1866).

259. See 2 RESTATEMENT OF TORTS, NEGLIGENCE xiv (1934).

260. *Smith v. Lampe*, 64 F.2d 201, 203 (6th Cir. 1933); accord *Cooley v. Pub. Serv. Co.*, 10 A.2d 673, 677 (N.H. 1940) ("The duty to take precautions rests upon the rule of reasonable anticipation, even though that rule does not prevail as to damages once the duty appears.").

rule is perhaps best demonstrated by its disregard by the New York courts in *In re Guardian Casualty Co.*,²⁶¹ which was decided ten years after *Palsgraf* and four years after the first *Restatement* was adopted. The defendants in *Guardian Casualty* were the drivers of two cars who negligently collided in an intersection. As a result of the collision, one of the cars was propelled across a sidewalk and into the stone stoop of a building, dislodged several stones, and became wedged between some of the remaining stones. About twenty minutes afterward, while several people and a wrecking car were nonnegligently attempting to remove the car, a stone, which had been loosened by the impact of the car with the stoop and which had been resting at least in part upon the car, fell onto the sidewalk and struck and killed the deceased, who was standing about twenty feet away. She had been “called down,” apparently from upstairs inside the building, to view the damage to the outside of the building, in which she and her husband conducted a laundry business.²⁶²

The deceased was not foreseeably put at risk by the defendants’ negligent driving, nor was the type of injury that she suffered—death by a falling stone—the type of injury the foreseeability of which made the defendants’ conduct negligent.²⁶³ Yet the majority of the intermediate appellate court held the defendants liable for the death of the deceased, and the majority’s holding was affirmed by the New York Court of Appeals, which ten years earlier had decided the *Palsgraf* case.²⁶⁴ The majority did not even mention the *Palsgraf* case or the harm-risked rule that was applied in that case. The “sole question,” they said, was whether there was a superseding cause, and, using the hindsight, step-by-step approach to analyze the “foreseeability” of the ameliorative intervening causes, they held that there was no superseding cause.²⁶⁵

261. 2 N.Y.S.2d 232 (App. Div.), *aff’d*, 16 N.E.2d 397 (N.Y. 1938).

262. *Id.* at 233.

263. See *In re Kinsman Transit Co.*, 338 F.2d 708, 724 n.10 (2d Cir. 1964) (treating the deceased’s injury in *Guardian Casualty* as “a foreseeable consequence of driving a taxicab too fast . . . [s]urely . . . ‘strain[s] the idea of foreseeability past the breaking point’”) (quoting Frances Bohlen, Book Review, 47 HARV. L. REV. 556, 557 (1934)).

264. *In re Guardian Cas. Co.*, 2 N.Y.S.2d at 234, *aff’d*, 16 N.E.2d at 397.

265. The majority analyzed the “foreseeability” of the intervening causes as follows:

The present defendants, whose wrongful acts caused a vehicle to be projected across a sidewalk and against a building, with such force as to loosen parts of the structure, must have foreseen the necessity of removal of the vehicle from the sidewalk. They might reasonably have anticipated that the parts of the structure which were dislodged by the blow would fall into the highway. That a passing pedestrian might be injured when such an event took place in a city street, was also foreseeable. It would seem plain that although the injury to the

Two judges dissented. They cited a number of cases, including *Palsgraf*, to support their opinion that the majority's decision "extends the liability for acts of negligence beyond all precedent,"²⁶⁶ but they did not mention or apply the harm-risked rule. Instead they applied, implicitly and incorrectly, the risk payout rule:

*Both automobiles had reached a condition of rest. The accident, so far as human foresight could predict, was at an end. Then a new cause, not within the range of reasonable apprehension, intervened. That cause was the collapse of a portion of the building due to the removal of the taxicab . . .*²⁶⁷

Although the automobiles had reached a condition of rest, the hazards that had been created by the realization of the foreseeable tortious risk (an automobile collision) had not dissipated. The falling of the stones onto the plaintiff was not due to a new, independent cause or hazard, but rather was caused by the playing out of the hazards that were created by the foreseeable collision. The active (kinetic) energy that was foreseeably and dangerously unleashed by the defendants' negligence was transformed into passive (potential) energy when the taxicab became wedged among the loosened stones, and this passive, stored up energy merely awaited the removal of the car to become active again, thereby causing the deceased's death.

However, undeterred by the courts' disregard of the harm-risked rule, the ALI made more expansive claims on its behalf when the first *Restatement* was revised in 1948. The reporter for the revision of the main torts topics was Laurence Eldredge, who was one of the strongest proponents of the risk rule.²⁶⁸ Comment e to section 281 and comment a to section 430 were revised to make the risk rule clearly applicable in all negligence cases, by eliminating language that had previously indicated that the rule applied to "certain forms" of negligent conduct or "in certain cases," respectively.²⁶⁹ Section 281, comment e was retitled "The hazard problem" and explicitly described the harm-risked rule as a duty limitation.²⁷⁰ In his reporter's note on comments e and ee to section 281,

pedestrian did not occur for some minutes after the application of the original force, because of the circumstances that the dislodged stones were temporarily held in place by the vehicle, this would not alter the case, when there is nothing to show the application of a new force causing the stone to fall.

Id.

266. *Id.* (Untermeyer, J., dissenting).

267. *Id.* at 235 (emphasis added).

268. See RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, at viii; ELDREDGE, *supra* note 226, at 18–22; Wright, *supra* note 29, at 1771 & nn.146, 148–49.

269. See RESTATEMENT (SECOND) OF TORTS § 281 cmt. e (1965) (revised version of the 1948 comment). Compare RESTATEMENT OF TORTS §§ 281 cmt. e & 430 cmt. a (1934), with RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 281 cmt. e, § 430 cmt. a.

270. RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 281 cmt. e; see RESTATEMENT (SECOND) OF TORTS § 281 cmt. e (1965) (revised version of the 1948 comment).

Eldredge acknowledged the courts' past general disregard of the supposed rule, but he purported to discern a nascent "judicial trend" supporting the rule:

Reason for Change: The new Comments state the modern approach in analyzing most of the problems which were once generally treated under the vague term "proximate cause". The [1934] Restatement recognized the existence of the hazard problem and referred to it in [several sections and comments]. However, in view of the present trend, this treatment of the problem is sketchy and inadequate. When [the 1934 Restatement] was written, most courts were still treating the hazard problem as one of "proximate cause". In recent years an increasing number of courts have recognized the true nature of the problem and have begun to treat it realistically. This analysis is seen, for example, in the syllabi of the official reports in a number of very recent cases in the Supreme Court of Pennsylvania. The modern literature emphasizes the correct analysis and the present judicial trend is to accept it.

The new comments are added to assist in clarifying a part of the law which has been greatly confused until quite recently. The Reporter and his Advisers are unanimously of the opinion that these comments reflect the present day thinking on the subject and that it is highly desirable to add them to the Restatement.²⁷¹

The boldest claim in the 1948 revision of the first *Restatement* was the assertion that the superseding cause limitation on the extent of responsibility should be completely replaced by the harm-risked duty limitation, despite the courts' acknowledged failure to adopt this "proper" (academically preferred) analysis. This claim was made in a new comment ee to section 281, which became comment h in the *Restatement (Second)*:

The problem which is involved in determining whether a particular intervening force is or is not a superseding cause is in reality a problem of determining whether the risk that that force would intervene, (i.e., that the other would be exposed to that hazard) was, at least, one of the reasons for imposing the duty upon the actor to refrain from the negligent conduct. . . . A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter [under the harm-risked duty limitation]. However, in the past courts have generally discussed the effect of intervening forces in terms of [superseding] causation. The proper solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about is facilitated by an appreciation of the fact that the problem is a "hazard problem" rather than a problem of [superseding] causation.²⁷²

The same assertion was made in a new comment c to section 435,

271. RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 281 "Reason for Change," at 651-52 (citations omitted). The final paragraph of the "Reason for Change" is quoted *infra* text accompanying note 280.

272. RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 281 cmt. ee at 651 (citation omitted); *see* RESTATEMENT (SECOND) OF TORTS § 281 cmt. h (1965).

which also persists in the *Restatement (Second)*:

Where it appears to the court in retrospect that it is highly extraordinary that an intervening force came into operation the court will declare such force to be a superseding cause. Analytically, the highly extraordinary nature of the result which flowed from the actor's conduct (with or without the assistance of an intervening force) establishes that the hazard which brought about or assisted in bringing about that result was not among the hazards with respect to which the conduct was negligent. Strictly the problem before the court is one of determining whether the duty imposed on the actor was designed to protect the one harmed from the risk of harm from the hazard in question (see § 281, Comment *e*, and § 449). However, courts frequently treat such problems as problems of [superseding] causation (see §§ 281, Comment *ee*, and 430, Comment *a*).²⁷³

These comments ignore at least three significant differences between the superseding cause analysis and the harm-risked analysis, which,

273. RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 435 cmt. c at 737 (citations omitted); see RESTATEMENT (SECOND) OF TORTS § 435 cmt. c (1965). Dan Dobbs repeats this argument. Although he notes: "In these intervening cause cases, courts may phrase the foreseeability test somewhat narrowly, by asking whether the intervening cause itself was foreseeable rather than by asking whether the general type of harm was foreseeable," he asserts:

Under either version of the foreseeability test, courts appear to be working toward the same central idea, that the defendant's liability is limited to those harms he risked by his negligence so that he escapes liability altogether for those harms that were not reasonably foreseeable at the time that he acted.

DOBBS, *supra* note 5, § 180, at 444–45. Like Eldredge, he claims that "the intervening cause cases all entail questions about the scope of the risk, so they can be resolved without a mention of intervening or superseding causes." *Id.* § 183, at 452 (citations omitted); see *infra* note 279. Nevertheless, like Eldredge and the *Restatement (Second)*, Dobbs acknowledges the courts' general use of the superseding cause limitation and thus devotes substantial space to discussing (and berating) it. See DOBBS, *supra* note 5, § 186, at 460–63, §§ 189–96, at 469–91.

The draft *Restatement (Third)* is less willing to accommodate actual court practice. Although it acknowledges the courts' continued general use of the superseding cause limitation, it dismisses the limitation and makes no attempt to elaborate it; indeed, it implies that the limitation is incapable of being elaborated. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 34 cmts. a, b. Ignoring the fact that some superseding causes are natural events or nontortious human interventions, it argues that the need for a superseding cause limitation has itself been superseded by the adoption of comparative responsibility liability regimes. *Id.* § 34 cmts. a, c. Nevertheless, comment e to section 34 states that "unforeseeable, unusual, or highly culpable [intervening acts] may bear on whether the harm is within the scope of the risk," even though the actual harm matches the foreseeable harm. *Id.* § 34 cmt. e. Comment e only discusses situations involving intentional criminal interventions, as in the *Watson* case, see *supra* text accompanying notes 188–90, which is the basis for a couple of the comment's illustrations. Although such interventions are part of the manner of occurrence of the harm, which supposedly is ignored under the harm-risked rule, the comment grudgingly states that they "may bear on whether the harm is within the scope of the risk." *Id.* (emphasis added). The comment states that section 442B of the *Restatement (Second)* has a categorical no-liability rule in situations involving criminal or intentional interventions, yet the *Restatement (Second)* treats intentional and even criminal interventions as superseding causes only if they were unforeseeable. See RESTATEMENT (SECOND) OF TORTS § 442B cmt. c (1965); *id.* §§ 448–49; *supra* note 178; *supra* text accompanying notes 192–93.

contrary to the assertions in both comments, make it impossible for the latter analysis to subsume or replace the former analysis. First, the superseding cause analysis focuses on the unexpectedness of the *intervening cause*, which is part of the particular manner of occurrence of the harm that is excluded from consideration under the harm-risked rule, while the harm-risked rule focuses on the foreseeability of the *actual harm* (including the general causal mechanism involved in producing it—for example, death by poisoning). Second, the superseding cause analysis asks whether the occurrence of the intervening cause was *highly unexpected* or *extraordinary* or even *highly extraordinary*, while the harm-risked rule merely asks if some occurrence was or was not *reasonably foreseeable*. Third, while the harm-risked analysis always uses *ex ante foresight*, which considers the foreseeability of the ultimate injury at the time of the defendant's tortious conduct, the superseding cause analysis often uses *ex post, step-by-step hindsight*, which takes into account all that is subsequently known about what happened to reconstruct the sequence of events and then, starting with the first step in that sequence, proceeds step-by-step to see if any step is highly extraordinary or unexpected given all of the prior steps.²⁷⁴ The 1947 *Lynch* case,²⁷⁵ the 1947 *Brown* case,²⁷⁶ and the 1938 *Guardian Casualty* case,²⁷⁷ each of which was decided only a few years before the 1948 revisions, are some of the many examples of decisions that employed the hindsight step-by-step analysis to hold the negligent defendant(s) liable despite a bizarre, unforeseeable sequence of events that involved neither a foreseeable plaintiff (except perhaps in *Brown*) nor a foreseeable type of injury.

As applied to these sorts of cases, the harm-risked rule is an overly restrictive limitation on the extent of legal responsibility. It is less well recognized, but also true, that the harm-risked rule by itself would be an insufficiently restrictive limitation, since it supposedly is not concerned with the particular manner of occurrence of the injury, no matter how highly unexpected or bizarre the manner of occurrence might be. Recall the *Watson* case, in which court held that, if the third party's igniting the spilled gasoline was malicious and thus highly unexpected, it would be a superseding cause that would absolve the defendant who negligently

274. See *supra* text accompanying notes 172–75.

275. See *supra* text accompanying notes 180–83.

276. See *supra* text accompanying notes 184–87.

277. See *supra* text accompanying notes 261–67.

spilled the gasoline from liability.²⁷⁸ Or consider a plaintiff who is purposefully and maliciously run over by a third party after she is forced to step into the street to get around an obstruction negligently created by the defendant. The third party's highly unexpected malicious intervention, without which the plaintiff would not have been injured, would be a superseding cause. Yet in each situation the defendant would be liable if the only limitation were the harm-risked rule, since each plaintiff was a foreseeable plaintiff and suffered the foreseeable type of injury that made the defendant's conduct negligent.²⁷⁹

In the last paragraph of his reporter's note on the new comments, Eldredge attempted to describe the great majority of judicial decisions that fail to mention or apply the harm-risked rule as implicit applications of that rule:

The hazard problem is an element in the analysis of every negligence case, though frequently the answer is so clear that no detailed analysis is necessary. Also, the fact that conduct is of a "generally dangerous character" may greatly enlarge the number of hazards which one is exposed to and this may lead the court to conclude that the defendant is liable even though the harm was brought about by a hazard the risk of which was not foreseeable. Such a conclusion does not mean that the case presented no hazard problem. It means that the actor's duty to refrain from "generally dangerous conduct" is created to protect the other from the risk of both foreseeable and unforeseeable hazards. But if the hazard is considered in retrospect to be highly extraordinary the court is likely to hold that the defendant is not liable for the harm caused by his conduct and to reach this conclusion by saying that the conduct was not the "proximate cause" of the harm. Opinions in such cases frequently lead the seeker after light into the realm of utter confusion.²⁸⁰

Eldredge has it backwards. It is the attempt to explain the many nonconforming judicial opinions as supposed applications of the harm-risked rule, rather than the nonconforming judicial decisions themselves, that "lead[s] the seeker after light into the realm of utter confusion." Nevertheless, the hope or dream that the harm-risked rule can be made

278. See *supra* text accompanying notes 188–90.

279. Employing a similar hypothetical, Dan Dobbs claims that the harm-risked rule would preclude liability, even though both the person injured and the type of injury (a fall due to slipping on a banana) are foreseeable, and the specific manner of occurrence supposedly is irrelevant. In the hypothetical, "the defendant negligently drops the banana peel and the plaintiff slips on it, but only because a purse snatcher pushes her as he grabs her purse." DOBBS, *supra* note 5, § 183, at 452. Dobbs admits that courts in such situations "typically . . . formulate their inquiries by asking whether the purse snatcher may have been a new cause that superseded the negligence of the banana peel dropper," *id.*, but he claims that "the intervening cause cases all entail questions about the scope of the risk, so they can be resolved without a mention of intervening or superseding causes." *Id.* (citation omitted); see *supra* note 273.

280. RESTATEMENT 1948 SUPPLEMENT, *supra* note 75, § 281 "Reason for Change," at 652. The first two paragraphs of the "Reason for Change" are quoted *supra* text accompanying note 271.

to serve as the single, all-encompassing limitation on the extent of legal responsibility continues to mesmerize some academics, including the drafters of the *Restatement (Third)*.²⁸¹

D. *The Birth and Fitful Infancy of the British Sibling*

Three decades after the adoption of the harm-risked rule in *Palsgraf* and the *Restatement*, the rule was adopted (at least with respect to the type of harm or hazard) for the British Commonwealth in *The Wagon Mound (No. 1)*,²⁸² but as a limitation on the extent of responsibility for negligently caused harm rather than as a duty limitation. The defendant charterers of the oil tank ship, the *S.S. Wagon Mound*, had negligently allowed a large quantity of furnace oil to be spilled into Morts Bay in Sydney Harbor while they were loading the oil into the ship. The oil spread across the surface of the bay, accumulating thickly in certain areas, including the waters surrounding and underlying the timber wharf that the plaintiffs used to build and repair ships. The plaintiffs' supervisor ordered a halt to all welding and burning while he checked with the manager of the oil company wharf where the *S.S. Wagon Mound* was berthed. Being assured that the oil was not flammable when spread upon water, he allowed work to proceed, but he directed that care should be taken to prevent flammable material from falling off the wharf into the oil. Nevertheless, a day later, the oil was ignited, presumably as a result of molten metal falling from the wharf and setting aflame some cotton waste or rag that was laying on a piece of floating debris. The resulting fire caused considerable damage to the plaintiffs' wharf and a ship, the *Corrimal*, upon which the plaintiffs had been working.²⁸³

The Law Lords, sitting as the Privy Council of the British

281. Like Eldredge, Dan Dobbs claims: "The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct." DOBBS, *supra* note 5, § 180, at 443. He claims that this harm-risked rule is "[t]he most general and pervasive approach to proximate cause," *id.* at 444, and that it is or should be the sole limitation on the extent of legal responsibility for tortiously caused harm. *Id.* § 185, at 458–60; *see supra* notes 235, 241, 273, 279; *infra* notes 298, 309, 320, 324, 329. The draft *Restatement (Third)*'s similar claims are discussed *supra* text accompanying notes 85–91; *supra* note 273; *infra* text accompanying notes 342–51.

282. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound (No. 1))*, [1961] A.C. 388. John Fleming cites a report that, as in *Palsgraf*, only a bare majority of the judges in *The Wagon Mound (No. 1)* actually supported its adoption of the harm-risked rule. *See* FLEMING, *supra* note 21, at 239 n.154 ("Rumour has it that the PC was split 3:2: *Foresight Saga* 3 (Haldane Society 1962).").

283. [1961] A.C. at 390–91.

Commonwealth, noted that the trial judge had made “the all-important finding” that, although “[t]he raison d’être of furnace oil is, of course, that it shall burn,” “the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water,” a finding which the plaintiffs attempted without success to limit in their arguments before the Law Lords.²⁸⁴ Thus, while the plaintiffs were foreseeable persons injured, having suffered foreseeable “mucking up” pollution damage to the wharf’s slipways that interfered with their use of the slips, the much more serious fire-related damage was not a type of injury the foreseeability of which made the defendants’ conduct negligent. The case thus raised for reconsideration the applicability of the harm-risked rule, which had been explicitly rejected forty years earlier by the English Court of Appeals in the *Polemis* case.²⁸⁵

Purporting to find no intelligible meaning in the “direct consequences” rule that was applied in *Polemis*, the Privy Council dismissed judicial decisions applying that rule or the related analysis of intervening and superseding causes as being “at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.”²⁸⁶ Rejecting the holding and reasoning in *Polemis* and embracing the harm-risked rule,²⁸⁷ the Law Lords stated:

[I]f some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the “direct” consequence) be substituted which leads to nowhere but the never-ending and insoluble conundrums of causation. . . . A conspicuous example [of the latter] occurs when the actor seeks to escape liability on the ground that the “chain of causation” is broken by a “nova causa” or “novus actus interveniens.”²⁸⁸

As the above quote indicates, the *Wagon Mound* court, like those who drafted the 1948 revision of the first *Restatement*,²⁸⁹ thought that the superseding cause limitation could and should be completely replaced by the harm-risked rule. We have already discussed the significant

284. *Id.* at 409–11 (argument of R.L. Taylor, Q.C.); *id.* at 413 (Viscount Simonds).

285. *See supra* notes 171, 198, 235.

286. [1961] A.C. at 419; *see id.* at 416–22.

287. *Id.* at 422–25. The Law Lords sitting as the Privy Council decide (or used to decide) appeals from the British Commonwealth countries. When they decide appeals from the United Kingdom, they sit as members of the House of Lords. The *Wagon Mound* holding was affirmed (although distinguished) by the English Court of Appeal in *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405 (C.A.), and by the House of Lords in *Hughes v. Lord Advocate*, [1963] A.C. 837. *See infra* text accompanying notes 292–94.

288. [1961] A.C. at 423.

289. *See supra* text accompanying notes 272–73.

differences between the two doctrines, which make it clear that the superseding cause limitation cannot be explained as a mere application of the harm-risked rule.²⁹⁰ Thus, not surprisingly, the superseding cause limitation continues to be recognized and applied by British and Commonwealth courts²⁹¹ as well as by American courts.

A year after the Privy Council's decision in *Wagon Mound (No. 1)*, the English Court of Appeal affirmed that the *Wagon Mound* harm-risked rule applies to cases arising in England, but also affirmed the continued vitality of the eggshell plaintiff rule, despite its inconsistency with the basic rationale underlying the harm-risked rule.²⁹²

Two years later, in *Hughes v. Lord Advocate*,²⁹³ the House of Lords, without explicitly overruling *Polemis*, assumed that the *Wagon Mound*'s harm-risked rule was applicable. However, it rejected the strict application of that limitation in order to allow the plaintiff to recover for a seemingly unforeseeable harm resulting from a bizarre sequence of events. The defendant's employees were working on underground telephone cables, which they accessed through a manhole in a road. They erected a canvas tent over the manhole and, in accord with normal procedure, placed four red warning lamps, containing paraffin as fuel, around the tent. Shortly after 5 p.m., after it had turned dark, they pulled the ladder up from the manhole and placed it on the ground next to the tent, pulled a tarpaulin over the tent opening, and went to a nearby building for a fifteen minute tea break. While they were gone, two boys, one eight and the other ten, entered the shelter, taking the ladder, a length of rope, a tin can that they had brought with them, and one of the red warning lamps, which they swung at the end of the rope. They used the ladder to explore the manhole. When they emerged from the manhole, the lamp was either knocked or dropped into the manhole and a violent explosion took place, causing the plaintiff to fall into the manhole. He sustained severe burn injuries. The most serious were to his fingers and were probably caused by his holding on to the metal ladder rungs, which were intensely hot as a result of the explosion, to

290. See *supra* text accompanying notes 274–79.

291. See, e.g., FLEMING, *supra* note 21, at 233, 242, 246–54; Stapleton, *supra* note 8, at 949 n.21 & 955 n.35; cf. *Hughes*, [1963] A.C. at 845 (Lord Reid) (“Of course, the pursuer has to prove that the defendant’s fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender.”).

292. *Smith*, [1962] 2 Q.B. at 406.

293. [1963] A.C. 837.

climb back out of the manhole. The explanation of the accident that was accepted was that when the lamp fell down the hole and was broken, some paraffin escaped, and enough was vaporized to create an explosive mixture that was detonated by the naked light of the lamp. The experts agreed that no one would have expected this to happen: that it was so unlikely as to be unforeseeable. The lower courts, relying on the *Wagon Mound*'s harm-risked limitation, held that the defendant, although negligent in having left the site unguarded against inquisitive children, was not liable, since the type of injury that occurred, injury by explosion, did not match the risk, injury by fire, that had made the defendant's employees' conduct negligent. The Law Lords disagreed, holding that the relevant risk was "burning injuries" or "injury by fire of some kind," which was foreseeable and which occurred, although the manner of occurrence was unforeseeable and the extent of the injury was much greater than might have been foreseen.²⁹⁴

The harm-risked limitation seemed to have been seriously eroded in *Hughes*. Yet, only two years later, in *Doughty v. Turner Manufacturing Co.*,²⁹⁵ the English Court of Appeal purported to rely on the limitation to reach a result that is irreconcilable with *Hughes* under the limitation. In *Doughty*, the defendant's employee accidentally knocked an asbestos-cement cauldron cover into a cauldron of molten liquid sodium cyanide that had been heated to 800 degrees centigrade, eight times as hot as boiling water. Although there was a foreseeable risk of the molten liquid being physically displaced and splashed on bystanders, apparently no splashes occurred as the cover slid into the molten liquid. At that point everyone thought the danger was over. However, one to two minutes later the plaintiff suffered severe burns when the molten liquid erupted as a result of an explosion caused by water vapor that was formed by a chemical reaction in the immersed cover. It was found that no one was aware or had reason to be aware that such a chemical reaction might occur, until subsequent testing by the supplier of the cauldrons and covers demonstrated that such reactions would inevitably occur when the covers were immersed in the molten liquid at temperatures over 500 degrees centigrade.²⁹⁶

Especially given the House of Lords's holding in *Hughes*, the harm-risked rule should easily have been satisfied in *Doughty*. The general causal mechanism underlying the actual harm in *Doughty*, burns by

294. *Id.* at 839–40, 844, 845–47 (Lord Reid); *id.* at 847–50 (Lord Jenkins); *id.* at 852 (Lord Morris of Borth-y-Gest); *id.* at 855–56 (Lord Guest); *id.* at 858 (Lord Pearce). Two Australian cases that also gutted the foreseeable consequences limitation in *Wagon Mound* (No. 1), while purporting to apply it, are discussed *supra* note 179.

295. [1964] 1 Q.B. 518 (C.A. 1963)

296. *Id.* at 519–20.

molten liquid ejected from the cauldron, exactly matched the foreseeable type of injury that made the employee's conduct negligent. Indeed, the match was much closer than in *Hughes*, in which the foreseeable type of harm was burns by escaping fire or flames, rather than the actual type of harm that occurred, burns by touching extremely hot ladder rungs, which moreover were heated by an explosion rather than by something catching on fire. The Law Lords in *Hughes* had dismissed as legally insignificant the marked difference between the foreseeable manner of occurrence of the harm (flames escaping from the lamps and burning the children directly or by igniting clothes, the tent, or other flammable material) and the actual manner of occurrence (flames escaping and igniting evaporated paraffin, thereby causing an explosion that caused the child to fall down into the hole and the ladder rungs to become extremely hot). As was discussed above, they even refused to characterize the type of harm as injury by explosion rather than the foreseeable injury by fire, characterizing it instead as injury by burning or injury by fire of some kind.

If an unforeseeable explosion as part of the manner of occurrence did not matter in *Hughes*, it should not matter in *Doughty*, especially given the much closer match between the foreseeable and actual type of injury in *Doughty*. Yet the *Doughty* court distinguished the *Hughes* case and held that the defendant in *Doughty* was not liable. Stating that it was unwilling to "make another inroad on the [*Wagon Mound*] doctrine of foreseeability,"²⁹⁷ the court, unlike the Law Lords in *Hughes*, focused on the details of the manner of occurrence and argued that the risk of being burned by a splash caused by a chemical reaction and consequent explosive eruption was unforeseeable and different in kind, not just in degree, from the foreseeable risk that made the employee's conduct negligent, which was the risk of being burned by a splash caused by physical displacement.²⁹⁸

297. *Id.* at 529 (Lord Justice Harman).

298. *Id.* at 526–27 (Lord Pearce); *id.* at 528–29 (Lord Justice Harman). Dan Dobbs's zeal to explain all cases as being consistent with the harm-risk rule, no matter how inconsistent they actually are, is highlighted by his attempts to explain *Doughty* and *Hughes*. To explain *Doughty*, Dobbs treats the particular manner of occurrence as an "integral part of the risk," contrary to the general approach under the harm-risk rule, which ignores the particular manner of occurrence. See DOBBS, *supra* note 5, § 189, at 468–69; *supra* text accompanying notes 229–33. Yet, in *Hughes*, he not only insists that the particular manner of occurrence is irrelevant, but also claims that the actual type of injury matches the foreseeable type of injury despite the significant differences between the two:

Although the *Doughty* court purported to be applying the harm-risked rule, the judges' reasoning is not based on that rule but rather on the risk payout rule. The judges were decisively influenced by the fact that the foreseeable risk that made the defendant's employee's conduct negligent in *Doughty*—the risk of splashing of the molten metal by physical displacement—never occurred or, even if it had occurred, the hazards created by the splashing had terminated without causing any injury before a new and different unforeseeable risk—explosive expulsion of the molten liquid due to a chemical reaction—came into play.²⁹⁹ Lord Justice Diplock stated: "The former risk was well known (and so foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the plaintiff damage by burning."³⁰⁰ He attempted to distinguish *Hughes* as a case in which the sequence of events leading to the plaintiff's injury "by burning" was "the direct consequence of the defendant's breach of duty and of the same kind as could reasonably have been foreseen, although of unforeseen gravity."³⁰¹ However, the direct consequences liability rule—which supposedly was rejected and replaced by the harm-risked rule in *Wagon Mound (No. 1)*—was more clearly satisfied in *Doughty*, in which there were no intervening causes, than in *Hughes*, in which the children's actions were intervening (but not superseding) causes. Similarly, it hardly seems that the injury in *Hughes* was "of the same kind as could reasonably have been foreseen, although of unforeseen gravity"—that is, that the harm matched the foreseeable type of injury that made the defendant's employees' conduct negligent—and in any

If the defendant negligently leaves kerosene where it might be ignited and burn the plaintiff, the fact that ignition unforeseeably triggered an explosion rather than a burning is of no consequence. The general type of accident was foreseeable, and from a known source of harm; the explosion is a mere "variant of the foreseeable."

DOBBS, *supra* note 5, § 189, at 466.

299. [1964] 1 Q.B. at 527, 529, 529–30, 532–33.

300. *Id.* at 530. Similarly, Lord Pearce based his holding for the defendant on "the intrusion of a new and unexpected 'factor.' There was an eruption due to chemical changes underneath the surface of the liquid as opposed to a splash caused by displacement from bodies falling on to its surface." *Id.* at 527 (citing *Hughes v. Lord Advocate*, [1963] A.C. 837, 845 (Lord Reid)). Lord Justice Harman stated:

In my opinion, the damage here was of an entirely different kind from the foreseeable splash. Indeed, the evidence showed that any disturbance of the material resulting from the immersion of the hard-board was past an appreciable time before the explosion happened. This latter was caused by the disintegration of the hard-board under the great heat to which it was subjected and the consequent release of the moisture enclosed within it. This had nothing to do with the agitation caused by the dropping of the board into the cyanide.

Id. at 529.

301. *Id.* at 532.

event there certainly was a closer match between the foreseeable harm and the actual harm in *Doughty*.

The intuition underlying the differing conclusions in *Doughty* and *Hughes* is not a harm-risked intuition or a direct consequences intuition, but rather a risk payout intuition. In *Hughes*, it is at least arguable that the harm resulted from the realization and playing out of a foreseeable risk—the risk of the flames’ escaping from the lamp and igniting something (in this case, the evaporated paraffin)—before the hazards thereby created had dissipated and everything had returned to normal. On the other hand, in *Doughty* the foreseeable risk (the risk of physical splashing of the molten liquid) either never was realized or was realized but did not result in any injury, and a new unforeseen risk and associated hazard (chemical reaction and explosive expulsion), not caused by the foreseeable physical splashing (if any occurred), occurred and caused the injury.

E. The Death (but Not the Burial) of the British Sibling

The strict harm-risked rule that was adopted in *Wagon Mound (No. 1)* was gutted only five years later in *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (The Wagon Mound (No. 2))*.³⁰² In *Wagon Mound (No. 2)*, the owners of two ships that were being refitted at the Morts Dock sued the charterers of the *S.S. Wagon Mound* for the extensive damage to their ships that was caused by the same fire that had damaged the dock. The plaintiffs’ negligence claims were rejected in the Australian courts, based on the harm-risked limitation adopted in *Wagon Mound (No. 1)*. The Privy Council reversed, in an opinion by Lord Reid, who claimed that “the evidence led was substantially different from the evidence led in *The Wagon Mound (No. 1)* and the findings . . . are significantly different.”³⁰³

With respect to the evidence, Lord Reid claimed that the plaintiffs in *Wagon Mound (No. 1)*, unlike those in *Wagon Mound (No. 2)*, had been deterred from arguing that it was foreseeable that the oil might be set alight because they then would have been held contributorily negligent for resuming operations and would have been barred from any recovery.³⁰⁴ Lord Reid’s claim ignores the plaintiffs’ unsuccessful attempt on appeal in

302. [1967] 1 A.C. 617 (1966).

303. *Id.* at 632, 640 (footnote omitted).

304. *Id.* at 640–41.

Wagon Mound (No. 1) to have the finding of lack of foreseeability limited or modified, as well as the fact that the plaintiffs' supervisor directed "that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil."³⁰⁵ Moreover, it is highly unlikely that the plaintiffs in *Wagon Mound (No. 1)* would have been found contributorily negligent for proceeding in the face of a foreseeable risk given the admittedly very small and insignificant nature of the risk.

With respect to the findings, Lord Reid argued:

The crucial finding of [the trial judge] in this case is in finding (5): that the damage was "not reasonably foreseeable by those for whose acts the defendant would be responsible." That is not a primary finding of fact but an inference from the other findings The vital parts of the findings of fact . . . are (1) that the officers of the *Wagon Mound* "would regard furnace oil as very difficult to ignite upon water"—not that they would regard this as impossible; (2) that their experience would probably have been "that this had very rarely happened"—not that they would never have heard of a case where it had happened, and (3) that they would have regarded it as a "possibility, but one which could become an actuality only in very exceptional circumstances"—not, as in *The Wagon Mound (No. 1)*, that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water. [Lord Reid omitted the trial court's fourth finding: "(4) They would have considered the chances of the required exceptional circumstances happening whilst the oil remained spread on the harbour waters as being remote."] . . .

In *The Wagon Mound (No. 1)* the Board were not concerned with degrees of foreseeability because the finding was that the fire was not foreseeable at all. . . . But here the findings show that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship's chief engineer. So the first question must be what is the precise meaning to be attached in this context to the words "foreseeable" and "reasonably foreseeable."

. . . .
[In *Bolton v. Stone*] a member of a visiting team drove a cricket ball out of the ground onto an unfrequented adjacent public road and it struck and severely injured a lady who happened to be standing in the road. That it might happen that a ball would be driven onto this road could not have been said to be a fantastic or far-fetched possibility: according to the evidence it had happened about six times in 28 years. And it could not have been said to be a far-fetched or fantastic possibility that such a ball would strike someone in the road: people did pass along the road from time to time. So it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable—it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. A mathematician given the data could have worked out that it was only likely to happen once in so many thousand years. The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.

But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the

305. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound (No. 1))*, [1961] A.C. 388, 391; *see supra* text accompanying notes 283–84.

injury to Miss Stone had been an unlawful activity, there can be little doubt but that *Bolton v. Stone* would have been decided differently. . . .

In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.³⁰⁶

The trial court's "crucial finding" in *Wagon Mound (No. 2)*, "that the damage was 'not reasonably foreseeable by those for whose acts the defendant would be responsible,'" is essentially the same as the trial judge's "all-important finding" in *Wagon Mound (No. 1)* that the defendant "could not reasonably have been expected to have known that [the oil] was capable of being set afire when spread on water."³⁰⁷ Yet, the court in *Wagon Mound (No. 2)* avoids holding that there is thus no liability due to the harm-risked limitation. It does so by holding that a "remote," "infinitesimal," "insubstantial," "very rare," "very improbable," and "very exceptional" risk will satisfy the harm-risked rule as long as it is "real" and not "fantastic."³⁰⁸ Such a risk is considered to be one of the foreseeable risks that make the defendant's conduct negligent, despite its minimal foreseeability, because the marginal cost of avoiding the risk was zero, given the care already required in the light of the significant foreseeable risks—those that actually made the defendant's conduct negligent. This tactic guts the harm-risked limitation, since it can be used to make almost any nonfantastic risk, no matter how extremely small and insignificant, one of the risks that supposedly made the defendant's conduct negligent.³⁰⁹

306. *The Wagon Mound (No. 2)*, [1967] 1 A.C. at 641–43 (citations omitted); *id.* at 633 (quoting the trial judge's findings).

307. See *supra* text accompanying note 284.

308. See *supra* text accompanying note 306; *accord* *Wyong Shire Council v. Shirt*, (1980) 29 A.L.J.R. 217 (Austl.).

309. See FLEMING, *supra* note 21, at 239 ("[J]udicial approval has been given to so expansive a view of foreseeability that the test has for all practical purposes lost much of its limiting bite."); Hurd & Moore, *supra* note 201, at 371–73, 381–83; Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 103–04 (1991); Wright, *Economic Analysis*, *supra* note 9, at 442–44 (noting that the zero-marginal-cost argument makes any legal cause limitation based on foreseeability difficult to explain under the economic efficiency theory); Wright, *Efficiency Theory*, *supra* note 9, at 573–75 (same). Dan Dobbs employs a version of this argument, without realizing that it guts the harm-risked rule, to explain *Wagon Mound (No. 2)*, which he claims "seems to be nothing more than a perfectly logical application of the rules of negligence and the foreseeability [harm-risked] rule of proximate cause." See DOBBS, *supra* note 5, § 184, at 455 & n.9.

F. The Continuing Confusion of the Ailing Harm-Risked Limitation and the Healthy Risk Payout Limitation in the United States

By the time the *Restatement (Second)* was being drafted, the failure of many courts to adopt the first *Restatement*'s harm-risked rule, as either a duty or extent of responsibility limitation, was fairly clear.³¹⁰ We have already discussed several well-known cases in which the defendant was held liable despite bizarre causal chains that led to unforeseeable types of injuries to unforeseeable plaintiffs, including *Guardian Casualty, Lynch*, and *Brown*.³¹¹ The harm-risked rule was similarly rejected in *Dellwo v. Pearson*.³¹² Mrs. Dellwo was injured while fishing from a boat with her husband on a lake. The Minnesota Supreme Court described the facts as follows:

[The Dellwos] were fishing [on a lake] by trolling at a low speed with about 40 to 50 feet of line trailing behind the boat. Defendant, a 12-year-old boy, operating a boat with an outboard motor, crossed behind plaintiffs' boat. Just at this time Mrs. Dellwo felt a jerk on her line which suddenly was pulled out very rapidly. The line was knotted to the spool of the reel so that when it had run out the fishing rod was pulled downward, the reel hit the side of the boat, the reel came apart, and part of it flew through the lens of Mrs. Dellwo's glasses and injured her eye. Both parties then proceeded to a dock where inspection of defendant's motor disclosed 2 to 3 feet of fishing line wound about the propeller.³¹³

The trial court instructed the jury that a defendant is not responsible for the unforeseen consequences of its negligence, and the jury returned a verdict for the defendant. The Dellwos appealed, and the Minnesota Supreme Court reversed:

Although a rigorous definition of proximate cause continues to elude us, nevertheless it is clear, in this state at least, that it is not a matter of foreseeability. We are unable now to make any better statement on this issue than that of Mr. Justice Mitchell many years ago. Speaking for this court, he said:

....
"What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining

310. See HART & HONORÉ, *supra* note 50, at 176–78, 254–90; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 43–44, at 250–80 (4th ed. 1971) [hereinafter PROSSER, HANDBOOK]; William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 16–19 (1953) [hereinafter Prosser, *Palsgraf*]. Even the advocates of the harm-risked rule admitted that courts refused to apply it in numerous situations. See GREEN, *supra* note 34, at 177–85; 2 HARPER & JAMES, *supra* note 252, § 20.5, at 1139–51, § 20.6, at 1155–56, 1160–61; KEETON, *supra* note 212, at 24, 28–30, 44, 49–51, 67–78, 96–97, 101–03; Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417–24 (1961); Glanville Williams, *The Risk Principle*, 77 LAW Q. REV. 179, 181–87, 193–203 (1961).

311. See *supra* text accompanying notes 180–87, 261–67.

312. 107 N.W.2d 859 (Minn. 1961).

313. *Id.* at 860.

whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. . . . Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

. . . We now reaffirm that the doctrine of the Christianson case is still the law of Minnesota It is enough to say that negligence is tested by foresight but proximate cause is determined by hindsight.³¹⁴

The results in each of these cases, as well as many other cases, are consistent with the risk payout rule, but not with the harm-risked rule. In another well-known case, *Marshall v. Nugent*,³¹⁵ the actual result could be supported under either rule, but the court's reasoning is based on the risk payout rule, which the court did not seem to realize is different than the harm-risked rule. The defendant's truck driver, Prince, cut a corner coming over a hill, forcing an oncoming car in which the plaintiff, Marshall, was a passenger, to go off the road in order to avoid a collision. Luckily, no one was hurt and the car was not damaged. Prince stopped his truck in the roadway to help the driver of the car, Harriman, get it back onto the roadway. Marshall went up the hill to warn oncoming cars about the vehicles blocking the roadway. Before he had gone far enough for the warning to be effective, a car came over the hill, swerved to avoid the truck parked on the road, skidded, bounced off a guard fence, and hit Marshall.³¹⁶

The U.S. Court of Appeals for the First Circuit affirmed a jury verdict for the plaintiff, Marshall. Chief Judge Calvert Magruder, who subsequently was an adviser to the reporter for the *Restatement (Second)*, agreed that Marshall suffered a foreseeable injury under a broad formulation of the foreseeable risks.³¹⁷ However, Magruder's often-quoted statement of the applicable rule was phrased as a risk payout rule rather than a harm-risked rule:

[S]peaking in general terms, the effort of the courts has been, in the

314. *Id.* at 861–62 (quoting *Christianson v. Chi., St. P., M. & O. Ry.*, 69 N.W. 640, 641 (Minn. 1896)) (footnotes omitted).

315. 222 F.2d 604 (1st Cir. 1955).

316. *Id.* at 607–08.

317. *Id.* at 610–11. The advisers to the reporter for the *Restatement (Second)* are listed *infra* note 328.

development of this doctrine of proximate causation, to confine the liability of a negligent actor to those harmful consequences which *result from the operation of the risk*, or of a risk, the foreseeability of which rendered the defendant's conduct negligent.³¹⁸

Moreover, Judge Magruder discussed a hypothetical variation on the actual case in which the result can only be justified by the risk payout rule, not by the harm-risked rule, and in his discussion he clearly employed the former rule rather than the latter rule:

If the Chevrolet had been pulled back onto the highway, and Harriman and Marshall, having got in it again, had resumed their journey and had had a collision with another car five miles down the road, in which Marshall suffered bodily injuries, it could truly be said that such subsequent injury to Marshall was a consequence in fact of the earlier delay caused by the defendant's negligence, in the sense that but for such delay the Chevrolet car would not have been at the fatal intersection at the moment the other car ran into it. But on such assumed state of facts, the courts would no doubt conclude, "as a matter of law", that Prince's earlier negligence in cutting the corner was not the "proximate cause" of this later injury received by the plaintiff. *That would be because the extra risks to which such negligence by Prince had subjected the passengers in the Chevrolet car were obviously entirely over; the situation had been stabilized and become normal*, and, so far as one could foresee, whatever subsequent risks the Chevrolet might have to encounter in its resumed journey were simply the inseparable risks, no more and no less, that were incident to the Chevrolet's being out on the highway at all. But in the case at bar, the circumstances under which Marshall received the personal injuries complained of presented no such clear-cut situation.

As we have indicated, [in the actual case] the extra risks created by Prince's negligence were not all over at the moment the primary risk of collision between the truck and the Chevrolet was successfully surmounted.³¹⁹

In Magruder's hypothetical, the harm-risked rule is easily satisfied, since both the person injured (Marshall) and the type of injury (physical

318. *Marshall*, 222 F.2d at 610 (emphasis added).

319. *Id.* at 612 (emphasis added). Dan Dobbs adopts Judge Magruder's "terminated risk," "spent force" explanation of this delay hypothetical. DOBBS, *supra* note 5, § 193, at 483. Dobbs attempts to use the terminated risk rationale, which he incorrectly equates with the harm-risked rule, *see supra* note 216, to justify nonliability in a case in which the plaintiff's car was rear-ended by a speeding car when she slowed down to view an accident on the side of the road that was caused by the defendant, even though the hazards created by the realization of the tortious foreseeable risks clearly had not terminated or dissipated:

The [nonliability] result is consistent with a terminated risk view. The likelihood of gawking drivers and impatient speedsters long after the car went off the road may well be outside the risk that [the defendant] should have had in mind when he overturned.

DOBBS, *supra* note 5, § 193, at 483 n.7 (citing *O'Connor v. Nigg*, 838 P.2d 422 (Mont. 1992)). Dobbs's discussion of the accident-gawker situation is inconsistent with his approval of the courts' routinely holding defendants liable for enhancement or expansion of a plaintiff's initial accident-related injury as a result of subsequent negligent handling or treatment by medical personnel, even though such subsequent negligent handling or treatment, although foreseeable, is not one of the risks that made the defendant's conduct negligent. *See id.* § 192, at 481.

trauma as a result of being hit by a vehicle) match the foreseeable persons injured and types of injury that made Prince's conduct negligent. But, as Judge Magruder explains in the extract quoted immediately above, the risk payout rule is not satisfied, since in the hypothetical the "extra risks" of collision that made Prince's cutting the corner negligent were never realized but rather "were obviously entirely over" when the car had been pulled back onto the highway and everyone resumed their journeys: "[T]he situation had been stabilized and become normal." The risk that was realized and contributed to Marshall's (hypothetical) injury five miles down the road is the risk of delaying traffic, which also was foreseeable as a result of Prince's negligence, but which was not one of the risks that made Prince's conduct negligent.³²⁰

Another well-known decision is Judge Henry Friendly's opinion for the U.S. Court of Appeals for the Second Circuit in *In re Kinsman Transit Co.*³²¹ One defendant's ship, the *Shiras*, broke loose from its tie-down at another defendant's dock on the Buffalo River as a result of pressure from ice flows in the river, the ship owner's negligence in failing to moor or anchor the ship properly, and the dock owner's negligence in failing to properly construct or maintain a deadman to which the mooring lines were attached. The ship careened stern first down the narrow, twisting river, at one point striking and setting adrift another ship. Both ships continued downstream and crashed into a drawbridge, which negligently had not been raised despite sufficient advance warning, causing a bridge tower to collapse and the ships to jam

320. A well-known actual case similarly involving coincidental timing, in which liability would be denied by both the harm-risked rule and the risk payout rule, is *Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899). However, as is explained in the text, Magruder's delay hypothetical is properly resolved by the risk payout rule but not by the harm-risked rule. Section 30 in the draft *Restatement (Third)*, which states that "[a]n actor is not liable for harm when the tortious aspect of the actor's conduct did not increase the risk of [that] harm," is meant to address these coincidental timing and location situations, which the draft recognizes would not be properly handled by the harm-risked rule that is stated in the black letter of section 29. RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 30 & cmt. a; *see id.* § 33(c) (stating a similar limitation). However, section 30 conflicts with sections 31–33 and section 35, unless "risk" in section 30 (and section 33(c)) is interpreted as referring to an ontologically puzzling, *ex post*, knowing-all-that-happened risk analysis (according to which all probabilities are either zero or one), rather than the limited knowledge foresight analysis that is assumed (but not stated) in the other sections of the draft *Restatement*. Section 30, and all the problems that it raises, would not be necessary if section 29 were phrased and consistently elaborated as the risk payout rule rather than the harm-risked rule.

321. 338 F.2d 708 (2d Cir. 1964).

against the bridge and each other, thereby damming the river so that property was flooded upriver for three miles on both banks of the river, all the way up to where the *Shiras* had originally been moored.³²²

The usual foreseeable risks of a ship's breaking loose would be collision damage to other ships or structures downstream in or on the banks of the river, not flooding. Although the *Shiras* possibly could have grounded and created a dam at a narrow bend further up the river, it is debatable whether all of the plaintiff owners of flooded riverside property, especially those below the bend or far above it, were foreseeable plaintiffs or suffered a foreseeable type of injury, especially with respect to the defendant dock owner.³²³ Writing for the court, Judge Henry Friendly nevertheless held the defendants liable:

We have no difficulty with the result of *The Wagon Mound*, in view of the finding that the appellant had no reason to believe that the floating furnace oil would burn. On that view the decision simply applies the principle which excludes liability where the injury *sprang from a hazard different from that which was improperly risked*. Although some language in the judgment goes beyond this, we would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should be exonerated when *the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable* when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here *the damage was caused by just those forces whose existence required the exercise of greater care than was taken*—the current, the ice, and the physical mass of the *Shiras*, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation. The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated.

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked. See the many cases cited in Prosser, Torts, . . . and the recent reaffirmation, *Dellwo v. Pearson*, . . . 107 N.W.2d 859 . . . ([Minn.] 1961), of Mr. Justice Mitchell's statement in *Christianson v. Chicago, St. P., M. & O. Ry.*, . . . 69 N.W. 640, 641 ([Minn.] 1896), that the rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854), has no place in negligence law. Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise serious doubt whether the concept is meaningful [citing and discussing *Guardian Casualty*]; indeed, we wonder whether the British courts are not finding it necessary to limit the language of *The Wagon Mound* as we have indicated [citing and discussing *Hughes v. Lord Advocate*].³²⁴

322. *Id.* at 712–13.

323. *See id.* at 722–23 & n.6.

324. *Id.* at 723–25 & n.10 (emphasis added) (citations omitted). Dan Dobbs, when

Although the distinction is not clearly drawn by Judge Friendly, he clearly rejects the harm-risked rule and employs reasoning based on the risk payout rule. He approves the differing results in the British cases, *Doughty* and *Hughes*,³²⁵ and employs the “sprang from a foreseeable risk” principle to explain the lack of liability in *Doughty*:

The risk against which defendant was required to use care—splashing of the molten liquid from dropping the supposedly explosion proof cover—did not materialize, and the defendant was found not to have lacked proper care against the risk that did. As said by Lord Justice Diplock, [1964] 2 W.L.R. at 247, “The former risk was well known (that was foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the plaintiff damage by burning.”³²⁶

The *Restatement (Second)* was published a year after Judge Friendly’s opinion in *Kinsman*. The reporter for the *Restatement (Second)*, William Prosser, was, like Judge Friendly, a critic of the harm-risked rule.³²⁷ However, once again, most of the advisers (almost all of the academic advisers) were strong proponents of the harm-risked rule.³²⁸ The first *Restatement*’s distinction among the types of interests foreseeably put at risk was abandoned. Clause (b) of section 281, which previously contained the foreseeable-interest-affected requirement, was rephrased as a foreseeable plaintiff requirement, and comment g and its accompanying

attempting to reconcile *Kinsman* with the harm-risked rule, employs reasoning that tracks the risk payout rule rather than the harm-risked rule:

[W]hen a large ship is allowed to break loose from its moorings in a fast-running river, a variety of harms associated with such a large force can be classed together, so that even if no one would have considered that a loose ship might cause upstream flooding because it could crash into a bridge and dam the river, such harm is nevertheless closely associated with the foreseeable forces—ships and heavy waters—so that liability is again an appropriate question for the trier of fact and not to be precluded by a rule of law.

DOBBS, *supra* note 5, § 189, at 467–68.

325. See *In re Kinsman*, 338 F.2d at 724 n.9, 725 n.11; *supra* text accompanying notes 293–301.

326. *In re Kinsman*, 338 F.2d at 724 n.9.

327. See RESTATEMENT (SECOND) OF TORTS app. § 281 reporter’s note, at 305–09 (1966); KEETON, *supra* note 212, at 95–96; PROSSER, HANDBOOK, *supra* note 310, §§ 43–44, at 250–80; Prosser, *Palsgraf*, *supra* note 310, at 16–19.

328. See RESTATEMENT (SECOND) OF TORTS §§ 281–503, at iii–iv (1965) (listing as advisers the following well-known academic proponents of the harm-risked rule: Laurence H. Eldredge, Fleming James, Jr., Robert E. Keeton, W. Page Keeton, Wex Smathers Malone, Clarence Morris, Warren A. Seavey, and John W. Wade). The other advisers were Gerald F. Flood, Calvert Magruder, Allan H. McCoid, Samuel D. Thurman, and Roger J. Traynor, some of whom may also have been proponents of the harm-risked rule. See *id.*

illustration were replaced by comment j, which explicitly rejects the distinction between types of interests put at risk: "The plaintiff is not subjected to fragmentation in terms of risk or harm to his foot, his hand, his eye, his chattels, or his land."³²⁹ Otherwise, however, the *Restatement (Second)* persisted in trying, with obvious difficulty, to recharacterize the case law as being consistent with the harm-risked rule (as a duty limitation). For example, it states:

Flexibility of risk. In determining whether a particular harm or hazard is within the scope of the risk created by the actor's conduct, "risk" must be understood in the broader sense of including all of those hazards and consequences which are to be regarded as normal and ordinary. "Risk" is not limited to those hazards which a reasonable man would have in contemplation and take into account in planning his conduct. Thus one who drives an automobile through city streets at excessive speed may not, as a reasonable man, have in mind the possibility that he may endanger a child in the street and that one who attempts to rescue the child may suffer harm; that he may injure some one who will suffer further injury from negligent medical treatment, or from a fall while attempting to walk on crutches; or that the injured man may be left lying in the highway, where a second car will run over him. None of these possibilities is in itself sufficient to make the driver negligent, and none of them is sufficiently probable to influence the conduct of a reasonable man in his position, which will be determined without regard to them. Nevertheless, *each of them is a normal, not unusual consequence of the hazardous situation risked by the driver's conduct, and each is justly attachable to the risk created, and so within its scope.*

In determining whether such events are within the risk, the courts have been compelled of necessity to resort to *hindsight rather than foresight*. If an event appears to have been normal, not unusual, and *closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected* by a reasonable man in the actor's place.³³⁰

This interpretation of the harm-risked limitation, which is necessary if

329. See *id.* § 281 & cmt. j; RESTATEMENT (SECOND) OF TORTS app. § 281 reporter's note, at 307-08 (1966). For persuasive criticism of the foreseeable-interest-affected requirement, which also notes the lack of case support for it, see KEETON ET AL., *supra* note 34, § 43, at 289-90. Surprisingly, the draft *Restatement (Third)* would revive the foreseeable-interest-affected requirement. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmt. h. The reporters erroneously seem to assume that the *Restatement (Second)*'s elimination of the foreseeable-interest-affected requirement was meant to create an exception to the *Restatement*'s independent, explicit foreseeable-risk-or-hazard requirement. See *id.* § 29 cmt. h & reporter's note to cmt. h. If the type of risk or hazard that was foreseeable and made the defendant's conduct tortious (for example, an accidental firing of a gun or explosion) materialized and unforeseeably injured the owner of real or personal property rather than foreseeably injuring the property itself, or vice versa, there would be little reason (as the *Restatement (Second)* belatedly acknowledged) for relieving the defendant of liability simply because the interest of the plaintiff that was affected was not the specific one that was foreseeably put at risk, as even proponents of the harm-risked rule admit. See, e.g., DOBBS, *supra* note 5, § 184, at 457-58 ("[C]ourts have not drawn a distinction between interests in bodily security and security of one's property.").

330. RESTATEMENT (SECOND) OF TORTS § 281 cmt. g (1965) (emphasis added).

that limitation is to be able to explain the decided cases, actually abandons that limitation and replaces it with the risk payout limitation.

The *Restatement (Second)* also repeats the claim, which was first made in the 1948 revision, that all “legal cause” (extent of responsibility) issues, including those that have traditionally been handled by the superseding cause limitation, can and should be handled instead by the harm-risked duty limitation, while again deferring to the clear contrary practice by retaining all the traditional superseding cause sections.³³¹ This claim conflicts with other provisions that continue to state that the “manner of occurrence” of the harm need not have been foreseeable and is not considered when determining whether the harm matched the foreseeable risk.³³²

How do things stand today? A useful indication is provided by returning to the state, New York, in which both *Palsgraf* and *Guardian Casualty* were decided. In a recent case, *Di Ponzio v. Riordan*,³³³ the plaintiff Di Ponzio’s leg was fractured when he was pinned between his car and the car of another customer, Riordan, while filling his car with gas at a self-service station owned by the defendant United Refining Co. (URC). Riordan had parked his car behind Di Ponzio’s, with the rear of his car facing the rear of Di Ponzio’s car, where Di Ponzio stood to pump the gas into his car. Riordan put the gearshift of his car in park but left the engine running, despite signs warning customers not to smoke and to turn off their engines, while he filled his car up and then went inside the station to pay for the gas. When Riordan left the station to return to his car, he observed his car beginning to roll backwards toward Di Ponzio. He ran toward the car, but was unable to get to it before it struck and pinned Di Ponzio between the two cars. The

331. *Id.* § 281 cmt. h; *see id.* § 435 cmt. c; *supra* text accompanying notes 272–73. As was previously discussed, some of the principal academic proponents of the harm-risked theory have even tried to substitute the harm-risked limitation for the tortious aspect causation requirement. *See supra* text accompanying notes 244–54.

332. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. f, § 435(1) & cmt. a, § 442B & cmt. a (1965); *supra* text accompanying notes 229–33. Comment f to § 281 states:

Harm beyond the risk. Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor’s conduct, the actor is ordinarily not liable. This is subject, however, to the qualification that where the harm which has resulted was itself within the risk created, the fact that it has been brought about in a manner which was not to be expected, or by the intervention of forces which were not within the risk, does not necessarily prevent the actor’s liability.

RESTATEMENT (SECOND) OF TORTS § 281 cmt. f (1965).

333. 679 N.E.2d 616 (N.Y. 1997).

pavement was flat and level between the cars, and the cause of the car's shifting into gear remained inexplicable.³³⁴ Di Ponzio sued URC on the theory that URC's attendants had negligently turned off the two-way intercom system and failed to note that Riordan had left his engine on or required him to turn it off, contrary to URC's policy that attendants should not allow customers to pump gas while their engines were running. URC's policy, as well as a municipal ordinance that required the posting of the warning signs, was aimed at avoiding the risks of fires and explosions due to ignition of the gas vapors.³³⁵

URC moved for summary judgment on the grounds that (1) there was no evidence that they violated a legal duty owed to Di Ponzio; (2) any alleged negligence was not a proximate cause of Di Ponzio's injuries; and (3) the accident and injuries were not foreseeable as a matter of law. The trial court denied URC's motion, holding that URC had a duty as the owner of the property to exercise reasonable care under the circumstances and that the issues of proximate cause and foreseeability were questions for the trier of fact.³³⁶ Four of the five judges in the intermediate appellate court agreed with the trial court that, as owner of the property, URC owed a (general) duty of reasonable care to the plaintiff, and that the question of whether URC had fulfilled this duty was best left, along with the proximate cause issue, to the trier of fact. Two of the four judges also agreed with the trial court that the foreseeability issue was for the trier of fact, while the other two held that the complaint should have been dismissed since it was unforeseeable as a matter of law "that a vehicle left unattended with its engine running at a self-service gas station will inexplicably move and injure a plaintiff."³³⁷ The fifth judge, who cast the deciding vote in favor of dismissing the complaint, held that as a matter of law URC owed no duty to Di Ponzio and that any alleged negligence by URC was not a proximate cause of Di Ponzio's injury. Although he quoted *Palsgraf's* language that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation" and noted the unforeseeability of the car's inexplicably shifting into gear, he did not base his no-duty holding on the harm-risked limitation but rather stated that "the relationship between a gas station owner and patron" should not be held to require the defendant to do more than it had done, by posting notices,

334. *Id.* at 618.

335. *Id.* at 617-18, 619-20.

336. *Id.* at 618.

337. *Di Ponzio v. Riordan*, 645 N.Y.S.2d 368, 372 (App. Div. 1996); *see id.* at 370-71, 375. Although it is not clear, the two judges who held that the car's movement was unforeseeable as a matter of law may have treated this as a negligence (breach of duty) issue.

to get customers to turn off their engines.³³⁸ In sum, the judges in the trial court and the intermediate appellate court paid scant attention to the harm-risked rule.

The New York Court of Appeals affirmed the order dismissing the complaint, but on different grounds. The court explicitly referred to and relied on the harm-risked limitation in holding that URC had no duty to “protect its customers from the unforeseeable occurrence that led to plaintiff’s injury.”³³⁹ However, much of the court’s discussion used language that reflects the risk payout limitation rather than the harm-risked limitation. For example, the court stated:

As is explained in [Restatement Second] section 281, comment e, conduct is considered negligent when it tends to subject another to an unreasonable risk of harm *arising from* one or more particular foreseeable hazards. When the person is harmed by an occurrence *resulting from* one of those hazards, the negligent actor may be held liable. In contrast, where the harm was *caused by* an occurrence that was not part of the risk or recognized hazard involved in the actor’s conduct, the actor is not liable. The following example taken directly from the Restatement provides a useful illustration of the point:

“A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.”

As this hypothetical fact pattern makes clear, where an individual breaches a legal duty and thereby causes an occurrence that is within the class of foreseeable hazards that the duty exists to prevent, the individual may be held liable, even though the harm may have been brought about in an unexpected way. On the other hand, no liability will result when the occurrence is not one that is normally associated with such hazards. . . .

. . . Assuming without deciding that URC had a duty to control its customer’s conduct [by requiring him to turn off his engine], the existence of such a duty would not aid plaintiff Di Ponzio’s case, since his injuries did not *arise from* the occurrence of any of the foreseeable hazards that the duty would exist to prevent.

When a vehicle’s engine is left running in an area where gasoline is being pumped, there is a natural and foreseeable risk of fire or explosion because of the highly flammable properties of the fuel. . . .

The occurrence that *led to* plaintiff’s injury was clearly outside of this limited class of hazards.³⁴⁰

As we previously discussed, the loaded gun illustration upon which the court relies, like most of the other illustrations that are relied upon by

338. *Id.* at 373, 374 (Denman, P.J., concurring).

339. *Di Ponzio*, 679 N.E.2d at 617; *see id.* at 620.

340. *Id.* at 619–20 (emphasis shifted and added) (citations omitted).

proponents of the harm-risked limitation, involves a failure to satisfy the tortious aspect *causation* requirement, since an essential part of the description of the negligent aspect of A's conduct—the fact that the gun was *loaded*—did not contribute to D's injury.³⁴¹ There thus is no need to invoke any harm-risked or risk payout limitation on the extent of responsibility. Similarly, the tortious aspect causation requirement was not satisfied in *Di Ponzio*, since a necessary condition in the description of the defendant's negligent conduct—letting a customer keep his engine running *where gasoline vapors are present*—did not contribute to the plaintiff's injury.

If one nevertheless reaches the extent of responsibility issue in *Di Ponzio*, as the court did, both the harm-risked limitation and the risk payout limitation would apply and prevent the defendant from being liable. Thus, like many other cases that are cited in support of the harm-risked limitation, but which would be decided the same way under the risk payout limitation, *Di Ponzio* provides no support for using the harm-risked limitation rather than the risk payout limitation, especially given *Di Ponzio*'s frequent use of risk payout language. On the other hand, as we have seen, there are many cases in which the courts allow liability that is improper under the harm-risked limitation but proper under the risk payout limitation.

VI. CONCLUSION

The draft *Restatement (Third)*, for the first time, would make the harm-risked limitation the sole general limitation on the extent of legal responsibility for tortiously caused harm, by completely rejecting the no-worse-off and superseding cause limitations as independent limitations.³⁴² Almost seventy years after the publication of the first *Restatement*, fifty-five years after the 1948 revisions of the first *Restatement*, and forty years after the publication of the *Restatement (Second)*, the draft *Restatement (Third)* echoes the hopeful language in the reporter's notes to the 1948 amendments, which previously constituted the high-water mark in the *Restatement*'s longstanding advocacy of the harm-risked limitation:

The risk standard has proved increasingly attractive to courts, and a trend toward its ascendancy as the predominant standard employed to limit liability, with necessary adjustments at the margins, continues from the time of the Second Restatement of Torts.³⁴³

341. See *supra* text accompanying notes 250–53.

342. See *supra* note 273; *supra* text accompanying notes 85–91.

343. RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmt. e; see *supra*

As this statement acknowledges, the harm-risked rule, even with “necessary adjustments at the margins,” has yet to achieve a predominant status in the courts, despite almost seventy years of attempts by the drafters of the various editions of the *Restatement* to get the courts to accept it. There are good reasons for its failure to achieve judicial approbation, especially as the sole general limitation on the extent of legal responsibility for tortiously caused harm. As this Article has shown, many cases would be improperly resolved if it were the sole limitation—cases that can only be properly resolved under the no-worse-off and superseding cause limitations, which are widely employed by the courts.³⁴⁴

Moreover, the draft *Restatement (Third)*, like the prior *Restatements*, fails to recognize the significant difference between the harm-risked limitation and the risk payout limitation, sometimes using harm-risked language but also often using risk payout language.³⁴⁵ For example, although the black letter of section 29 states the harm-risked rule,³⁴⁶ the reporters describe *Marshall v. Nugent* as “[t]he classic case expressing the limit on liability reflected in this section,” and they focus on the language in that case that states the risk payout limitation rather than the harm-risked limitation:

[S]peaking in general terms, the effort of the courts has been, in the development of the doctrine of proximate causation, to confine the liability of a negligent actor to those harmful consequences which *result from the operation of the risk*, or of a risk, the foreseeability of which rendered the defendant’s conduct negligent.³⁴⁷

text accompanying notes 268–71 (quoting similar language from the reporter’s notes on the 1948 amendments).

344. See *supra* text accompanying notes 25–157, 272–80.

345. See *supra* notes 255–57 and accompanying text.

346. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 (“An actor is not liable for harm different from the harms whose risks made the actor’s conduct tortious.”). Although this language does not explicitly incorporate the foreseeable-person-injured requirement, comment m to section 29 assumes that “[o]rdinarily, the risk standard contained in this section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to [unforeseeable] plaintiffs,” and it concludes by stating:

In those cases in which the plaintiff was, because of time or geography, nevertheless truly beyond being subject to harm of the type risked by the tortious conduct, but the plaintiff somehow suffers such harm, the defendant is not liable to that plaintiff for the harm.

Id. § 29 cmt. m.

347. *Id.* § 29 reporters’ note to cmt. d (emphasis added). The *Marshall v. Nugent*

Although the draft does not recognize the significant difference between the risk payout limitation and the harm-risked limitation, its references to the risk payout limitation explicitly acknowledge that it satisfies the basic principle that motivates (but is not actually satisfied by) the harm-risked limitation: that liability should be limited to actual harms that bear a significant relation to the foreseeable risks that made the defendant's conduct tortious.³⁴⁸ The draft also acknowledges that numerous exceptions need to be made to the harm-risked limitation (that are not needed for the risk payout limitation) to make it minimally plausible and that even with these exceptions it is inconsistent with the reasoning and the results in many cases.³⁴⁹

Rather than once again trying, as the first and second *Restatements* did, to get the courts to employ the well-intentioned but misguided harm-risked limitation, the *Restatement (Third)* should acknowledge the serious deficiencies in the harm-risked limitation that have prevented, and will continue to prevent, its general acceptance by the courts, especially as the sole limitation on the extent of legal responsibility for tortiously caused harm. As a number of members urged at the May 2003 annual meeting of the American Law Institute, where the relevant sections were first presented and discussed, the draft *Restatement* should consistently employ and elaborate the risk payout version of the risk limitation, rather than the harm-risked version.³⁵⁰ The *Restatement (Third)* should also acknowledge and

case is discussed *supra* text accompanying notes 315–20.

348. See, e.g., RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmt. e.

Rationale. Limiting liability to harm arising from the risks created by the tortious conduct . . . imposes limits on liability by reference to the reasons for holding an actor liable for tortious conduct in the first place. The risk standard appeals to intuitive notions of fairness and proportionality by imposing liability for the harms resulting from risks created by the actor's wrongful conduct, but for no others.

Id. (emphasis added); cf. KEETON, *supra* note 212, at 22 (“[I]n relation to the hypothetical case of the transportation of explosives, . . . legal responsibility should be limited to damages caused by explosion or by conduct responsive to the explosion risk . . .”) (emphasis added).

349. See RESTATEMENT (THIRD), TENT. DRAFT NO. 3, *supra* note 42, § 29 cmts. e, l, o; *id.* § 30 (discussing coincidentally being at the wrong place at the wrong time); *id.* § 31 (eggshell plaintiffs); *id.* § 32 (rescuers); *id.* § 33 (intentional and reckless conduct); *id.* § 35 (enhanced harm resulting from intervenor's attempt to aid); *id.* § 36 (trivial and insubstantial causal contributions). For discussion of some of the many problems raised and exceptions necessitated by the harm-risked rule, which do not exist under the risk payout rule, see *supra* notes 230, 234–35, 241, 273, 279, 298, 309, 319–20, 324, 329 and accompanying text.

350. See American Law Institute, 80th Annual Meeting, Discussing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (forthcoming 2004) (unedited transcript of May 12, 2003, afternoon session, at 122–24, 133–38, 145–48, on file with author) (remarks of Oscar Gray, Harvey Perlman, Benjamin Zipursky, Kenneth Simons, and Richard Wright); cf. *id.* (unedited transcript at 126–27) (remarks of

elaborate the other two general limitations that have been discussed in this Article—the no-worse-off limitation and the superseding cause limitation. All three limitations flow from and implement the basic principles of justice and, thus, not surprisingly, are widely applied (explicitly or implicitly) by the courts. To continue further down the path trod so unsuccessfully by the first and second *Restatements* in this area is to ignore (an extended version of) Santayana’s advice: “Those who cannot remember [or learn from] the past are condemned to repeat it.”³⁵¹

Jerry Palmer, noting that the foreseeable plaintiff requirement would prevent liability in instances where it should exist).

351. GEORGE SANTAYANA, *THE LIFE OF REASON* 284 (1906). For elaboration and criticism of the *Restatements*’ similar longstanding, unsuccessful attempt to get the courts to employ a conception of negligence that is inconsistent with the principles of justice, see Wright, *Justice and Reasonable Care*, *supra* note 9; Wright, *Hand Formula*, *supra* note 9; Wright, *Negligence in the Courts*, *supra* note 9.

