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THE FIVE ELEMENTS OF NEGLIGENCE

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After centuries of glacial development in the English forms of action, negligence law in America began to take shape during the 1830s and 1840s as a general theory of liability for carelessly caused harm. Conveniently (if roughly) dated to Chief Judge Shaw's 1850 decision in *Brown v. Kendall*,¹ negligence emerged as a distinct tort sometime during the middle of the nineteenth century.² The essence of the tort was that a person should be subject to liability for carelessly causing harm to another.³ Also essential to negligence, evident from an early date, was the necessity of a causal connection between the defendant's breach of duty and the plaintiff's damage that was natural, probable, proximate, and not too remote.⁴

As early courts and commentators explored the developing tort of negligence, they increasingly divided it into its essential pieces—"elements"—centered on a defendant's failure to exercise due care and

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1. 60 Mass. (6 Cush.) 292 (1850).

2. See Percy H. Winfield, *The History of Negligence in the Law of Tort*, 42 L.Q. REV. 184, 195-96 (1926).

3. See, e.g., JAMES HENRY DEERING, *THE LAW OF NEGLIGENCE* § 1 (1886).

4. See, e.g., DEERING, *supra* note 3, § 1, at 27 (citing FRANCIS WHARTON, *LAW OF NEGLIGENCE* § 3 (1874)); WILLIAM B. HALE, *HANDBOOK ON THE LAW OF TORTS* § 19, at 44 (1896).

the plaintiff's proximately resulting harm.⁵ As negligence law proceeded to evolve, its elements were stated in a variety of ways, but most courts⁶ and commentators⁷ in time came to assert that it contains four elements. In perhaps its most conventional current iteration, negligence is formulated in terms of duty, breach, cause, and damage.⁸ Yet, courts and commentators continue to disagree on what the four elements should contain, on just how the various ideas recognized as essential to negligence claims should be stuffed into the four pigeonholes.⁹ Many courts frame the law of negligence within three elements—duty, breach, and proximately caused harm.¹⁰ And at least one court has reduced the

5. See, e.g., H. GERALD CHAPIN, *HANDBOOK ON THE LAW OF TORTS* § 105, at 501 (1917) ((1) duty, (2) breach, and (3) resulting injury); HALE, *supra* note 4, § 227, at 449 (1896) (“The essential elements of actionable negligence are: (a) Failure to exercise commensurate care, involving (b) A breach of duty, resulting proximately in (c) Damage to plaintiff.”).

6. Our review of recent supreme court decisions reveals four elements (sometimes listed without enumeration) in Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming, for a total of nearly thirty current four-element states.

7. See, e.g., KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 46 (2d ed. 2002); RICHARD A. EPSTEIN, *TORTS* § 5.1, at 109 (1999); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 30, at 164 (5th ed. 1984); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 658 (2001).

8. See, e.g., *Winn v. Posades*, 913 A.2d 407, 411 (Conn. 2007); *Durham v. HTH Corp.*, 870 A.2d 577, 579 (Me. 2005); *Brown v. Brown*, 739 N.W.2d 313 (Mich. 2007); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 3 (Miss. 2007); *Barr v. Great Falls Int'l Airport Auth.*, 107 P.3d 471, 477 (Mont. 2005); *Avery v. Diedrich*, 734 N.W.2d 159, 164 (Wis. 2007).

9. See, e.g., *Raleigh v. Performance Plumbing & Heating, Inc.*, 130 P.3d 1011, 1015 (Colo. 2006) (“(1) the existence of a legal duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff was injured; and (4) the defendant’s breach of duty caused the injury”) (citations omitted); *Bhakta v. County of Maui*, 124 P.3d 943, 956 (Haw. 2005) ((1) duty; (2) breach; (3) a “reasonably close causal connection between the conduct and the resulting injury;” and (4) damage); *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) ((1) a duty of care; (2) breach; (3) injury; and (4) breach as the proximate cause of the injury); *Farabaugh v. Pa. Turnpike Comm’n*, 911 A.2d 1264, 1272-73 (Pa. 2006) (“(1) a duty of care; (2) the breach of the duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the plaintiff”); *Jenkins v. CSX Transp., Inc.*, 649 S.E.2d 294, 302 (W. Va. 2007) (“duty, breach, foreseeability, and causation”) (citation omitted).

A minority of four-element states modify the causation element with “proximate” or “legal.” See, e.g., *Jones Food Co. v. Shipman*, No. 1051322, 2006 WL 3718254, at *5 (Ala. 2006) (“proximate”); *Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 51 (Nev. 2005) (“legal”).

10. Nearly twenty jurisdictions organize negligence in a three-element construct. See, e.g., *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007) (“To prevail on a claim of negligence, a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the

element count to two.¹¹ More completely, two courts,¹² some commentators,¹³ and the *Restatement (Third) of Torts*¹⁴ attribute element status to *five* essential aspects of negligence, the standard four above plus proximate cause. My thesis here is that the latter, five-element formulation is best. This is because each of the five components is complex and conceptually distinct, and because all must coexist or a negligence claim will fail.

Disputes over how the elements of negligence should be formulated arise every generation or so when the American Law Institute “restates” the law of torts, which is what it is doing now.¹⁵ Normally, most courts and commentators have other (arguably more important) fish to fry and little interest in trifling with how one element or another should be conceived or phrased. Yet the outline of a tort structures how lawyers frame specific issues, which affects how scholars conceive and critique the law and how judges apply it to cases they decide. Thus, how the components of negligence are formulated is important to an elemental understanding of the nature of this tort and how it properly should be applied.

The standard four-element account of negligence—as duty, breach, cause, and damage—misleadingly conflates two distinct ideas that too often are linked uncomfortably together under the umbrella term,

breach.”) (citation omitted); *Stein v. Asheville City Bd. of Educ.*, 626 S.E.2d 263, 267 (N.C. 2006) (“(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach”).

11. *White v. Mattera*, 814 A.2d 627, 631 (N.J. 2003) (“[T]here are two essential elements of a cause of action based on the alleged negligence of a tortfeasor which must exist . . . , namely, the act of negligence itself and a consequential injury resulting therefrom.”) (citations omitted).

12. *See Detraz v. Lee*, 950 So. 2d 557, 562 (La. 2007) ((1) duty; (2) breach; (3) cause-in-fact; (4) legal cause; and (5) damages); *Naifeh v. Valley Forge Life Ins. Co.*, 204 S.W.3d 758, 771 (Tenn. 2006) ((1) duty; (2) breach; “(3) injury; (4) causation in fact; and (5) proximate, or legal, cause”) (citation omitted).

13. *See, e.g.*, DAN B. DOBBS, *THE LAW OF TORTS* § 114, at 269 (2000); THOMAS C. GALLIGAN, PHOEBE A. HADDON, FRANK L. MARAIST, FRANK MCCLELLAN, MICHAEL L. RUSTAD, NICOLAS P. TERRY & STEPHANIE M. WILDMAN, *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 167 (4th ed. 2007).

14. *See infra* note 15.

15. In 1996, the American Law Institute commissioned a *Restatement (Third) of Torts: General Principles*, eventually renamed the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, that now is close to completion. The *Third Restatement*’s most recent draft of the section on negligence liability states “the five elements of a prima facie case for negligence” as “duty,” “failure to exercise reasonable care,” “factual cause,” “physical harm,” and “harm within the scope of liability (which historically has been called ‘proximate cause’).” *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 6, “Liability for Negligent Conduct,” cmt. b at 79-80 (Proposed Final Draft No. 1 2005).

“cause”: *factual* causation and *proximate* cause.¹⁶ The first of these two intertwined requirements of the negligence tort, “cause in fact,” concerns the question whether a cause-and-effect relationship between the defendant’s wrong and the plaintiff’s harm actually exists—the existence *vel non* of an actual, *factual* link between the defendant’s breach of duty and the plaintiff’s possibly resulting damage. The second issue, “proximate cause,” assumes the existence of actual causation and inquires into whether the relationship between the wrong and harm was sufficiently close—whether the causal link was *proximate* rather than remote. No doubt these two peas reside together in the same pod, yet they remain two separate peas.

Surely it is not wrong to group the requirements of negligence into two, or three, or four elements instead of five, for there is nothing absolute in how the elements should be numbered or defined. At an existential level, what is most important is not the number of elements but their content, how negligence law is best conceived.¹⁷ But at a level of practical understanding, how a tort is formulated is of real importance, for it clusters and defines the boundaries of the substantive ideas themselves. Negligence thus is most usefully stated as comprised of five, not four, elements: (1) duty, (2) breach, (3) cause in fact, (4) proximate cause, and (5) harm, each of which is briefly here explained.

1. DUTY

Duty, obligation of one person to another, flows from millennia of social customs, philosophy, and religion. Serving as the glue of society, duty is the thread that binds humans to one another in community. Duty

16. Occasionally courts mitigate the confusion by revealing the conflation. *See, e.g.*, *Ulwick v. DeChristopher*, 582 N.E.2d 954, 958 (Mass. 1991) (“‘duty, breach of duty (or, the element of negligence), causation (actual and proximate) and damages’”) (citations omitted). Of course, decreasing the number of elements from four to three, or even two, aggravates the conflation confusion.

17. For this reason, perhaps, many decisions state the elements without enumeration. *See, e.g.*, *Morris v. De La Torre*, 113 P.3d 1182, 1184 (Cal. 2005) (“In order to prevail in an action based upon a defendant’s alleged negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of his or her injuries.”) (citation omitted); *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 232 (Ill. 2007) (“[F]or negligence, plaintiffs must show that defendant owed and breached a duty of care, proximately causing the plaintiff’s injury.”) (citation omitted); *Spencer v. Health Force, Inc.*, 107 P.3d 504, 510 (N.M. 2005) (“[A] negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff’s damages.”) (citation omitted).

constrains and channels behavior in a socially responsible way before the fact, and it provides a basis for judging the propriety of behavior thereafter.¹⁸

At bottom, negligence law assesses human choices to engage in harmful conduct as proper or improper. Because choices are deemed improper only if they breach a preexisting obligation to avoid and repair carelessly inflicted harms to others, duty gives definitional coherence to the negligence inquiry. Serving in this manner as the foundational element of a negligence claim, duty provides the front door to recovery for the principal cause of action in the law of torts: Every negligence claim must pass through the “duty portal” that bounds the scope of tort recovery for accidental harm.

In defining the maximum extent to which people are to be held accountable for their damaging misdeeds in differing contexts, duty balances the interests of certain classes of potential victims in security from certain types of harm, on the one hand, against the interests of certain classes of actors in freedom of action, on the other. This balance of interests controls the extent to which courts close the door on categories of problems at the edge of tort law or, instead, pass such “border problems” through to juries for determination. How strongly duty rules are framed controls the extent to which negligence lawsuits of various types are approved for full adjudication or are instead summarily ejected from the judicial system. Weaker no-duty rules funnel more disputes at the margin of negligence law into local courtrooms for possible redress while stronger no-duty rules force the victims of such disputes to absorb their injuries themselves or seek relief from insurance providers and other institutions beyond the courts.

Thus, the duty/no-duty element provides an important screening mechanism for excluding types of cases that are inappropriate for negligence adjudication. Among the recurring categories of cases where careless conduct does not always give rise to liability for resulting harm, where negligence claims may be barred or limited, are those involving harm to third parties that may result from the negligence of certain types of actors, such as manufacturers, professionals, employers, social hosts, and probation officers; harm to unborn children; harm that landowners may cause to trespassers and other uninvited guests; harm from negligently failing to provide affirmative help to others in need; and

18. This section draws from David G. Owen, *Duty Rules*, 54 VAND. L. REV. 767, 767-79 (2001).

harm that negligence may cause to nonphysical interests, especially emotional harm and pure economic loss. In situations such as these, where the appropriateness of allowing recovery under normal principles of negligence depends upon conflicting values and policies, courts recognize the importance of duty's threshold, gatekeeper role.

Why the law should ever deny recovery for negligently inflicted harm, why it should not always provide a remedy for persons injured by unreasonable acts or omissions of others, is best revealed by example. A social host may imprudently serve an adult guest too much alcohol before the guest attempts to drive home, yet courts (and legislatures) have concluded that legal responsibility, as a matter of policy, should be borne alone by the intoxicated guest who drives the car. In another situation, a jury might or might not consider it "negligent" for a check-casher or fast-food restaurant employee to fail to surrender money demanded by a gunman threatening a hostage, but courts can probably best decide on a category basis whether the property interests of enterprises, and society's interests in discouraging hostage taking, should or should not be subordinated to the safety interests of the hostages. As a final example, whether a passerby should be held accountable for negligently failing to help a needy stranger, while clear perhaps to theologians, classically illustrates the kind of complex policy decision that courts in negligence cases, through duty rules, normally choose to exclude from jury consideration. Harm in all such cases is clearly foreseeable, but the kinds of choices among fundamental values and policies lurking within these special types of cases suggest that courts might reasonably determine—as a matter of legal principle, without input from a jury—that defendants in such situations should be categorically exempt from the normal reach of the law of negligence. The element of duty, which draws upon a deep reservoir of fairness, justice, and social policy, provides just this type of judicial tool.

2. BREACH

The second element of the tort of negligence is the misconduct itself, the defendant's improper act or omission. Normally referred to as the defendant's *breach* of duty, this element implies the preexistence of a standard of proper behavior to avoid imposing undue risks of harm to other persons and their property, which circles back to duty. In early law, the standard of care imposed on one person for the protection of another depended heavily on the formal relationship between the parties, such as innkeeper-guest, doctor-patient, and the like. As society grew

more complex, a general standard of care became necessary to govern the conduct of persons and enterprises who unavoidably impose risks of injury every day on other persons, often strangers, on highways or wherever. And so negligence law developed a standard for defining and assessing proper behavior in a crowded world where everyone must move around to function, where occasional collisions are inevitable.

While the standard of care must be adjusted for certain special relationships, as classically was the norm, modern negligence law imposes a duty on most persons in most situations to act with *reasonable* care, often referred to as “due care,” for the safety of others and themselves. A person who acts carelessly—*unreasonably*, without *due* care—*breaches* the duty of care, and such conduct is characterized as “negligent.” And so, within the *tort* of negligence (which we might label Negligence with a capital “N”), the second *element* is negligent action or inaction, often referred to simply as “negligence” (which we might label negligence with a lower case “n”).

To assess what type and amount of care is reasonable in particular circumstances, negligence law turns to the standard of “a reasonable prudent person” and asks how such a person would behave in a particular situation, in pursuing his or her own objectives, to avoid harming others in the process.¹⁹ By defining the standard of proper behavior in terms of a mythical prudent person, the law thus sets up an *objective* standard against which to measure a defendant’s conduct. That is, to determine whether a defendant’s choices and conduct that led to accidental injury were negligent or non-negligent does not depend so much on the defendant’s personal efforts to be careful, which is a subjective question about which negligence law generally is not concerned. Instead, in determining breach, negligence law normally compares the defendant’s conduct to an external standard of good behavior, an “objective” standard, measured by how a reasonable, prudent person would have acted in the circumstances with respect to imposing risks on others.²⁰ While most adults are measured by the reasonable person standard, children and persons with physical disabilities are held to a standard of behavior reasonable for similar persons with such characteristics. Yet persons with greater than normal

19. Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 41 (1915) (“[N]egligence is doing what a reasonable and prudent man would not have done or not doing what such a man would have done.”).

20. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108-10 (1881).

skills and learning, like doctors and race car drivers, must exercise the greater skills they actually or reasonably should possess.

Applying an objective, reasonable-person standard of behavior to complex situations requires considered thought. If the actor and the victim have some type of established relationship, such as teacher-student, doctor-patient, or possibly even friend-friend, custom and experience often provide a strong guide to the kinds of rights and responsibilities that flow between the parties. Even in many stranger-stranger interactions, such as drivers on the highway, custom establishes certain norms of behavior that define how people in those situations reasonably should act. So, drivers in New York are expected to stay on the right side of the road, whereas drivers in London are expected to stay on the left. And drivers in both cities are expected to stay far enough behind other vehicles to be able to stop, when the front car stops, to avoid a collision. But often people must act without clearly established norms of proper behavior, and there the law has turned from grounding the norm of good behavior on people's customary expectations of how others should act in that situation, to a principle of reason based on social utility.

When an actor's choice of action (such as walking fast on a crowded sidewalk to get to an important appointment), involves a risk of harm to others (such as colliding with other walkers), then the propriety of the action (fast walking) may be determined by weighing the value of the actor's goal (being on time for the appointment) against the risk of harm the actor's conduct imposes on others (the likelihood of collision and the degree of harm it may entail). If the act is likely to achieve a good for the actor (and others) that is greater than any harm foreseeably risked to the security (safety) of potential victims, discounted by the likelihood that the act will cause the harm, then it is justifiable in terms of social utility (and economic efficiency). Assessing responsibility for harm in this manner thus evaluates the quality of an act by the extent to which the act is calculated to affect the net aggregate welfare of everyone in society, including most particularly the actor and potential victims. Such a balancing of interests accords equal value to the interests of all sidewalk users in both freedom of action and security. This type of risk-benefit (or "cost-benefit") approach for evaluating risky conduct has

moral roots in the Kantian ideal of equal freedom, and it also is supported by principles of utility and efficiency.²¹

Judge Learned Hand applied this type of “calculus-of-risk” approach for judging the quality of choices in the celebrated $B < P \times L$ formula for negligence described in *United States v. Carroll Towing Co.*²² The “Hand formula” often is perceived as providing an economic model of negligence law,²³ and to a large extent it does. At least as important to negligence theory, however, is that interest balancing of this type rewards actors for according the interests of other persons equal consideration to their own, which tends to minimize waste, maximize society’s scarce resources, and so generally to advance the public good.

Finally, powerful though the Hand formula may be for making rational decisions and judging those decisions, it must be recognized that this evaluative approach to the social rationality of choice properly plays only a default role in judging harmful behavior as negligent or non-negligent. That is, while a Hand formula analysis often helpfully illuminates the inquiry, this analytic method is properly determinative of negligence only when customs, expectations, property and other rights, and moral precepts fail to provide firm guidance on how people in particular situations should behave.²⁴

3. CAUSE IN FACT

Few problems are more intriguing, with solutions more illusive, than causation—the causes and effects of molecular actions, biologic activity, and human choices to act and refrain from acting in certain ways. “The attraction of causes is as magnetic for people as flames are for insects, and it is frequently as deadly.”²⁵

21. See David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201 (David G. Owen ed., 1995).

22. 159 F.2d 169, 173 (2d Cir. 1947) (expressing the concept, in algebraic terms, as negligence being implied if $B < P \times L$, where B is the burden or cost of avoiding accidental loss, P is the increase in probability of loss if B is not undertaken, and L is the probable magnitude or cost of such loss).

23. The classic explanation is Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

24. Skeptics of social utility find little use for cost-benefit analysis, even in a default role. See, e.g., Richard W. Wright, *Hand, Posner, and the Myth of the “Hand Formula,”* 4 THEORETICAL INQUIRIES L. 145 (2003).

25. Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1208 (1976).

Before negligence law assigns responsibility to a defendant for a plaintiff's harm, it demands that the plaintiff establish a cause-and-effect relationship between the negligence and the harm. Causation thus provides the central negligence element that links the defendant's wrong to the plaintiff's harm. Thousands of people every day are injured or killed in car collisions, slip-and-fall accidents, and myriad other kinds of accidents. While many such incidents are attributable to the negligence of one or more persons, many others result from simple bad luck or the careless behavior of victims themselves. Negligence law allows an accident victim to recover damages only if the defendant was at least partially to blame for causing the accident.²⁶ The element of "cause in fact" (or "factual cause") thus may be described as the actual connection between a defendant's negligence and the plaintiff's harm.

To prove causation, it does not suffice for the plaintiff to show merely that the defendant's *conduct* caused the harm; the plaintiff must further link his or her damage to the defendant's *negligence*, the aspect of the conduct that breached a duty to the plaintiff. So, if a person steps off a curb into a roadway and is hit by a car driven negligently too fast, the pedestrian in a negligence suit against the driver must show not only that the defendant's car hit him or her, and that the defendant was driving negligently, but also that it was the *excess speed that amounted to the negligence* that actually caused the harm. If, instead, the evidence reveals that the driver probably would have hit the pedestrian anyway, even if the car had been operated at a reasonable rate of speed, then the accident was caused only by the driver's conduct, not by the negligent aspect of the conduct which was merely incidental to the accidental harm.²⁷

The speeding-car-striking-pedestrian example illustrates the basic causation standard, the "but-for" test, which requires that a defendant's negligence be a *sine qua non* of the plaintiff's harm, a necessary antecedent without which the harm would not have occurred. Put otherwise, the defendant's negligence is a cause of the plaintiff's harm if the harm would not have occurred *but for* the defendant's negligence.

26. Under principles of comparative negligence, most states reduce a victim's damages proportionate to his or her own negligence that combined with the defendant's negligence to cause the accident, and many bar recovery altogether if the accident was mostly (or in some states equally) the victim's fault. See DOBBS, *supra* note 13, § 201, at 503.

27. See, e.g., Perkins v. Tex. & New Orleans R.R. Co., 147 So. 2d 646, 648 (La. 1962) (In a collision with a car, a train's excessive speed was a cause in fact "in bringing about the collision if the collision would not have occurred without it. On the other hand, if the collision would have occurred irrespective of such negligence, then it was not" a cause in fact of the harm.).

Though California has reformulated the but-for test in “substantial factor” terms,²⁸ most states reserve the substantial factor test for situations where multiple events combine to cause an injury that would have occurred even if one of them were removed. For example, two defendants, acting independently, might each negligently set separate fires that eventually merge and burn down the plaintiff’s house. In such cases, although the house would have burned down anyway if only one defendant had negligently set a fire, the negligence of each defendant is considered a cause in fact of the plaintiff’s damage so long as it was a substantial factor in producing it.²⁹

While a plaintiff normally must prove causation, the burden of proof on this element may shift to two or more defendants in certain special situations. Assume that three people are hunting quail, that two negligently fire shotguns in the direction of the third, that a pellet from one gun hits the third hunter, the plaintiff, but that the plaintiff cannot establish from which gun the pellet came.³⁰ In this special situation, where the plaintiff cannot prove which of the defendants’ similar acts of negligence caused the harm, both defendants may be subject to liability unless one is able to prove that he or she did not cause the injury.³¹

4. PROXIMATE CAUSE

Proximate cause, though linked to cause in fact, is a separate element unto itself.³² The issue usually called “proximate cause” is very different from the issue of factual causation, the element just examined. Presupposing some factual connection between a defendant’s breach of duty and the plaintiff’s injury, proximate cause addresses instead the question of whether in logic, fairness, policy, and practicality, the defendant ought to be held legally accountable for the plaintiff’s harm that in some manner is “remote” from the defendant’s breach. Proximate cause might thus be defined, if somewhat tautologically, as a reasonably close connection between a defendant’s wrong and the plaintiff’s injury, a connection that is not remote. More broadly, proximate cause is a

28. See *Mitchell v. Gonzales*, 819 P.2d 872, 876-79 (Cal. 1991).

29. The classic case is *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 179 N.W. 45 (Minn. 1920) (involving one fire from a negligent origin and one from an uncertain origin).

30. The classic case is *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

31. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 28(b) (Tentative Draft No. 5 2007).

32. This section draws from DAVID G. OWEN, PRODUCTS LIABILITY LAW ch. 12 (2d ed. forthcoming 2008).

doctrine that serves to limit a tortfeasor's responsibility to the consequences of risks viewed fairly as arising from the wrong. Because "[i]t is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent,"³³ proximate cause is an "elusive butterfly"³⁴ that e'er evades a net of rules.³⁵

Quite like duty, proximate cause provides a broad fairness cauldron into which many factual and legal issues are thrown and mixed together. Yet, while traditionally referred to as "legal cause" (in an effort to distinguish it from factual cause), proximate cause is an issue of "fact" for resolution by a jury. Whereas courts determine duty according to policy factors applicable to whole categories of actors in recurring situations, juries determine proximate cause according to fairness facts unique to every case.

Proximate cause goes by a variety of names. Some courts still use the "legal cause" term just mentioned, left over from the *Second Restatement's* confusing umbrella term referring broadly to factual and proximate cause alike. As for umbrella terms, "proximate cause" itself is often used to describe both causal issues, factual and proximate alike, as commonly are the terms "cause" and "causation," words that more comfortably describe cause in fact alone. This terminological confusion means, of course, that a lawyer reading judicial decisions discussing "proximate cause" (and certainly "causation") needs to be on guard for the possibility that the court actually may be addressing the issue of cause in *fact*, not proximate cause at all. In an effort to reduce confusion, the *Restatement (Third) of Torts* replaces the "proximate cause" appellation with "scope of liability."³⁶ By whatever name, proximate cause is an elemental requirement of every negligence claim.

Because proximate cause is little more than a swirling maelstrom of policy, practicality, and case-specific fairness considerations—rather than a meaningful set of rules or even principles—it would seem incapable of being subjected to rational "testing." Yet, lawyers, courts, and juries invariably seek guidance in unraveling the mysteries of this

33. 1 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906).

34. *Accordini v. Security Cent., Inc.*, 320 S.E.2d 713, 714 (S.C. Ct. App. 1984) (Sanders, C.J.).

35. "Proximate cause cannot be reduced to absolute rules." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 279 (5th ed. 1984).

36. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM ch. 6, "Scope of Liability (Proximate Cause)," and § 29 cmt. b, at 604 (Proposed Final Draft No. 1 2005).

perplexing doctrine, which has led to an eternal search for a proper “test” for deciding whether a plaintiff’s injury in any particular case was a proximate result of the defendant’s wrong. Over the years, courts have applied a number of tests that still sometimes inform judicial decisions, at least to some extent. A prominent early test turned on whether a harmful result was a “direct consequence” of the defendant’s negligence. Under this test, a cause is proximate which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the plaintiff’s harm.³⁷

Today, the concept of “foreseeability,” in one formulation or another, is the cornerstone of proximate cause.³⁸ Under this “test,” the responsibility of an actor for the consequences of wrongful action is limited by principles of reasonable “foreseeability.” This outer boundary of tortious responsibility seeks to prevent actors from being held liable for consequences that fall outside the scope of their wrongdoing, beyond their moral accountability. The idea here is that responsibility for consequences should be based on the quality of an actor’s choices that led to the consequences. The moral fiber of such choices is gauged by consequences the actor should have contemplated as plausible eventualities at the time the choice was made. If some other, “unforeseeable,” consequence eventuates from a chosen action, the fact that it lies outside the bundle of consequences the actor reasonably should have contemplated means that it probably did not inform the actor’s deliberations and choice. There thus is no substantial moral connection between a person’s actions and their consequences that are unforeseeable. So, in evaluating the moral quality of an actor’s choice, only foreseeable consequences of the choice may fairly be considered.³⁹ This is a moral justification for bounding the law of torts by the foreseeable scope of risk.

Defendants are protected from the remote consequences of their negligence in two general types of cases. In the first, the consequences

37. The classic case applying this approach is *In re Polemis & Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560. An important early variant of the direct-consequences formulation was the “natural and probable consequences” test.

38. The classic cases are *Palsgraf v. Long Island R. R. Co.*, 162 N.E. 99 (1928) (majority opinion by Cardozo, C.J.), and *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co.* (“Wagon Mound No. 1”), [1961] A.C. 388 (P.C.) (appeal taken from N.S.W.) (opinion by Viscount Simonds).

39. See Owen, *supra* note 21, at 201, 226-27. But see Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 L.Q. REV. 530 (1988) (offering a theory of strict accountability for causing harm called “outcome responsibility”).

of a defendant's negligence appear simply too attenuated, perhaps too bizarre, even in retrospect—"too cockeyed and far-fetched."⁴⁰ So, if the plaintiff is injured in a fall from slipping on the vomit of a friend who was nauseated by a smelly plate of shrimp, the injurious consequences may simply seem too far outside the foreseeable risks of serving foul food to hold the restaurateur responsible for the plaintiff's harm.⁴¹

A second situation in which the connection between a defendant's breach of duty and the plaintiff's harm may appear tenuous or "remote" is where some person or force, other than the plaintiff or defendant, intervenes between the defendant's negligence and the harm. After the consequences of the defendant's negligence are let loose, some third party may come along and deliberately convert those consequences into an instrument of harm. For example, a railroad's negligence may cause a tank car to derail so that gasoline streams throughout a town. Thereafter, a person may throw a match into the gasoline, for the purpose of setting a fire, which may cause the fumes to explode and cause an injury.⁴² Such egregious misconduct by a third party, that combines with, but grossly distorts, the natural consequences of the defendant's negligence in a manner that harms the plaintiff, raises a question of whether the third party's conduct in fairness should relieve the defendant of responsibility for the harm for which its negligence was, at least in part, causally responsible.

The question in such intervening cause cases is whether the third party's conduct, intervening upon a set of risks created by the defendant's negligence, distances the defendant so far from the plaintiff's harm that the defendant's misconduct should be considered legally "remote" and, hence, no longer a "proximate" cause of the plaintiff's harm. Stated another way, the issue in cases of this type is whether the third party's conduct so dominates the consequences of the defendant's negligence as to trivialize the defendant's role in causing the plaintiff's harm, such that the defendant fairly should be relieved of all responsibility. If a jury or court concludes that such an "intervening" force or cause was so significant that it "breaks the chain" of proximate causation, the intervening cause of the third party is termed

40. See William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 19 (1953) (citation omitted).

41. See *Crankshaw v. Piedmont Driving Club*, 156 S.E.2d 208, 209-10 (Ga. Ct. App. 1967).

42. See *Watson v. Ky. & Ind. Bridge & R. Co.*, 126 S.W. 146, 150-51 (Ky. Ct. App. 1910) (remanding because third party's purpose was unclear).

“superseding” and the defendant is insulated from *all* responsibility for the harm.⁴³

In both these situations—where the consequences of a defendant’s negligence appear tenuous and bizarre, and where a third party’s intervening misconduct may dwarf the defendant’s conduct into moral insignificance—courts almost universally turn to a standard “test” for proximate cause: *foreseeability*. As with proximate cause more generally, foreseeability provides little real guidance in most cases, even when enriched a bit as “reasonably foreseeable,” or “scope of (foreseeable) risk.” Nevertheless, most courts seem perfectly content with using foreseeability as the polestar for determining whether a defendant should be held responsible for consequences of his or her negligence that somehow are remote.

5. HARM

The last element of a negligence claim is harm, the damage a plaintiff suffers as a proximate result of a defendant’s breach of duty.⁴⁴ Requiring a defendant to compensate the plaintiff for harm improperly inflicted by the defendant is the underlying, restitutionary (and deterrent) objective of the negligence cause of action. That is, as much as money damages can do so, the law requires a negligent tortfeasor to restore what the plaintiff lost as a proximate result of the defendant’s wrong.

The interest normally protected by the law of negligence is freedom from improperly inflicted *physical* harm, including physical injury, death, and property damage.⁴⁵ This means that negligence law normally does *not* protect plaintiffs against the risk of “pure” economic loss (such as lost wages, a lost contract, or lost profits) where the plaintiff does not

43. A few courts have concluded that the bluntness of superseding cause, relieving a defendant of all liability, is outmoded in a comparative fault world and so should be abolished. *See, e.g., Barry v. Quality Steel Prods., Inc.*, 820 A.2d 258, 270-71 (Conn. 2003); *accord* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 34 cmt. c, at 679 (Proposed Final Draft No. 1 2005).

44. “Some of the most intriguing brain teasers in tort law involve the valuation of damages for harm arising from wrongfully inflicted injury to person or property.” David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1127 (1999).

45. “‘Physical harm’ means the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property (‘property damage’). Bodily harm includes physical injury, illness, disease, and death.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 4 (Tentative Draft No. 5 2007). Punitive damages are sometimes awarded when a defendant’s actions are not merely negligent but intentionally harmful or reckless, to punish and deter such gross misconduct, but such damages are formally noncompensatory.

also suffer physical harm.⁴⁶ But the law of negligence *does* allow accident victims to recover damages for their secondary losses proximately flowing from a physical injury, including lost earnings and earning power, pain and suffering, emotional distress, and, in some jurisdictions, lost enjoyment of life.⁴⁷

CONCLUSION

Negligence, as is true with all legal claims, is comprised of various “elements,” identifiable components which draw together a cluster of related issues for analysis and resolution. Too often, the elements of negligence are merely recited and not explained. In formulating the elements here, this *Idea* can just scratch the surface of each one, filling each with only elemental content.⁴⁸ But the idea of this *Idea* is quite modest: to identify and explain, compactly and conjointly, the five elements of negligence, the most important tort.

Five is the number of negligence elements here endorsed, rather than the usual four. The five-element approach permits the division of the conventional, two-pronged element of “causation” (or “proximate causation”) into its separate components, *cause in fact* and *proximate cause*, in recognition of the distinctness and complexity of issues embraced by each. Cause in fact requires a determination of cause and effect, which involves a sometimes rigorous comparison of physical, historical facts in the actual universe with those in a hypothetical universe from which the defendant’s negligence is removed. Actual causation thus logically precedes and usually has little to do with the proximate cause inquiry into the array of fairness and justice considerations bearing on the propriety of imposing negligence responsibility on a person whose wrongdoing actually, though remotely, caused the plaintiff’s harm.

Thus, negligence is logically divisible into five elements—duty, breach, cause in fact, proximate cause, and harm—which usefully may be assembled and explained.

46. See generally Symposium, *Dan B. Dobbs Conference on Economic Tort Law*, 48 ARIZ. L. REV. 687 (2006).

47. See generally DOBBS, *supra* note 13, ch. 25.

48. Other commentary probes the interior of the negligence elements and how they fit together. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671 (2006); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425 (2003).