Relative Proximity and Proximate Causation

Yuval Abrams[*]

Abstract

The theory and doctrine of proximate cause has been too easily dismissed. Two primary intellectual errors underly this dismissal: one is a misunderstanding of causal proximity, the other is a mistaken inference from the otherwise correct observation that there are multiple causes of an effect, to the claim that there is no hierarchy between proximate and more remote causes.

This article defends the classic conception of proximate causation as a causally grounded notion. It does so by reconstructing the doctrine, articulating an underlying concept of proximate causation, in which proximity is relative (but still objective).

Proximate causation is a relation between two causes and an effect; it occurs when one cause mediates the effects of another. To say that D is a proximate cause of E relative to C, means that C's influence on E runs through (is mediated by) D. When this happens, D is causally closer to E, than is C. Just as New York City is closer to Boston than is Philadelphia. This relation is only definable along a path of causation.

Understanding this idea informs the doctrines of proximate cause, which proceed following *Bacon's Maxim*: trace back from the injury to its causes, *in sequence*. along the paths of causation, until responsibility is absorbed. Once responsibility is absorbed, the process terminates. For this reason, causal chains "break": not because the cause and effect are too remote or attenuated, but because a set of causes that are proximate, relative to these remote causes, are sufficient to absorb responsibility. With responsibility absorbed, there is nothing further to trace back. This is missed if the tracing is conducted from cause to injury, rather than, in reverse, from injury to cause.

With a better understanding of these doctrines, the article shows how proximate causation, properly understood, underlies and explains much of the law of proximate cause. Proximate cause is essentially a defense that asserts that the defendant is not the most proximate cause to the harm, and that someone (or something) else is. The implications for both liability and contribution are discussed.

[*] Postdoctoral Fellow, New York University School of Law

Introduction

Snapchat's "Speed Filter" allowed users to record and share their real-life speed on a photo or video.[1] On September 10th, 2015, while using Speed Filter, driving 107 miles per hour, Christal McGee rear-ended a car driven by Wentworth Maynard, severely injuring him. Prior to the crash, McGee apparently told her passengers she was "just trying to get the car to 100 m.p.h. to post it on Snapchat".[2] Snapchat's terms of use forbade using Speed Filter for illegal purposes. When opening Speed Filter, a pop-up warning advised "Please, DO NOT Snap and drive."

Maynard sued Snapchat, alleging that Speed Filter was a design defect which, by motivating McGee to speed, proximately caused his injury. The trial court dismissed Maynard's claim, on inter alia proximate cause grounds, ruling that (i) It was McGee's inattention, not the app, that caused the accident and (ii) McGee's criminal and negligent driving, her violation of the terms of use, and her disregard for the pop-up warning, each "broke the causal chain" between Snapchat's alleged wrongdoing and the harm.[3]

The Georgia Supreme Court disagreed, remanding the case.[4] The court held "the proximate-cause inquiry asks whether 'a prudent manufacturer would foresee an appreciable risk that,' as a result of an unreasonable design decision, 'some harm would happen' 'according to ordinary and usual experience.'".[5] It is therefore up to the factfinder to determine whether Snapchat's design was

[1] This feature has since been discontinued, *see* Bobby Allyn, Snapchat Ends 'Speed Filter' That Critics Say Encouraged Reckless Driving, NPR, (July 17, 2021 11:58 AM), https://www.npr.org/2021/06/17/1007385955/snapchat-ends-speed-filter-that-critics-say-encouraged-reckless-driving
[2] Maynard v. Snapchat, Inc., 313 Ga. 533, 534 (Ga. 2022) 870 S.E.2d 739.
[3] Maynard v. Snapchat, Inc., 357 Ga. App. 496, 500, 502, 851 S.E.2d 128 (2020). reversed and remanded by *Id.*. 533.
[4] Maynard v. Snapchat, Inc., 366 Ga. App. 507, 509 (Ga. Ct. App. 2023)
[5] 313 Ga. 533, *supra* note 2, 540, *citing* Johnson v. Avis Rent A Car Sys., LLC , 311 Ga. At 592, (GA 2021) 858 S.E.2d 23

unreasonable and the harm foreseeable. One judge, in dissent, argued that the criminal nature of McGee's speeding must count for something in limiting Snapchat's duty to foresee this outcome.[6]

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On September 4th, 1989, a pump caught fire at a Texaco facility in Port Arthur, Texas. Two hours later, after the fire was extinguished, a problem arose with a nitrogen purge valve. Sue Allbritton, a Texaco employee, accompanied her supervisor to deal with the valve. Instead of proceeding along the normal, safer route, they took a shortcut along an aboveground pipe-rack. They took that same shortcut on their return when Allbritton slipped and fell, as the ground was still wet from the earlier fire extinguishing efforts. Allbritton sued Union Pump Company, the manufacturer of the pump that caught fire, claiming that the defective pump caused her injuries.

The Texas Supreme Court ruled the defective pump "too remotely connected with the plaintiff's injury".[7] Quoting an older Texas case it added:

> [A] line must be drawn between immediate and remote causes. The doctrine of "proximate cause" is employed to determine and fix this line and "is the result of an effort by the courts to avoid, as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability.[8]

That line, the court argued, is drawn by looking to *foreseeability*, "but it also incorporates policy driven decisions such as when subsequent events will be treated as intervening causes".[9] Allbritton's careless shortcut, the court reasoned, was both unforeseeable and needlessly dangerous. Union Pump's liability may therefore "cut off" at "some point", which the court reasoned was "at the point the crisis had abated or at the point that Allbritton and [her supervisor] departed from their usual safe path".[10]

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Whether causal chains are ultimately *broken*, due to the introduction of superseding factors, such as criminal behavior, or whether these chains persevere, so long as these new factors were foreseeable, is a long-standing dispute in the doctrines of proximate cause. Relatedly, and more fundamentally, is the question whether the doctrines of proximate cause are ultimately about causation at all or whether they are essentially policy considerations governing "scope of liability".[11]

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[6] *Id.*, 556 (Bethel, J., dissenting).
[7] Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995)
[8] *Id.*, 775, quoting Springall v. Fredericksburg Hospital and Clinic, 225 S.W.2d 232, 235 (Tex. Civ. App. — San Antonio 1949, no writ), quoting City of Dallas v. Maxwell, 248 S.W. 667, 670 (Tex. Comm'n App. 1923).
[9] *Id.,* 785.
[10] *Id.*
[11] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (hereinafter RESTATEMENT (THIRD)), Ch. 6, special note on proximate cause (2010).

Causation is an essential element in all torts and result-crimes. To be held legally responsible for an injury, the wrongdoing in question must have caused the harm.[12] We are generally enjoined from wrongfully causing harm and are potentially liable for the harm we have in fact caused. How far does this extend? As Prosser and Keeton memorably put it: "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events and beyond".[13] Legal responsibility, however, does not extend quite as far as that. The law famously distinguishes between proximate consequences, for which one is potentially liable, and remote ones, for which one is not.

Why limit responsibility at all? Why not allow responsibility to track causation from the dawn of time through eternity? A common, perhaps sensible, approach takes this to be practical necessity, as "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts and would 'set society on edge and fill the courts with endless litigation'".[14] Limitation, on this view, is sound *policy*, incorporating considerations of justice and efficiency.[15] Importantly, on this view, the limitation has little to do with causation itself, which extends unmitigated and unbroken through eternity. Perhaps the most famous illustration of this is the "first building rule" in *Ryan*[16], where liability for a fire that spread through a neighborhood was limited to the first house burned.[17] It is not only with bright-lined rules like *Ryan* where policy considerations are at work. In fact, the dominant views on proximate cause focus on fault-based or fairness considerations like foreseeability,[18] or on the related harm within the risk rule,[19] rather than on causation itself.

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[12] This need not mean that the defendant caused the harm. In cases of imputed liability, such as vicarious liability, or in cases of accomplice liability, one is responsible for someone else's causing the harm in question. Still, this liability is dependent on the servant's (in the case of vicarious liability) or principal's (in the case of accomplice liability) having caused the injury.

[13] W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (hereinafter KEETON) § 41, 264 (5th ed. 1984).

[14] *Id.* Quoting Mitchell, J,. in North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894). *See also* In re Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir. 1968) ("Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damage caused "in fact' by his negligence…. Such limiting principles must exist in any system of jurisprudence for cause and effect succeed one another with the same certainty that night follows day and the consequences of the simplest act may be traced over an ever-widening canvas with the passage of time.").

[15] KEETON *supra* note 13, 264 ("This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to a greater extent, however, the legal limitation on the scope of liability is associated with policy – with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.").

[16] Ryan v New York Central R.R. Co. 35 N.Y. 210, (1866)

[17] The New York Rule has been rejected in all other jurisdiction. See FOWLER V. HARPER, FLEMING JAMES., JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS (hereinafter HARPER) §20.6 (Third Edition, 2023-3 Cum. Supp. 2006-2008)

[18] Paroline v. United States, 572 U.S. 434, 445, 134 S. Ct. 1710, 1719, 188 L. Ed. 2d 714, 726 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct"); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 203 (2d ed. 2011 & 2020 update) ("It is very doubtful that liability unlimited by foreseeability has much contemporary support."). The dominance of the foreseeability doctrine is often attributed to the *Wagon Mound* cases. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (*The Wagon Mound*), [1961] 1 All E.R. 404, and Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. (*Wagon Mound (No. 2)*), [1967] 1 A.C. 617. *Wagon Mound* was a repudiation of the earlier 'directness' test in In re Polemis & Furness, Withy & Co., [1921] 3 K.B. 560.

[19] RESTATEMENT (THIRD), *supra note* 11 §29 ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious"). For example: A negligently gives a loaded gun to a minor, who drops it on B's toe. The risk that makes giving a gun to a minor negligent doesn't relate to manner in which harm was caused.

Some of the most eminent authorities urge abandoning "proximate cause" terminology altogether, characterizing it as "poor"[20], "unfortunate"[21], and "misleading".[22] The Third Restatement adds: "There may be no legal term in as widespread usage as proximate cause that has been as excoriated as it has. One searches in vain to find a defender of the term".[23] Consequently, the Third Restatement mostly dropped "proximate causation" terminology, despite its "widespread use" by courts, replacing it with "Scope of Liability (Proximate Cause)", explicitly rejecting thereby the notion that scope of liability principles are about causes at all.[24] The parenthetical concession to causal terminology in the section title was explained as necessary to "communicate…with [those] who understand limitations on liability under the proximate-cause rubric", but that the American Law Institute "fervently hopes that the Restatement Fourth of Torts will not find this parenthetical necessary".[25]

Skepticism regarding proximate cause and its causal bona fides goes back at least 150 years.[26] Critics allege the doctrine relies on mistaken presuppositions about cause, or that it has nothing to do with cause, and that the doctrine is vague and malleable, asserting a *conclusion* of liability, rather than a causal *premise* supporting that conclusion.[27] Yet the roots of proximate cause in common law are venerable, traced by many to the maxims of Lord Francis Bacon: "*In jure non remota causa sed proxima spectatur*" ("In law, look to the proximate, not remote cause").[28] While the extent to which Bacon's maxim actually governed English law is contested,[29] by the mid-19th century the term was well entrenched in Anglo-American law.[30]

This article defends the Baconian position, according to which proximate causation is indeed a causal matter. I offer a philosophical defense of proximate causation as a coherent *causal* concept, that is normatively attractive, legally useful, and recognizable in many of the historic doctrines of proximate

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[20] *Id.* comment B
[21] KEETON, *supra* note 13, 263, 273.
[22] DAN B. DOBBS, THE LAW OF TORTS § 181, 444 (2000)
[23] RESTATEMENT (THIRD) *supra* note 20, Ch. 6, special note on proximate cause.
[24] *Id.*
[25] *Id.*
[26] See Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV 201 (1869). In 1874, St. John Green wrote: "Where a court says the damage is remote, it does not follow naturally, it is not proximate, all they mean and can mean is that they think that in all circumstances the plaintiff should not recover", Nicholas St. John Green, *Torts under the French Law*, 8 AM. L. REV. 508, 519 (1874).
[27] Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 169 (2021).
[28] FRANCIS BACON, A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMES OF THE COMMON LAWS OF ENGLAND, in THE ELEMENTS OF THE COMMON LAWS OF ENGLAND (1630 and photo reprint 1978), Regula 1, 1.
[29] *See* Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 633 (1920) ("That Bacon's First Maxim was not recognized by lawyers before his time is clear from his examples. That lawyers for two hundred years after his time were uninfluenced by it seems clear from the authorities. No title, proximate cause, is found in any of the abridgments or digests before the end of the eighteenth century, nor has any reference to the maxim been noticed in any case before that time").
[30] Ward v. Weeks, 7 Bing. 211, 212 (1830) ("a man is liable only for the natural and proximate consequences of his actions, and not for remote consequences resulting directly from some intermediate agent"). In America, the principle was stated in Greenleaf's treatise on evidence, SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE VOL II 258 (1848) ("The damage to be recovered must always be the natural and proximate consequence of the act complained of"), citing THEODORE SEDGWICK ON THE MEASURE OF DAMAGES (1847). *See also* Harrison v. Berkley, 32 S.C.L. (1 Strob.) 525 (S.C. 1847): "Only the proximate consequence shall be answered for" and the rich discussion of the history in Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L. Q. 49 (1991).

cause and scope of liability.[31] Determining liability follows *Bacon's Maxim*: trace back from the injury to its causes, in sequence, beginning with the most proximate causes; only proceed onward to more remote causes, if there are reasons not to stop. The process terminates when liability is assigned such that the plaintiff's redress has been fully accomplished.

To be clear, I do not claim to interpret what Lord Bacon himself meant by the term *causa proxima*, what subsequent common law judges understood about the philosophical underpinnings of proximate cause, or to contribute to the voluminous literature on the *history* of this debate.[32] Rather, I offer a rational reconstruction of a concept – proximate cause – and an argument for its application in doctrine. Ultimately, there might be more to scope of liability than proximate causation alone, but, taking proximate causation seriously on its own terms points to an underappreciated coherence in the proximate cause doctrines, missed if we focus exclusively on foreseeability, the risk rule, or policy.

To this end we must distinguish, at the outset, between *proximate causation* in the technical sense and the *doctrines of proximate cause*. The heart of the technical analysis of the concept is that "proximate causation" is a *relative*, rather than absolute term; a three-place relation rather than two.[33] A relation of proximate causation relates two causes to an effect, comparing the causes to one another in terms of proximity. When C causes E *via D*, D is proximate to E *relative to* C. Suppose that C leaves a knife on a desk, which D uses to stab E. C contributed to the stabbing, by affording D the knife, so C is a factual cause.[34] Because C's contribution to the stabbing runs through D's action, D's action is proximate to E's injury, relative to C's. No tracing of causation between C and E can avoid running through D. In this sense, as a cause, D is objectively more proximate to E than is C. Another way of putting this is that D *mediates* C's influence on E.

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[31] Two recent articles of significance have argued for a unified coherent doctrine of proximate cause. Mark Geistfeld has argued for a purposive unified doctrine based on the norms governing responsibility, showing how foreseeability and directness operate at different stages in the case. This analysis does not ground the limitations of liability of proximate causation in the nature of causation itself, *see* Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420 (2021). A recent piece by Joshua Knobe and Scott Shapiro does attempt to explain proximate causation in terms of causation itself. Knobe and Shapiro's account of causation, however, is enmeshed with notions of responsibility, such that cause, both ordinary and proximate, or, more accurately, causal cognition, has normative assumptions built in. This view differs significantly from the notion of causation assumed here, where facts about what caused what are not-norm dependent. *See* Knobe & Shapiro, *supra* note 27.

[32] For a comprehensive list see the "luxuriant" list of sources in footnote 5 of HARPER, *supra* note 17 §20.6.

[33] *C is proximate to E, relative to D*, is a three-place relation, involving three variables (C, D, and E), whereas *C is proximate to E* is a two-place relation, involving two variables (C and E).

[34] I attempt in this article to steer clear, to the extent possible, of the controversies of what constitute a factual cause. While I have strong views on this subject, the account of proximate causation on offer here is intended to be neutral between any account of cause-in-fact, as long as one is consistently working with an account. The account of proximate causation can work with a counterfactual (but-for) account of causation, a sufficiency-based account (such as NESS) (*See* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985)), an interventionist account of causation (e.g. that of JUDEA PEARL, CAUSALITY: MODELS, REASONING, AND INFERENCE (2nd ed. 2009) and JAMES WOODWARD, MAKING THINGS HAPPEN (2003)), causal processes (e.g. WESLEY SALMON, SCIENTIFIC EXPLANATION AND THE CAUSAL STRUCTURE OF THE WORLD (1984); PHIL DOWE, PHYSICAL CAUSATION (2000)), forces (Beale, *Supra* note 29); paradigms (Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973)); a causal primitivist account (MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY (2009)); or perhaps others. I take no stance on whether the account works with the "substantial factor" account (Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 303, 309 (1912); RESTATEMENT OF TORTS, §431), as that account is somewhat underspecified. But more generally, any account of causation as an *asymmetric* relation, and which can be graphed or modeled accordingly as a structure of transmission of causal influence, will obey the principles set forth here.

That D's contribution is proximate to E's injury relative to C's is insufficient to determining whether C or D is liable for E's injury. To assign liability using Bacon's Maxim, technical proximate causation needs to be supplemented by further considerations, which together form the *doctrines of proximate cause*. These doctrines do include normative considerations, but, importantly, they refer to, and make essential use of, the basic technical sense of proximate causation. They are not free-floating policy decisions at all.

The best way to understand these doctrines is to think of proximate cause as a defense, made once causation-in-fact has been established.[35] The defense is that there is at least one cause, proximate to the harm relative to the defendant's causal contribution, that *absorbs* responsibility, shielding the defendant from liability. Once redress from those more proximate causes has occurred, the claim asserts, nothing remains for the defendant to answer for. Following Bacon's Maxim means tracing back, along the chains of causation, to the causes that absorb liability. Tracing back requires following the *order* of causation, such that more proximate causes are addressed before those more remote.

Ultimately, the doctrines of proximate cause determine whether the defendant is among the most proximate absorbing causes to the harm: in short, whether the defendant is *legally* a proximate cause. Without this tracing back procedure, we cannot answer the question of liability.

Proximate cause is a doctrine of hindsight, rather than foresight.[36] Instead of: *how far does a wrongdoer's responsibility extend before it becomes remote?* – which is impossible to answer on purely causal grounds, the appropriate question reverses the perspective. An injured plaintiff traces back causally to the most proximate wrongdoers, and successively on to the next most proximate wrongdoers, and so forth, until responsibility is fully absorbed. Once responsibility is fully absorbed, there is nothing further to trace. Thus, in the example above, if E can successfully recover completely from D (who stabbed her), there is nothing further to pursue from C (who sold D the knife), or, for that matter, from B (who manufactured the knife and sold it to C), etc. But, if for reasons of law,[37] D does not absorb responsibility (for example, if D was legally incompetent), tracing back to C is very much in play. But, until E has knocked on the door of those who more proximately caused her harm, she may not seek redress from those more remote.

The article proceeds as follows: In Section I, I discuss the causal bona fides of proximate causation. First, I will discuss the historic reasons why the Baconian principle was rejected. This lies in a misunderstanding of an important insight by John Stuart Mill about the multiplicity of causes. Mill's insight, that there are multiple interacting causes for every effect, has been overgeneralized and misapplied such that it fails to distinguish between interacting and remote causes. With this obstacle removed, in Section II, I present the technical sense of proximate causation. Next, in Section III, I turn to the doctrines of proximate cause. Bacon's Maxim is followed by tracing liability back along a causal sequence or structure. I then show why the doctrine of proximate cause is normatively

[35] Unlike affirmative defenses, the burden of production that the defendant's action proximately caused the plaintiff's injury is still on the plaintiff.

[36] Dellwo v. Pearson, 249 Minn 452, 107 N.W. 2d 859 (1961) ("it is enough to say that negligence is tested by foresight, but proximate cause is determined by hindsight").

[37] As opposed to cases where D is tort-proof, because he is insolvent or unreachable. I discuss this issue in section III. In some cases, the correct thing to say is that the remote cause is on the hook as a guarantee for D's liability. Even so, the remote cause cannot be liable for anything above and beyond what D is liable for, and, should D be found, should be entitled to complete indemnification from D.

compelling. Despite the hostility towards mechanical[38] or "scientific" theories of causation, a proper understanding of the doctrine makes good moral sense. In section IV, I show that the doctrine is recognizable in the laws of proximate cause. I argue that much of the doctrine of proximate cause makes sense without appeal to foreseeability: particularly, the much maligned, but historically central, doctrines of superseding causes. Finally, I discuss implications for apportionment before concluding.

I. Causation, Legal Causation, and Proximate Cause

Treating causation as an element of tort or criminal liability presupposes that causation obtains independently of a judgment of liability or blame: liability and blame (for the consequences) depend on, are indeed because of, causation, which is prior to them. For example, if D poisoned P's food, hoping to cause P's death, but P died of a heart attack before taking the poison, D has not caused the death, however reprehensible or morally blameworthy D's conduct. Conversely, if D accidentally shot P, justifiably mistaking P for an aggressor, D may be absolved, but has caused P's death all the same. Causation, in other words, is a factual matter and is a necessary condition for liability, not a sufficient one. Additional factors are required for blame or liability to attach; when they obtain, blame or liability is warranted because (among other things) the defendant caused the harm in question.

While there are skeptics about the factual nature of causation in the law,[39] there is general agreement that at least part of the causation question is a purely factual matter. The factual component of the causation question, cause-in-fact, asks whether the defendant's wrongful conduct did in fact cause the harm or injury. There are rival theories or tests for what satisfies this criterion: but-for,[40]

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[38] Wing v. Morse, 300 A.2d 491, 495 (Me. 1973) ("proximate cause" an "unfortunate word because it improperly places emphasis on the physical or mechanical closeness of the cause under investigation"); KEETON, *Supra note* 13, criticizing the "directness" test ("offers a "mechanical solution of a problem which is primarily and essentially one of policy").

[39] This approach is most famously articulated in Wex S. Malone, Ruminations on Cause-in-Fact, 9 STAN. L. REV. 60 (1956). In Law and Economics, skepticism of causation is rife. Historically, much of this traces to Coase, although, Coase's arguments pertain more to the lack of a need to settle the causal issue. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON., 1 (1960). A related form of skepticism is the approach that seeks to shift liability to the cheapest cost avoider (GUIDO CALABRESI, THE COSTS OF ACCIDENTS 155 (1970)). A common middle ground view sees some paradigm cases of causality as factual, with much of the grey area a matter of legal policy (*e.g.* David A. Fischer, *Causation in Fact in Omission Cases*, UTAH L. REV. 1335 (1992)). Similarly, some philosophers have argued that, perhaps, facts about responsibility ground facts about causation, e.g. it is the fact that gardener is responsible for the death of the plant (but the Queen is not) that explains why he (but not she) caused the death (by omission). Judith J. Thomson, *Causation: Omissions*, 66 PHIL. AND PHENOMENOLOGICAL RESEARCH, 81 (2003) and Sarah McGrath, *Causation by Omission: A Dilemma*, 123 PHILOSOPHICAL STUDIES 125 (2005). Stapleton's view is more difficult to characterize. While by no means advocating a non-factual view, she maintains that causal questions in the law are answers to particular questions, framed by the needs of legal analysis. She is, therefore, dismissive of the ability of a metaphysics of causation to sort out questions of this sort. Jane Stapleton, *Choosing What We Mean by Causation in the Law*, 73 MO L. REV., 433 (2008). Knobe & Shapiro, *supra* note 27, take the view that causation is factual, but that the facts of causation are grounded in normality. On their view, facts about causal structure are objective and categorial, but facts about actual causation are context and norm dependent.

[40] RESTATEMENT (THIRD) *supra* note 11 § 26. Factual Cause ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct"). See also MODEL PENAL CODE §2.03(1)(a) ("Conduct is the cause of a result when (a) it is an antecedent but for which the result in question would not have occurred."). But-for was recently reinforced as the "ordinary meaning" of "results from" in Burrage v. United States, 134 S. Ct. 881 (2014). *But see* the backpedaling from this standard in RESTATEMENT (THIRD), *supra* note 11, §27. There has been considerable debate, both as to whether the Substantial Factor test was meant to replace or to clarify the but-for standard, as well as, more generally, whether substantial

substantial factor,[41] sufficiency/NESS,[42] material contribution;[43] forces,[44] paradigms,[45] primitivist causal realism.[46] These rival theories do not disagree whether causation matters to liability; they disagree about what causation is. Common to them all is that causation, whether e.g., the defendant's poison did in fact kill the victim, is an objective and factual matter, determined independently of moral or policy judgments.[47] Causal claims are true in a factual, value-free, prelegal sense, independent of any legal determination. It is a question for philosophy or science (perhaps psychology) what this means. But whatever it means, whatever causation consists in, is the target of the cause-in-fact analysis.

Less clear, however, is whether factual causation is enough to satisfy the causation element. If the defendant harmed the plaintiff, who was sent to the hospital, where the plaintiff refused medical treatment,[48] or was negligently treated,[49] or was struck by an automobile enroute,[50] did the defendant cause these subsequent injuries? Should the defendant be liable for them? Further criteria seem necessary to delineate cases where liability is appropriate from those in which the "result is so attenuated that the consequence is more aptly described as mere fortuity".[51] Whether factual causation can handle this alone depends, to some extent, on the account of factual causation. The most common and popular conceptions of causation-in-fact are not up to that task, as they are overinclusive. *But-for*, for example, includes every ancestor of the defendant, always also includes the plaintiff, and would answer in the affirmative to each of the hypotheticals above.[52] This is not necessarily a criticism of these as conceptions of factual causation; for causation is not all there is to liability.

A common assumption is that causation in the law consists of at least two distinct questions: the first, cause-in-fact, concerns whether the defendant's wrongful conduct produced, contributed to, or is causally relevant to the harm; the second, concerns whether the defendant should bear responsibility for the harm caused. This second question is usually seen as bearing a special connection to the first, belonging therefore within the element of causation, pertaining, perhaps, to the way in which the

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factor is better understood as a criterion of factual cause (step one) or of the scope of liability (step two). For these reasons, the Restatement (Third) has recommended discarding the substantial factor test.

[41] RESTATEMENT OF TORTS §431 and RESTATEMENT (SECOND) OF TORTS (1979) §431.

[42] Wright, *supra* note 34; RESTATEMENT (THIRD) *supra* note 11, §27

[43] McGhee v National Coal Board 3 All ER 1008 (1972), 1 WLR 1 (1973).

[44] Beale, *supra* note 29.

[45] Epstein, *supra* note 34.

[46] MOORE, *supra* note 34.

[47] For this reason, I did not list Hart and Honore's influential theory or the recent exposition of Halpern & Hitchcock's Actual Causation framework and the related framework put forth recently by Knobe and Shapiro, *supra* note 27, as in these frameworks causation and responsibility are more intertwined. H.L.A. HART AND A. M. HONORÉ, CAUSATION IN THE LAW (1985, 2nd ed.) (hereinafter HART & HONORÉ); Joseph Y. Halpern and Christopher R. Hitchcock, *Actual Causation and the Art of Modeling*, in HEURISTICS, PROBABILITY AND CAUSALITY: A TRIBUTE TO JUDEA PEARL (R. Dechter, H. Geffner, and J. Y. Halpern eds.), 383-406 (2010). Another important account that is unclear in this regard is Schaffer's, see Jonathan Schaffer, *Contrastive Causation in the Law*, 16 LEGAL THEORY 259 (2010).

[48] Regina v. Blaue, All Eng. Rep. 446 (Ct. App.) (1975–3)

[49] Thompson v. Fox, 192 A. 107 (Pa. 1937)

[50] Coates v. Continental Vinyl Window Co., 2003 WL 21540440 (Mich. App. 2003) (*per curiam*). Contrast with Atherton v. Devine, 602 P.2d 634, 636-637 (Okla. 1979). See discussion, *infra*.

[51] Paroline v. United States, 572 U.S. 434, 445 (2014).

[52] But for also has an under-inclusivity problem in cases of causal overdetermination, where more than one party's actions were sufficient to cause the harm (e.g., two fires that join together to burn down plaintiff's house). See RESTATEMENT (THIRD) *supra* note 11, §27.

defendant caused the harm. The second step is traditionally called "proximate cause", "legal cause", or "scope of liability".[53]

On the classical conception, proximate cause has something to do with causation. It is for this reason called "proximate cause" and part of the causal element. Much of the skepticism about causation focuses on this point.[54] Judge Andrews, in his famous *Palsgraf* dissent, expressed the skeptical view:

> A cause, but not the proximate cause. 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.[55]

The modern consensus on proximate cause seems to agree with Andrews.[56]

I will defend the classical view, hopefully clearing up some misconceptions about proximate causation and its causal bona fides. With the correct understanding, proximate causation is to be interpreted literally: it is about the proximity of the cause to the effect. Proximity plays an important role in determining, explaining, and justifying the doctrines in step two of the legal analysis of causation, the doctrines of proximate cause.

To be clear, I am not arguing that there is nothing to legal causation or scope of liability, beyond proximate cause. I am not arguing against foreseeability or the risk test as appropriate criteria for liability. In other words, the argument is not that there are no policy reasons to limit the scope of liability, external to the causal question. I am arguing that at least part – perhaps a very substantial part – of the law of proximate cause is proximate cause in the narrow sense, and that without this, much of the underlying logic of the doctrine is missed.

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As common law expanded liability beyond basic trespass, the wrongdoing inherent in acts of liability was recharacterized as causation of harm, rather than as engaging in unauthorized violence.[57] It was in negligence cases where causal sequences could be long and remote, that theorizing remote

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[53] RESTATEMENT (THIRD), *supra* note 11, "special note".

[54] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY, 102 (expanded ed. 2003) ("Causation had perhaps been the weakest link in the doctrinal superstructure created by the late nineteenth and early twentieth-century legal scientists. As the jurisprudential insights of Realism became more widely publicized, "proximate cause" cases increasingly appeared as instances where courts resorted to formulas to conceal the bases of their decisions. Treatments of causation seemed to confirm the Realists' belief that rules of law were meaningless apart from their administration, since different courts cut off liability at different points through the use of causation doctrines. Moreover, orthodox causation analysis was especially vulnerable to attack because doctrinally oriented scholars could not themselves unite on any universal causation formula. Hence a shift of emphasis in the analysis of causation questions from doctrinal to policy considerations was not markedly difficult to achieve, and perhaps not even striking in itself.").

[55] Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99, 352 (1928) (Andrews, J. dissenting).

[56] *See e.g.,* THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY, Vo. 1. 110 (1906) ("The terms "proximate" and "remote" are thus respectively applied to recoverable and non-recoverable damages. . . It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent…The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other"). Quoted favorably in Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 839 (1996).

[57] GUYORA BINDER, OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW, 159, 172 (2016).

causation mattered. This is where proximate causation, limiting liability to consequences "natural and proximate"[58] became standard. The important difference in law was between immediate and direct causation, taken to be self-evident, and indirect or remote causation, which diminished causal responsibility. The distinction between proximate and remote causes was construed as an application of Bacon's Maxim, understood as a scientific distinction about causality itself.[59]

In the nineteenth century, skepticism arose about proximate causation as an objective or scientifically respectable notion. Was proximate causation a coherent causal notion, or was it really a term to designate (or disguise) moral or policy-based considerations?[60] The criticisms were of three related sorts: First, of the concept of "proximate cause" itself as philosophically or scientifically mistaken or confused; second, that the concept (whatever it is) is not up to the job in distinguishing between cases where liability is or should be limited from those in which it should not; and finally, that use of such a flawed concept is a misleading rhetorical device by the courts to obscure or disguise what should be judgments of policy.[61]

Some of these criticisms were justified, but others were due to mischaracterization. Did taking Bacon "literally" mean that only the nearest antecedent in time and space was the responsible cause?[62] The law seems generally averse to such a conclusion, which excludes liability for sending poisoned candy across the country,[63] or a bomb buried for many years before detonating. How does one characterize a cause as the nearest? Is the fire that an arsonist lights nearer to the effect than the act of the arsonist himself?[64] Perhaps we mean the nearest responsible cause. This might be what underlies the doctrine of the last wrongdoer, according to which the last action of wrongdoing that causes the harm is the proximate cause.[65] But this test doesn't always apply either: sometimes the last wrongdoer is not held responsible, such as in cases of minor negligence, or where negligence was not within the risk, or when there is a subsequent intervening force; sometimes an earlier wrongdoer is still held responsible, as when A has an obligation to protect B against C's wrongful conduct.[66]

Philosophically, that causation weakens with distance in space or time is not obvious.[67] Furthermore, Bacon's ideas were thought to stem from an outdated theory of causation,[68] particularly, one which allowed only one cause, or one proximate cause, for each effect. In any case, no theory of philosophically or scientifically respectable causation would be sensitive to the policy considerations

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[58] *Ward*, *supra* note 30.
[59] MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 52 (1992); Union Pump, *supra.* note 7, 773, 777.
[60] LEON GREEN, RATIONALE OF PROXIMATE CAUSE 12 (1927). *See* St. John Green's (1874) comments, *supra* note 26, 201.
[61] Henry W. Edgerton, *Legal Cause* (pt. 2), 72 U. PA. L. REV. 343, 347 (1924). *See* KEETON, *supra* note 13, 301.
[62] KEETON, *Id.*, 276
[63] People v. Botkin, 132 Cal 231, 64 P 286 (1901). RESTATEMENT (THIRD), *Supra* note 11, §29 Comment b. ("Employing the term "proximate cause" implies that there is but one cause--the cause nearest in time or geography to the plaintiff's harm").
[64] KEETON, *supra* note 13, 274.
[65] FRANCIS WHARTON, TREATISE ON THE LAW OF NEGLIGENCE §134 (1874); KEETON, *supra* note 13, citations in footnote 29.
[66] RICHARD A. EPSTEIN, TORTS, 264-265 (1999).
[67] *But see* recent defenses of this view in MOORE, *supra* note 34 and Alex Kaiserman, *Partial Liability*, 23 LEGAL THEORY 1 (2017).
[68] St. Green *supra* note 26, Beale *supra* note 29, Kelly *supra* note 30.

governing how the law was applied. No theory of causation, for example, would explain why causation is more robust for intentional action than for negligence, accident, or coerced actions.

One approach, favored by those seeking to vindicate causal analysis, was to double down on the two-step analysis: a purely factual step and a normative (policy-driven) one. This two-step causal analysis would first evaluate whether some defendant's actions were objectively a cause. Once this objective condition was satisfied, policy considerations alone determine whether the defendant should be liable for what he caused. This approach was favored by the Realists. "Proximate Cause", on this approach is just a label for these policy considerations. Some went one step further, arguing that these doctrines should be expelled entirely from the causation element and seen as part of duty.[69]

An alternative, "scientific", approach was advocated by Beale. Beale observed that the correct application of Bacon's Maxim was to trace back from the injury to cause. He also correctly intuited that the proximity in question should not be proximity in space or time, but proximity in causation. Yet, Beale's account instead endorsed starting with the act and tracing its consequences forward, as a "much simpler task", since while there are "myriad" causes of an effect, those which remain "efficient" are few.[70] Constraints of efficiency and justice dictate the exclusion of remote consequences. Consequences are proximate when they are the result of the "active force" set in motion by the wrongful act. When that force has "come to rest", the law no longer takes interest in the consequences of the act. For example, if I throw a stone at a window, I've shattered the window by activating a force. If I put the stone down and you pick it up and throw it, my force has come to rest, and is no longer active. I am not the proximate cause; you are.

Over time, the Realist approach seems to have won out. Beale's tests are seen as overly mechanistic, somewhat arbitrary, and inadequate to capture the case law.[71]

But while critics of proximity as nearness in time or space are correct, they miss Beale's insight that the nearness required is nearness in causation. And while the "last wrongdoer" is not always the right approach to determining liability, it hardly follows that nearness in causation plays no role in determining who is liable. Beale almost got it when he observed that causation needs to trace back from effect to cause, looking to closer causes first.

What about the fact that there can be, indeed may always be, multiple causes for an effect? This criticism, frequently cited by the Third Restatement and the treatises, goes back, at least, to Nicholas St. John Green:

> There is but one view of causation which can be of practical service. To every event there are certain antecedents, never a single antecedent, but always a set of antecedents, which being given the effect is sure to follow, unless some new thing intervenes to frustrate such result. It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents taken together.[72]

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[69] Green, *supra* note 60, 623; HARPER, *supra* note 17 §20.4.
[70] Beale, *supra* note 29, 636.
[71] *See discussion* of *Horton*, *infra* note 203. As Judge Henry Edgerton exclaimed after examining Beale's test and comparing it to the case law, "This is complicated; it is ambiguous; it seems arbitrary; and the authorities do not drive us to it." Edgerton, *Legal Cause* (pt. 1), 72 U. PA. L. REV. 211, 223 (1924).
[72] *Supra* note 26, 212 (1869).

The roots of this claim are in the philosophy of John Stuart Mill and his discussion of what is now called the *causal selection problem*.[73] A fire is lit by striking a match. What makes it the case that *striking the match* counts as *the* cause of the fire? The match only produces fire because it interacts with other conditions. Absent those conditions, there would be no fire: "It's usually between a consequent and the sum of several antecedents, the concurrence of all of them being needed to produce—i.e., to be certain of being followed by—the consequent".[74] There will be many such conditions, such as oxygen present. *The* cause, properly speaking, of an effect is the sum of the conditions: "the whole of the contingencies of every sort from which the consequent invariably follows" that are sufficient to produce the consequent.[75] Since it is only the sum that is, properly speaking, "the cause", any distinction between "causes" and mere "conditions", in which we label only some, but not all, conditions as "causes", is mistaken, or at best a matter of context.[76] It is not causal considerations that distinguish them.

While the Mill point is well-taken, it is easily taken too far. Invoking the argument of multiplicity of causes as against the idea of proximate causation rests on a fundamental confusion.[77]

It is one thing to acknowledge that causation involves interaction between multiple actions, forces, or conditions. This was the point of the oxygen and match example. Both are required for the fire; both indeed are active in producing the fire; so, the question, which is the real cause of the fire, is perhaps miscast. What caused the fire was the interaction between the match, the surface against which the match struck, and the oxygen. The fire itself continued to burn as a process involving this oxygen. If the match is then thrown to the gasoline covered ground, the match, oxygen, and gasoline interact, such that none is the true cause to the exclusion of the other. But concerns regarding the inability to distinguish between "true" causes and mere conditions, while of merit *horizontally*, at a particular interaction or time-slice, are misapplied when looking *vertically* back along a causal path. Perhaps the one who *spilled* the gasoline is just as much a cause as the one who lit the match.[78] But what about the one who *sold* the gasoline to the spiller? While the multiple horizontal inputs to a causal interaction are equally proximate, matters are different when we look at vertical inputs, further up the chain of causation. Mill's insight may be apt for the inability to distinguish causally between various contributing contemporaneous conditions. It doesn't follow that we cannot screen off and rule out more distal causes due to other, more proximate ones, downstream from them. The sold gasoline and the spilled gasoline are the very same gasoline in the interaction. It is not two specimens of gasoline that interact with the match, but one.

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[73] *See e,g,* discussion in Knobe & Shapiro, *supra* note 27, 182-183.

[74] JOHN STUART MILL, A SYSTEM OF LOGIC Book III, ch. 5, §3 (1843).

[75] *Id.* Mill treats positive and negative conditions as equivalent. This, in my view, is a mistake, since the negative conditions don't interact with the positive ones. They are simply absent preventers. There are always infinitely many of these. *See* Yuval Abrams, *Omissive Overdetermination: Why the Act-Omission Distinction Makes a Difference for Causal Analysis*, 49 U. W. AUSTL. L. REV. 57, 72-74 (2022).

[76] See David K. Lewis, *Causation*, 70 J. PHIL., 556, 558 (disparaging the cause/condition distinction as "invidious discrimination"). HART & HONORÉ, *supra* note 47, attempt to vindicate this distinction using abnormality.

[77] Another place where the Mill point is overextended is in the distinction between active and passive causes, or between actions and omissions. *See* Abrams *supra* note 75.

[78] Cf. *Watson*, *infra* note 154.

One way to bring this out is to focus on causal disagreement. If we disagree about whether A or B shot C dead, we are disagreeing about causes (who killed C?). In this case, we disagree about the facts of the case; our hypotheses are mutually exclusive. This is orthogonal to Mill's point.

On the other hand, suppose both A and B contributed to C's death (A started the fire, B spilled the gasoline, and C dies in the blaze). Here Mill's point is in full force. Both are causes because both contributed. A's and B's actions brought about the effect together. If we disagree whether A or B was the "real" cause, we are not disagreeing about what happened. Rather we disagree who is responsible, or whose contribution was more important. A and B are both *component causes* of the effect. Their relation to one another in terms of contribution is *symmetric*. If we look only at one component and not the other, we have an incomplete description of the cause.

Now suppose that A gives B a gun, and B shoots C. Or A compels B to shoot C, so he does. If we disagree whether A or B caused C's death, this is not a causal disagreement. Assuming we grant the same facts, both statements are true, but they are not *rival* causes. Rather, A's causal contribution is mediated by B's. It is B's contribution (shooting C) that renders A's contribution a causal contribution in the first place. In other words, the reason why A's contribution is a contribution, is because it contributed to B, which contributed to the result. This relation between A and B is *asymmetric*. In these cases, Mill's point is irrelevant. A and B can be distinguished by a causal structure or hierarchy in which the influence of one cause via another is traceable. If we put this in Mill's terms of sufficiency, the proximate cause interacts with several contemporaneous conditions, which are jointly sufficient to produce the effect. The remote cause is not party to that interaction. By the time the interaction comes around, the remote cause is out of the picture: it is redundant, in that the proximate causes are sufficient without it. B's shot is no more potent in virtue of the fact that A gave him the gun.[79] On the other hand the remote cause together with the other proximate causes is not jointly sufficient if we exclude the proximate one: A giving B the gun does nothing if B doesn't shoot. Unlike the causal selection problem, in which what distinguishes a cause from a condition is practical interest, causal hierarchy is an objective feature of how causes work.

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In explaining its objection to "proximate cause" terminology, the Third Restatement states:

> Employing the term "proximate cause" implies that there is but one cause--the cause nearest in time or geography to the plaintiff's harm--and that factual causation bears on the issue of scope of liability. Neither of those implications is correct. Multiple factual causes always exist…and multiple proximate causes are often present. An actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause. And proximate cause is only remotely related to factual causation.[80]

Both claims – that there may be multiple proximate causes and that they need not be close in space or time – are correct. But they are irrelevant. That there are multiple horizontal inputs into a causal

[79] It is true that B only has the gun because A gave him the gun. A is still causally connected. But at the interaction itself, A has already done its work.

[80] RESTATEMENT (THIRD), *supra* note 11 §29 Comment b.

interaction doesn't impinge on the remoteness of prior causes. The proximity required is not of space and time, but of proximity in causation.

II. The Concept of Proximate Cause

What then is proximity in causation more precisely?

A. Causation

Factual cause forms the core of any causal inquiry. We look to the causal sequence that produced the injury. Proximity pertains to the ordering of that sequence. Legal causation and the determination of liability thereupon also rely on this sequence, though they supplement other determinations as to responsibility for, or ownership of, that sequence. That latter question is discussed in the next section.

While there are multiple accounts of factual causation, the account of proximate cause presented here is meant to be neutral between them. Any workable notion of factual causation will have a notion of proximate cause relevant to it; indeed, the very same one.

A is a cause of B means that A factually caused B. If you have *but-for* in mind, read that as: had A not happened, B would not have happened. If you have a sufficiency account, this means that A was enough (given other factors) to guarantee or bring about B (so B *had to happen*, given that A happened). If you have a productive account, using forces or processes, this means that A and B are connected by a physical process that produced B. Our concern with proximity will be how to read proximity off of that reading.

B. Causal Modeling via Graphs

Causal relations can be represented by diagrams, which represent *causal structure*, i.e., the causal connections and direction of causal influence between cause and effect. The most common and versatile method of representation is a causal graph.[81] Causal graphs connect *variables*, which can represent actions, events, facts, or states of the world, and are connected by *arrows*, which represent causal connection.[82] The direction of the arrow is important, for it relates the direction of causal influence from cause to effect. Causation is an asymmetric relation. It's not enough to know that A and B are causally connected, we care whether it is A that caused B or vice versa.

[81] The graphs that interest us are called directed acyclic graphs (DAG). *See* Christopher Hitchcock, *Causal Models*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds). (Spring 2023 Edition) URL = https://plato.stanford.edu/archives/spr2023/entries/causal-models/, section 2.3.

[82] What the appropriate relata of a causal relation are is a complex and complicated question. This question is intimately related to what the correct theory of causality is. Some work better with actions and events, some with facts or states. For our purposes, and at our level of abstraction, however, it will not matter. What does matter is that both the causal theory and the relata should remain constant in evaluating a case, model, or scenario.

Suppose that A torches the house, which leads to its burning down. We can represent this with a very simple graph (Figure 1), where C, the cause, is *A torches house* and E, the effect, is *House burned*:

Figure 1: Causal Connection

The arrow represents the causal connection and direction from C to E.[83]

Causal models or graphs are abstract representations. They leave out information. This is not necessarily a problem. While more information can always be added to the representation, for example, by adding more links to the chain, what matters is the direction of the arrows.[84] Which variables get related is a function of what we care about – what question we are trying to answer – but the existence and direction of the causal connection between the variables is determined by the facts. This will become clearer as we add complexity to represent more complex causal scenarios.

[83] Depending on your background theory of causation, the arrow can be interpreted accordingly. For example, on a counterfactual or necessary condition of causation (aka but-for) this means that A is necessary (in the circumstances) for B, or that had A not occurred B would not have occurred. On the interventionist account, in which these diagrams are most popular, the causal relations are represented by a set of structural equations. Causal dependence can be determined by solving these equations for various interventions on the variables. To see whether A is a cause of B, one changes the value of A (intervenes on A) and solves for B. We don't need the equations for our purposes in this paper, but they can be very illuminating. On a sufficiency theory (such as NESS), this arrow means that A was sufficient (or part of a set that was sufficient) for B. On a productive force or process account, this reads that a causal process emanating from A produced B. On such an account, the graph has a less abstract, more realist interpretation as representing the physical processes in the world that interact and the spatio-temporal points of their actual interaction. Fortunately, in this simple example, the claim is true on all of these theories. Sometimes, of course, these theories will differ as to whether A in fact caused B. In such cases, the representation in figure 1 might be contested or false. There can of course be important differences between these theories as to whether A was in fact a cause in fact of B's harm. A fully worked out modeling scheme, in which the arrows are interpreted, can also be used for inferring when A is a cause in fact of B. This would be sensitive to the underlying theory of cause. For example, if A is a necessary condition for B, but not a sufficient one, it very much matters which relation the arrow represents. But remember, our concern is with the proximate causation analysis. In other words, we are taking for granted that the causal connections between the arrows have been established and agreed upon. If we disagree whether A's torching the house did in fact cause the house to burn, our disagreement is with the factual causal claim itself, leading us to reject the model with an arrow connecting them. Once we agree that there is a causal connection, on the other hand, we can abstract away from the interpretation of the arrow and just look at the relationship between the causes themselves. This is what we are after here.

[84] We could, for example, add the variable of 'A lights match' connecting it to 'torch lights', and so on. None of this would change the direction of causation or of the fact that 'torch lights' causes 'house burns'. For the model-relativity point see JOSEPH Y. HALPERN, ACTUAL CAUSALITY 107-126 (2016). Halpern's system deploys normative considerations of abnormality similar to Knobe and Shapiro, *supra* note 27. For this reason, in Halpern's system actual causation is always model-relative. This complication is not relevant to the mediation question. In the setups discussed in this article, causation is already established and is common ground. The question is not which variables depend on which (as they do in Halpern's setup), but, given an accepted model, whether a variable is intermediate.

C. Causing Through or Mediation

The next concept we need, to make sense of proximate causation, is the idea of *causing through,* where C causes E through D, or via D. In more technical terms, the relationship between C and E is *mediated* through D.[85]

Figure 2:(Full) Causal Mediation

Suppose I go to the doctor with an infection. My doctor gives me antibiotics, which cure me. Going to the doctor caused my being cured, but the way that it did so was through the antibiotics. The antibiotics were a causal mediator between the first cause (going to the doctor) and the effect (being cured).[86] It is important to emphasize that the presence of a mediator does not entail that the mediated cause (going to the doctor) is not a cause. Going to the doctor *is* a cause. The presence of a mediator is just a feature of how causal influence works.

Causes and effects are connected via chains that transmit causal influence. Had we simply modeled my visit as in Figure 1, where C is *going to the doctor* and E is *being cured*, that model would still have been correct. Adding D (taking antibiotics) to the model (as in Figure 2) adds new causal information, but doesn't alter the fact that there is causal influence between C and E.[87]

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[85] JUDEA PEARL, *Direct and Indirect Effects*, in PROCEEDINGS OF THE SEVENTEENTH CONFERENCE ON UNCERTAINTY IN ARTIFICIAL INTELLIGENCE 411 (2001); Reuben M. Barron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOCIAL PSYCH. 1173 (1986).

[86] Different theories of causation might differ as to the causal status of enabling conditions like going to the doctor. In truth, much of this can be recaptured with rephrasing. This example was specifically selected not to involve an omission, which complicates the picture for some theories. Regardless, I think that on any causal theory, the plaintiff will ultimately need to furnish the underlying causal process that produced the effect. *See* Abrams *supra* note 75.

[87] In the relation between cause C, effect E, and mediator D, we can test for causal mediation, in the general case, by looking to see whether: (i) the causal relationship between C and D holds, (ii) the causal relation between D and E holds, but (iii) there is no relation when we have C without D. In testing for mediation in the general case, one could run this empirically. If you're trying to test it in the specific case this would involve a counterfactual. Running the counterfactual as a diagnostic doesn't commit you to a but-for criterion of cause in fact. The phenomenon of mediation or causing through requires that causal influence or production runs through the mediator. On sufficiency tests, such as NESS, the remote cause is redundant to the causal set that includes the mediator. In other words, the mediator plus the other horizontal conditions are sufficient to produce the effect.

These are cases of full or complete mediation of one cause by another. In full mediation, all of C's influence on E runs through D.[88] Full mediation is an asymmetric relation: if D fully mediates the connection between C and E, C cannot also fully mediate between D and E, in this sense.

We are now in a better position to articulate what a proximate cause is.

> **Proximate Cause**: When D (fully) mediates C's influence on E, D is a proximate cause of E, relative to C.

This notion of proximate causation is relative. Technically speaking, there is no sense in which a cause is categorically proximate to an effect, as there may always be further causes or links even more proximate, along the same chain or path. On the other hand, if the two causes are not along the same path, neither is proximate relative to the other.

Two causes of an effect, on the same path, are related to each other in terms of their proximity to that effect. In other words, while *cause* is, typically, understood as a two-place or dyadic relation between a cause and an effect, *proximate cause* is a three place (triadic) relation between two distinct causes of an effect to one another: Cause-D is proximate to Effect-E, relative to Cause-C. There is nothing exotic about three-place relations (e.g. New York City is closer to Boston than is Philadelphia). But relations only make sense when what is being compared is commensurable across the relata. Distance in space or time is not the issue. What is required is an ordering of causes along a chain or path.[89]

D. Causal Interaction

The mediation discussed above was full mediation. All of C's influence that reaches E is via D. But most, perhaps all, causation is via interaction, or partial mediation.[90] In interaction, the interacting conditions influence one another to produce the effect. When C and D interact to produce E, each is a cause; neither cause brought about the effect without the other.[91]

It is important not to confuse mediation and interaction. It would be false to say that the doctor's visit and the antibiotics *interacted* to cure me. Relative to the visit, the antibiotics' effect was direct. That

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[88] In counterfactual terms this means that had you gone to the doctor and she had not given you antibiotics, you would not have been cured (i.e. going to the doctor would not have caused you to be cured). In related interventionist semantics, we can capture this by intervening on the antibiotics, while holding your visit to the doctor fixed. This shows that the dependence of the cure on the doctor only holds when mediated by the antibiotics. In NESS terms, this means that the set of variables that includes going to the doctor, but does not include the antibiotics, is not sufficient to produce the outcome. In process theories, the claim is that all of the causal influence of the doctor's visit on your being cured came from the antibiotics themselves.

[89] In this sense, we could even call the proximate cause relation a four-place relation, since it relates two causes, an effect, and a causal chain.

[90] That doesn't mean that there is something wrong with models of full mediation; that will depend on whether the interacting variables are of any interest to us.

[91] Sometimes we can attribute aspects of the effect to one cause, rather than another; at other times the effect is joint and indivisible. With the former we need to be careful about individuation in determining which properties of the effect are attributable to which properties of the cause. It is here that the different theories of causation and their respective relata get tricky. For example, if I paint a ball red and throw it across the room, the fact that there is a red ball across the room is due to my throwing, but the fact that it is red is not. *See* Donald Davidson, *Causal Relations*, 64 J. PHIL. 691 (1967).

is mediation. On the other hand, the antibiotics cured me by interacting with my body: causation is joint; neither component influences the outcome directly without the other.

An interaction relationship can be represented as in Figure 3:

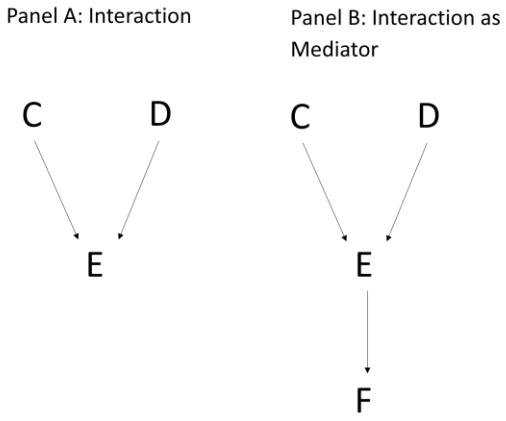

Figure 3: Causal Interaction

One could describe interaction as two interacting variables mediating each other's influence. A better way to do this, however, is to treat the event of the *interaction itself* as (full) mediator. When C and D interact to cause F, the interaction between C and D is an occurrence that we can label "E", such that E is proximate to F relative to C and to D (Figure 3(b)).[92] Interactions are proximate to their downstream consequences, relative to their inputs. Interaction is symmetric between the interacting components themselves. The relation between the interaction and both its inputs and its effect, however, are asymmetric.

E. Branches and Sequences

An important lesson from causal interactions is that causal sequences have distinct paths or branches. This can be true of both the inputs (causes) and the outputs (effects).

Suppose that A sells D matches, which D uses to burn down E's house. A's sale of matches contributed to the burning, but this is only a contribution because of what D did with them: burn E's house. The connection between A and the fire runs through D's action. This is simple mediation. On the other hand, when D burns the house, he may also use gasoline. The matches *interact* with the gasoline, as well as the wood, and the oxygen, to burn down the house. This was Mill's point.

Suppose that B sold C the gasoline and C poured it all over the house. C's mediating action is proximate to the fire relative to B's sale. D's and C's actions interact, but A's and B's don't; rather, each is a more distant link on a separate path. The two paths interact to produce the fire, which is the interaction of C's and D's acts. There is one causal path that runs: A-D-Fire, there is another that runs

[92] Typically, these events have familiar names like the *ignition of the fire* or the *firing of the gun*.

B-C-Fire.[93] There is a path directly connecting the fire to the burn that branches off in either direction to either C or D.

The same applies to the *outputs* of an interaction. Suppose that when F sees the fire, he sounds the alarm and when G sees the fire he flees. F's seeing the fire causes F's sounding the alarm. It doesn't cause G's flight. G's flight is caused by G's seeing the fire, which is turn is caused by the fire, which is caused by D's lighting the torch. This scenario can be represented as follows:

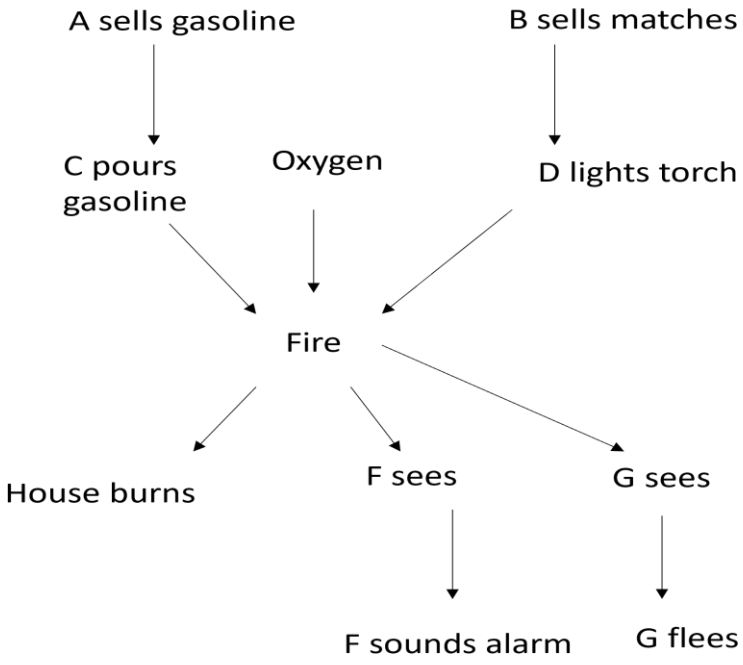

Figure 4: The Fire

As can be seen (Figure 4), relative to the house burning, the fire is proximate to all of A, B, C, and D's contributions, whereas C's is proximate to A's and D's to B's. D's and A's are not comparable to one another in terms of proximity, and neither is comparable to the oxygen.

The significance of the graph is not merely the time or order in which events occur. Rather, it tells us something about how events in the world affect each other, as well as which events can be manipulated to alter which outcome. For example, since the alarm is only sounded if F sees, the alarm is prevented from sounding by preventing F from seeing. But this will not prevent G from running. Even though G's running is an effect of the same cause (fire) it is not an effect of F's seeing. You can manipulate G's running by preventing G from seeing (but this won't prevent F from sounding the alarm). On the other hand, preventing the fire (either directly, or by preventing B from lighting the torch) would prevent both F from seeing (and thus sounding the alarm) and G from seeing (and thus running).

[93] For brevity, I have equivocated here in notation between actors and actions.

Recall *Maynard* (Figure 5(a)).[94] The speed-filter is connected to Maynard's injury, but that connection runs through McGee's using the filter, which in turn is mediated by McGee's crashing into Maynard. These are mediations, not interactions. Absent McGee's hitting Maynard, there is no connection between Snapchat and the injury. This is true, even granting Maynard's claim that speed-filter caused McGee to speed. Her speeding is still proximate to the crash relative to the placement of the filter, or her use of it. There is no getting around the driving and the impact with Maynard, in this case, as proximate relative to any background motive or incentive for her speeding.

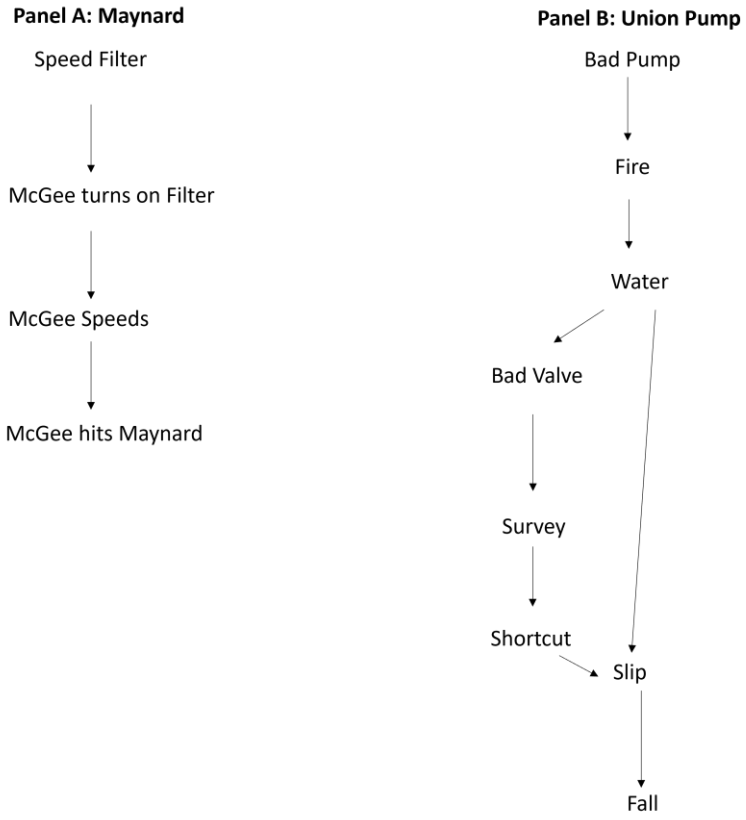

Figure 5: Maynard and Union Pump

In *Union Pump*[95] (Figure 5(b)), the slip and fall is via interaction. Allbritton walked on a wet surface. She interacted with the water to fall. That interaction is proximate to her fall, relative to the presence of water or to her decision to take the short cut. It is also proximate relative to the fire.

Sometimes causal influence can be both mediated and direct. Suppose I induce you to join me in burning down C's house, which we then proceed to do. I am a cause of C's house's burning in two distinct ways: first by inducing you I have contributed to the burning;[96] second, by burning it myself.

[94] *Supra* note 2.
[95] *Supra* note 7.
[96] This is in strictly causal terms. In the law, of course, there are doctrines of conspiracy and accomplice liability to cover cases like this. Arguably their very rational is to get around the proximate causation issues that would otherwise arise. In

You are proximate to the burning relative to me, only along the first path, which runs from my solicitation to your burning. But on the second path, the direct one in which I burn the house, you are not proximate; my contribution there is direct.

In other words, proximate causation in the technical sense is only defined or only makes sense along a particular causal path. When the path from C to E runs through D, D is proximate to E relative to C. But when there is a path from C to E that doesn't run through D, the relative proximity of C and D to E is undefined. It doesn't matter whether C or D is closer in space or time to E. If C's and D's causal contributions are on causally distinct routes – are causally independent of one another – they cannot be judged in terms of relative proximity. Recall the example about the route from Philadelphia to Boston. If there is only one road between Philadelphia and Boston and it runs through New York City, then New York City is proximate to Boston relative to Philadelphia; but if there is more than one route, that proximity only holds on the roads that run through New York City. New York City is on the way to Boston from Philadelphia, if you are travelling on I-95, but it is not if you travel north and then east, skipping New York City entirely.

Proximity as a relation between causes only holds along defined paths of causal structure. It is proximity in *causation* rather than proximity in space or time, as Beale correctly observed.[97]

Even *Ryan* can be modeled this way.[98] House one burns, which burns house 2, which burns house 3…each house is proximate relative to the next. There is an interaction along the way between the fire, the wood, and the oxygen. But the initial negligent spark is remote.

That there is a cause more proximate doesn't mean that the remote negligent actor is not liable, just as Union Pump's or Snapchat's remoteness doesn't necessarily imply that they are not liable. This is because, although the technical notion of proximate causation plays a role in structuring the liability inquiry, it is not sufficient, on its own, to determine who is responsible.

III. The Doctrines of Proximate Cause

Proximate causation, in the technical sense, is an objective feature of reality and its causal structure. By itself, proximate causation doesn't settle questions of liability. For that, we need the *doctrines of proximate cause*. These doctrines are normative in nature. Their primary purpose is to determine how proximate causation is applied to determine liability. That they are normative does not mean they float free of causation.

The general principle involves applying Bacon's Maxim: trace back from the effect (the injury) to its causes. To get a feeling for how the Maxim works, take the famous *Squib* case.[99] Shepherd tossed

treating the actors jointly, we look to what they caused together. Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985).

[97] Beale, *supra* note 29.

[98] *Supra* note 16.

[99] Scott v. Shepherd, 96 Eng. Rep. 525 (K.B. 1773). The *Squib* case's significance was about causes of action. The judges disagreed about whether Scott's action constituted trespass or case. This question is distinct from the proximity question and cuts across both factual and proximate cause. For this reason, the so-called directness test, which arguably reflects the

an explosive into a crowded market. Willis, a bystander, hoping to protect himself, grabbed it and threw it across the market, where it landed in the goods of Ryal, who tossed it further, accidentally hitting Scott in the face just as it exploded. The exploding squib caused Scott's injuries, as did each of the intermediate tosses. But there is an order to the tossing. Following Bacon's Maxim involves tracing through each in reverse causal order. We don't get to Shepherd (the defendant) before we get to Willis. We don't get to Willis before we get to Ryal. We don't get to Ryal if the squib itself would be liable, or if Scott himself is fully liable for his own injuries. In this case, the tracing continued all the way back to Shepherd. But no further than Shepherd. The doctrines of proximate cause explain why.

A. Principles of Absorption

Determining liability requires *principles of absorption*,[100] which determine when and to what extent an action that caused harm is grounds for responsibility. Recall how proximate causation operates as a doctrine of responsibility: trace back from the harm to its causes, along the chains of causal influence. Bacon's Maxim requires the tracing to proceed in sequence. If a particular cause D is proximate to the effect relative to cause C, do not trace back to C prior to tracing through D. If D is sufficient to absorb responsibility, in accordance with the principles of absorption, the process terminates at D. On the other hand, if D does not absorb responsibility, continue tracing back from D to prior nodes in the causal chain (C, and reiteratively B, and so on). D's causal priority over C is purely a matter of causation. On the other hand, whether D absorbs responsibility, and therefore prevents any subsequent tracing, is a matter of the absorption principles.

What are these principles? They are none other than the familiar principles of tort responsibility. When asking whether D absorbs responsibility for harm caused to E, treat D and E as doer and sufferer of a harm and ask whether D would be liable for the harm to E. If the D-E relationship is insufficient for liability, D does not absorb responsibility and we continue tracing back;[101] if the relationship is sufficient, D absorbs responsibility.[102] This is a very general claim: differences in circumstances can vary as widely as with any tort claim. Essentially, if D has wrongfully harmed E, D is liable to E for the injuries he has wrongfully caused. That C furnished D with the means to harm E in no way impinges on D's responsibility. E's claim against D is not diminished by the fact that C is in the background. On the other hand, if C harmed E via a direct causal route, not mediated through D, E has an independent claim against C along that causal route. In that case, D can rightfully claim that that direct injury or contribution (if the injury is indivisible) is not his doing. Similarly, if D was merely negligent towards E, and C can be shown to have independently aggravated the effect (or the risk) of D's wrongdoing, then D can rightfully invoke C's negligence as a contributing factor as well. In this case, D would only *partially absorb* responsibility. The correct view in such a case would be to view D and C as jointly causing E's harm. For example, if D negligently uses C's cleaning product at normally unsafe levels, but the product is actually more toxic than normal, D's negligent use could be said to be less than fully responsible for the actual level of toxicity emitted, since C made the product

trespass/case distinction, is unclear: is it a test of factual cause involving the continuation of force (as distinct from a mere enabling condition) or a test of proximate cause (requiring no supervening cause)?

[100] I believe this term was coined (critically) in Terry Christlieb, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161 (1993).

[101] Or, if D has a defense based on plaintiff's conduct, liability might be altogether defeated.

[102] This claim gets complicated, as we will see, with defenses. See discussion *infra* Section IV.A.

less safe than it was supposed to be, increasing the toxic levels beyond what D's negligence itself would have normally produced.[103]

In essence, there are three forms of principles of absorption: (1) Intrinsic bilateral relations between doer and sufferer; (2) Vertical or sequential principles between doers along a causal path; (3) Horizontal or interactive principles, between multiple doers or paths at an interaction. Critics of proximate causation on Millian lines confuse (2) and (3). They are correct that there can be more than one party to a causal interaction, i.e., more than one proximate cause. This is why we need horizontal principles of absorption: to allocate responsibility between the proximate causes. But they confuse this notion with vertical influence along a path.

Together, the principles determine a reiterative sequence for the determination of liability along the lines or paths of causation. For each causal path, we determine, using these principles, the "owner" of that path, to arrive at the set of proximate causes. While this might seem intractable – after all there are so many causal inputs to an interaction – it is in fact relatively manageable, since, in practice, the procedure involves a plaintiff, a defendant, and any other proximate causes that the defendant can plausibly invoke in his defense, in accordance with the causal sequence alleged by plaintiff.

1. Intrinsic Bilateral Relations between Doer and Sufferer.

These are the fundamental building blocks of the absorption principles. They relate when causing harm is grounds for liability. We look simply at the relationship between doer and sufferer *in isolation*, asking if it is one in which doer is responsible for the harm to sufferer. Meeting the bar of liability in isolation is a necessary condition for any tort liability and imposes a ceiling on that liability. What A does not absorb in isolation cannot be reimposed on A by adding further parties. A's responsibility might diminish, however, when other parties are introduced, via the other principles.[104]

Some plausible principles in this class:

- **Prima Facie**: If D caused harm, D is prima facie liable for that harm.
- **Intentional Harm**: If D caused harm intentionally, D is fully responsible for the harm intended.[105]
- **Wrongful Accidental Harm**: If D caused harm accidentally with fault, D's responsibility is proportionate to the degree of fault in D's action, unless liability is strict. D's engaging in risky

[103] Cases like this in which the mediating cause transmits more causal influence than he bargained for can be handled in one of two ways. Either as a mediation case, where the work is done by the absorption principles, or as an interaction case, where the negligent actor interacts with the conditions created by the remote party (in this case, C interacts with D's product). This latitude of modeling is a feature of the models themselves.

[104] This first category is an idealization of sorts, because all causation is via interaction. We normally ignore most contributing factors to the interaction, because their contribution is irrelevant or leads nowhere of interest. This will not matter, however, because we are not relying on an assumption that these causes are free of interactions. Interactions are governed by the horizontal principles discussed below. The rules for these principles will be consistent with the rules for intrinsic bilateral relations.

[105] *Cf.* RESTATEMENT (THIRD), *supra* note 11, §5 ("An actor who intentionally causes harm is subject to liability for that harm"), *Id.* §33 ("An actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur").

behavior makes D accountable for the materialization of that risk. If the risk was greater than what D could have reasonably foreseen, this counts against holding D entirely responsible.[106]

- **No Tort**. If D caused harm entirely faultlessly, and liability for the action is not strict or absolute, D has not committed a tort. Responsibility is not absorbed.
- **Justified Harm**. If D's causing harm was justified, liability is sometimes defeated, in which case, the process terminates.[107]

These principles are the basic building blocks of the principles of absorption, because the other principles are reiterations of these principles in interaction with each other. One might differ on how these principles should work. What matters, however, is that these principles are distinct from the technical notion of proximate causation.

2. Vertical or Sequential Principles between Doers Along a Causal Path.

This is the proximity principle in action. If C caused harm to E through D's action, D's action is proximate relative to C's. But that is not sufficient to determine that it is D who is liable to E. We need to know whether D's action absorbs liability. If it does not, and liability is not defeated, liability will continue tracing back along the causal path to C.

Determining this is straightforward: judge the relationship between D and E, as in (1) above. If D is fully liable (e.g., D acted intentionally), stop and don't proceed up the ladder to C. If D is not liable (e.g., D acted faultlessly), and liability is not defeated, liability passes through D: proceed up the ladder to C. If D is partially liable (e.g., D acted negligently), we might or might not proceed up the ladder towards the causes of the risk residual to Ds action. When arriving at C, apply the process again: beginning with the intrinsic principles, followed, if necessary, by the vertical ones, until the process terminates. The absorbing members of the sequence are the *owners* of the sequence.

It is important to note that vertical principles of absorption apply for each line or chain of causation. If C causes both through D and independently, trace liability back along both paths: one via D (applying the principles on D, followed by C, sequentially), the other directly to C.

Vertical absorption must preserve the same features that generate intrinsic absorption. If A does *X* intentionally, which causes B to innocently do *Y*, this will not necessarily imply that A intends to *Y*. For example, if A intentionally poisons C, and B, in his excitement to report the event to his friends,

[106] This is not a function of D's causal contribution, but of D's fault. Harm beyond D's contribution suggests we are looking at a horizontal case, anyway.

[107] Defenses can complicate this picture. When D has a defense against E, this could mean that liability is thereby defeated, or it could mean that liability continues to pass through. There might also be cases where justification doesn't defeat the duty to compensate, as in cases of necessity. *See* Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910). Liability should be defeated in cases where the defense pertains to the plaintiff's own conduct (consent, assumption of risk), thereby rendering the outcome the plaintiff's own fault or not an injury. On the other hand, in cases where the defense is meant merely to excuse the defendant himself, responsibility traces through. The same point can be made by always having responsibility trace through, asking thereby, when the remote cause can avail himself of the proximate cause's defense. The result, I think, should be the same.

slips, A has not intentionally harmed B; in fact, A has probably not negligently harmed B either.[108] The rule governing risk or duty successfully deal with this, but we should state this more carefully.[109] The causal relation itself might be extensional and transitive, but states of culpability, which depend on propositional attitudes, are not.[110] The chaining of causes between A's act and B's harm might be sound, but to absorb responsibility for the effect of the action, we must be able to restate the causal sequence between remote cause and effect in the same terms we did above in the intrinsic principles. Call this the *culpability transmission principle*. According to this principle, if C causes E through D, and liability traces through D, C only absorbs the liability for E that C would have absorbed had C caused E directly, as in step (1).

Relatedly, C should inherit the defenses D would have against E that don't pertain directly to D's impaired agency. So, C can assert justification defenses such as consent or self-defense, even though it was D, not C, who received E's consent or who was threatened, as well as assumption of risk, but probably not excuse defenses or justification defenses that only arose for D due to circumstances C himself wrongly created.[111]

3. Horizontal or Interactive Principles between Multiple Doers.

These principles govern causal interactions, when more than one action is involved in producing the harm. These are *horizontal*, because each member of the class of wrongdoers is at equal proximity to the harm. They are *interactive* because the contribution of each interacted to produce the harm. The harm is the result of the interaction of C's action with D's action.

The horizontal principles determine responsibility for, or ownership of, a causal interaction. As the interaction involves two or more causal paths, ownership is adjudicated between these paths. The first step, then, is to establish path ownership. To establish path ownership, the vertical principles must be applied to ascend the path until responsibility along that path is absorbed. At that point, the paths are compared to one another, using the horizontal principles to determine ownership of the interaction. If one path owns the interaction to the exclusion of the other, that path absorbs the entirety of responsibility for the interaction; the other path is remote.

Horizontal principles therefore also govern actions less proximate to the interaction if the application of the vertical principles in step (2) lead up the ladder to a higher rung to establish path ownership. Two actions might be horizontally judged as equivalently proximate to an interaction, if each is the most proximate absorbing cause on a path leading to that interaction. For example, B

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[108] Sometimes this provision will get more complicated by running up against the doctrine of transferred intent. In this case, the doctrine won't apply. Typically, the doctrine simply involves a change of identity of the victim of the same or a similar tort or crime. DOBBS ET AL *supra* note 18, 54-5.

[109] Cf. *Palsgraf*, *supra* note 55. *See also* RESTATEMENT (THIRD), *supra* note 11, §33 (c) ("an actor who intentionally or recklessly causes harm is not subject to liability for harm the risk of which was not increased by the actor's intentional or reckless conduct")

[110] That causation is extensional means that we can substitute different descriptions of the same causal claim without altering their truth value. The causal claim relates the objects, A and B, irrespective of how we describe them. To say that causal claims are transitive means that if A caused B and causes C, then A caused C. Attitudes, like intentions, are neither extensional (they are intensional) nor transitive. If I intend to steal a car, not knowing that you need that car to get to a wedding, I did not intend to spoil the wedding, even if I intended to do x, which did spoil the wedding.

[111] *See* "swerve" example *infra*.

compels C to throw a match onto the ground that D covers in gasoline (Figure 6). C's and D's actions interact, placing them at equal proximity to the effect. But since the vertical principles trace through C back to B, B now owns the subsequent path, and is treated as the interactive cause with D. On the other hand, A, who sold the gasoline to D, is not a proximate absorbing cause, because D fully absorbs responsibility for his act. If D himself is not a fully absorbing cause (because D didn't know it was gasoline, or because D was a minor, etc.), then, again, using the vertical principles, trace back to A. In that case the horizontal principles would determine ownership between A and B.

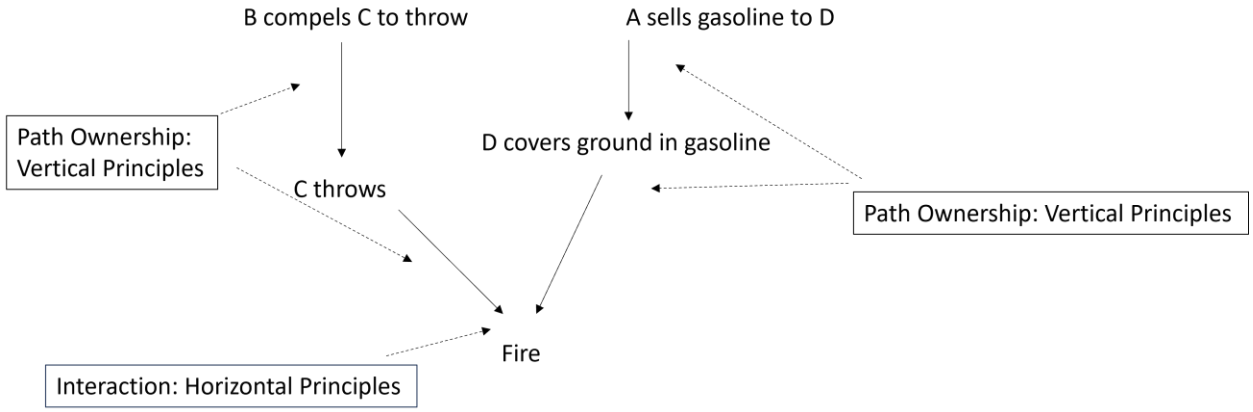

Figure 6: Throwing the Match

The principles also operate when it is the plaintiff's own action that contributes to the harm. Suppose that C leaves an obstacle on the road and D leaves nails. Plaintiff swerves to avoid C's obstacle and runs over D's nails (Figure 7). The causal interaction is between D's nails and plaintiff's car, but since plaintiff's action was a justified (or compelled) attempt to avoid collision, responsibility is not absorbed and passes up the ladder vertically to C's leaving the obstacle. We get joint causation between C and D, rather than contributory negligence or merely holding D liable for the nails.

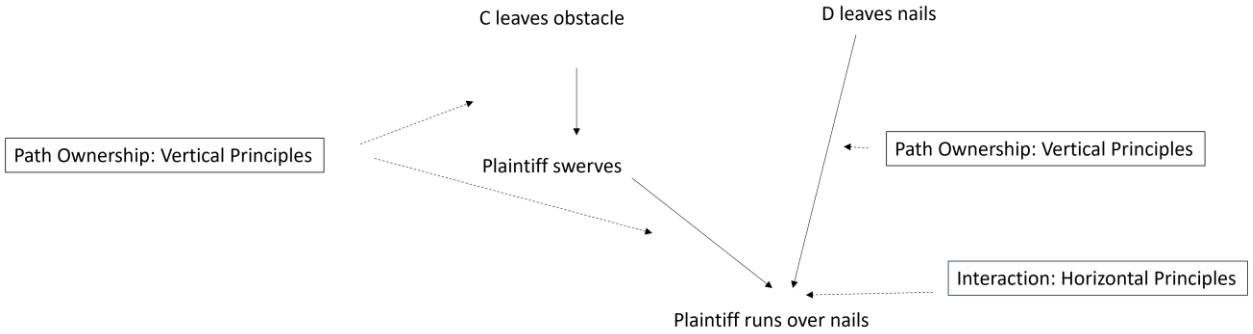

Figure 7: Swerve

Some plausible horizontal principles, when C and D interact, causing harm, such that C and D are both causes of that harm:

- **Intentional Harm**: If C and D are both intentional, each fully absorbs, dividing the damages between them, unless fault is seen as unequal between them.

- **Wrongful Accidental Harm**: If both are negligent, the normal principles of contribution and comparative fault apply.[112]
- **Mixed Intentional and Accidental**: If C is intentional and D is negligent (or inherently dangerous), D may be completely absolved. We might divide between them but will certainly not absolve the intentional harmer.[113]
- **No Tort**: If D (or C) caused harm entirely faultlessly, and liability for the action is not strict or absolute, D has not committed a tort at all. Responsibility is not absorbed (it continues to pass up along the vertical line).

These principles are schematic; suggested as basic principles governing horizontal interactions. This list is not meant to be exhaustive. Undoubtedly, we can draw further distinctions between negligence and gross negligence, or recklessness.[114] For intentional torts, we can draw distinctions between malicious or criminal behavior and cases with knowledge. What matters for our purposes is that what governs the horizontal interaction is a matter of fault and assumption of responsibility, rather than causal principles (since, by definition, in a horizontal interaction, both are causes and are equally proximate). They follow similar principles to those governing intrinsic bilateral relations. Just as with the vertical principles, we must be mindful of the culpability transmission principle.

A simple way of putting these principles is that the contributor with greater fault absorbs responsibility. But this, while perhaps correct descriptively, misses a noteworthy subtlety. The reason that intentional action absorbs the horizontal interaction with the negligent action (or with inherently dangerous activity) is not merely greater fault. Rather, it is due to a fundamental distinction between intentional harms and accidents. In the latter, there is a gap between what the actor intended and the consequences. The wrongful actor is responsible for an unintended outcome he might well have preferred hadn't happened. Instead, the negligent actor has essentially assumed the risk of the harm's materializing as an effect of his actions. Rather than allowing the losses to fall where they are, we undo harm to the wrongfully injured plaintiff by forcing the negligent actor to internalize the externality of his action. But if, when faced with liability for that unintended outcome, the negligent wrongdoer competes with a party for whom that outcome was intended, there is no issue of allocating responsibility for a risk.[115]

Ultimately, application of these principles should produce a set of interacting proximate causes. Each member of that set produced part of the interaction and is responsible for the part he produced. Remote actors are shielded by the absorbing proximate wrongdoers; actors more proximate are, by definition, non-absorbing. In the *Squib* case, with which this section began, each link in the chain mediated the influence of the next. Each link proximate to Scott, was excused, so liability kept on

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[112] In both of the above, the typical arrangement will be joint and several liability for each. The point is just that in reconstructing the principles of absorption, intentional wrongdoing absorbs all consequences, whereas negligent wrongdoing is more attenuated.

[113]For controversy on dividing between intentional and negligent actors, *see* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §14 (2010); DOBBS ET AL, *supra* note 18, 853; and Degener v. Hall Contracting Corp., 27 S. W. 3d 775 (Ky. 2000) (allowing indemnity from intentional tortfeasor).

[114] For instance, in Purchase v. Seelye, 121 N.E. 413 (Mass. 1918), in which a surgeon's operating on the wrong side, severed the link to the railroad's original negligence.

[115] When the harm caused exceeds the harm intended, we therefore get the predictable difficulties with the extent to which intentional action absorbs. The arguments for intentions trumping negligence are therefore less strong in cases like the eggshell skull, or in the pockets of strict liability for intentional torts.

tracing, via the vertical principles, back to Shepherd, whose action was wrongful, so liability absorbs. In the match throw (Figure 6), the interaction between the match and the gasoline is at least partly owned by B. C threw but was compelled. So, the B-C path is owned by B. The remaining question is how the gasoline got there. Was it intentionally placed? Negligently spilled? Is its presence entirely appropriate? That answer will determine path ownership of the gasoline, and in turn, ownership of the interaction of the gasoline with the match.

B. Normative Justification

The correct way to understand the doctrines of proximate cause is not as breaking off a causal chain from C to the effect, but rather of tracing backwards: the plaintiff argues that various actions contributed to her loss, tracing back to the causes of her loss along the paths of causation. When arriving at a fully culpable cause along a particular causal chain, the Baconian principle says "stop"; when arriving at a set of proximate causes that completely absorb responsibility, the task is complete. The causal chain is "broken" because there is no more responsibility to trace.

Why is the Baconian principle justified? There are numerous reasons why the law cares about proximate causes, rather than ultimate or root causes. The latter are of obvious potential relevance for social science or policy but cannot be the focal point of corrective justice between the parties in a private law dispute; nor for that matter, can they serve as an effective deterrent. Compensation after all is limited by the amount of harm actually incurred. Its distribution is zero-sum. Each additional defendant included means either lower contribution per defendant or double counting and overcompensating the plaintiff. Given that the wrong of the most proximate defendant is not lessened by the existence of prior wrongdoers, it would be both unjust and manifestly unwise to hold the defendant less than 100% liable for what he has wrongfully brought about on his own.

When D acts to cause harm to E, D should be responsible for E's injury. D has freely chosen to act wrongfully. This much is taken for granted in the discussion. But the fact that the circumstances in which this choice was made were made possible by C does not diminish D's responsibility at all. There is, therefore, nothing in C's doing that lessens D's responsibility.

Saying otherwise would paradoxically mean zero liability: since all caused harm would be divided among all prior wrongdoers, back in time, creating diffusion of responsibility on a massive scale, or arbitrary distinctions in liability dependent on the number of other tortfeasors outside of the wrongdoer's control. Justice Mitchell in *North* had it exactly backwards: the problem with getting rid of Bacon's Maxim is not so much infinite responsibility as none, or trivial responsibility.[116]

Furthermore, to say otherwise, would give D a free pass on liability. There stands D all by himself, responsible for P's harm. True, C caused P's harm too. But D is proximate to the harm, compared to C. P can trace back to D. If she does so, what can D say? It wasn't me? No. But what about C? What *about* C? In what way does C's responsibility mitigate D's? D chose to do what he did. He owns his action. That you sold me a gun in no way mitigates my responsibility for shooting my victim. There is no reason for me to owe less than 100% just because I got the gun from you. You influence the outcome, true. But your influence is through me and my influence is 100%. Your influence in no way

[116] *Supra* note 14.

enhanced mine or made it worse. The proximity relation is asymmetric. Every bit of your doing is also my doing. But not the reverse.

If we ignored proximity, this would mean that D has the power, indeed the liberty, to unilaterally impose liability on C. I've acted and now it's up to you to decide whether to cause me to be liable, not to mention, if you can share in contribution, that you can do so with impunity.[117]

A system that prioritizes recovery from the proximate source of injury better reflects the fundamental principles of inviolability of persons and their property. When I wrongfully injure you, it is I who have violated your rights. You have a claim against me for so doing. It is not your problem why I violated your rights. If the choice was mine whether to injure you, I have freely and wrongly made that choice. If something about those circumstances made my choice less than fully free, so that I am not fully responsible, in principle, that is my claim against the party that put me in that position. Thus, ignoring administrative costs, victims would fully recover from their proximate injurers, who in turn might have a claim against those who put them in that position.

Such a system of impleader would perfectly replicate what we have already proposed here using the principles of absorption. For example, if A coerced B to hit C, C has a claim against B (the proximate cause of this injury), who in turn has a claim against A for coercing him and making him liable to C. A has no reciprocal claim against B.

On the other hand, if A sells the gun to B, who uses it against C, C has the same claim against B, but this time, B has no claim against A. How has A made B worse off? In fact, were we to ignore proximate causation and allow C to recover directly from A, A would have a claim against B: you made me liable to C. B's action was free and unforced. B's liability for his action should be 100%, rather than split with A. Were A to compensate C, A should be entitled to indemnification from B. Following the Baconian maxim replicates the just outcomes of a hypothetical system of impleader, by eliminating these intermediate steps.

C. Absorption: "Breaking" v. "Subordinating"

Typically, when D absorbs liability, leaving no further liability to trace back to C, this "breaks the causal chain" between C and E. This suggests that C is no longer a cause in the legal sense: he is not liable. But another possibility is that D's liability takes priority over C's, leaving C liable in a secondary sense. This form of secondary liability has C liable, conditional on D's inability in practice to make the plaintiff whole. This could be a failsafe if D is unavailable or insolvent; alternatively, C could be liable

[117] It also mirrors the ex ante incentives we want the actors in this circumstance to have. There is B standing with the gun that A gave him. Does the fact that A gave him that gun in any way alter the considerations we want B to bear in mind at that moment? Were B to be allowed to deflect a share of his responsibility by pointing at A, that would perversely incentivize B to shoot. It is B, after all, who has control over whether he shoots. We might also incentivize A by making him liable conditionally, but it makes no sense to limit B's liability at all. Similarly, for the recovery, the evidence needed to show that A caused the harm is ipso facto evidence that B caused the harm.

immediately, but with the proviso that C can subsequently go after D for indemnity. D would then be liable to C for 100% of the damages.[118]

The choice between the two types of absorption might be a matter of policy. Both follow the Bacon Maxim as the determination of liability follows the sequence of causes. The difference is whether the remote cause is absolved or secondarily liable.

The case for secondary liability is strongest with affirmative duties to prevent the very harm in question: C fails to protect E from injury by D. The argument for secondary liability in such cases is obvious: what content would the duty have if C were absolved by D's proximity? C's breach consists in allowing that very injury to happen. E's compensable harm is still the harm caused by D's injuring her. E is not entitled to double compensation. The order of compensation should be that D absorbs full responsibility. If E recovers from D, C is off the hook, since D has no reciprocal claim against C. But if E recovers from C, C can recover from D himself.

There are two related phenomena that explain this. One is the causal status of omissions, the other is the nature of the duty owed. The latter may allow extension of secondary liability beyond affirmative duty cases.

D. Omissions

The causal status of omissions is questionable.[119] Omissions cannot properly produce outcomes,[120] their relevance is in what they failed to prevent. If C and D interact to produce E, and B could have prevented E by preventing the interaction, B's failure to prevent the interaction suggests one type of explanation why E occurred. But it is misleading to speak of the omission as part of the interaction, both because omissions do not occur at a particular location or time (their effect is not local), so there is no proper way for them to interact with the active causes[121]; second, because the omission's relevance to the outcome is secondary or parasitic: a combination of actual factors (in this case, C and D) combine to produce an effect for which they are sufficient, absent interference by a preventing factor, which this particular omission could have been. Had the defendant done what he omitted, the harm would have been prevented; but this also holds for everyone else.[122] Furthermore, any set of

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[118] This, for example, is what happens in vicarious liability. *See* Devine v. Roche Biomedical Labs., Inc., 637 A.2d 441, 447 (Me. 1994) (potential indemnification claim by party whose liability, while caused by defendant's wrong, is not merely vicarious); Municipality liable in damages for harm caused by the disrepair of its streets or highways may recover over against a person who negligently created the danger receiving indemnity: RESTATEMENT (SECOND) OF TORTS, *supra* note 41 §886B, Comment j (1979); cf. Lombardozzi v. City of New York, 71 Misc. 2d 271, 335 N.Y.S.2d 907 (Sup. Ct. 1972).

[119] There is a long tradition of denying the causal status of omissions, both in philosophy and in the law. *See* Epstein (1973), *supra* note 34, MOORE, *Id.*, DOWE, *Id.* and Abrams *supra* note 75 . The law most obviously distinguishes between acts and omissions in the affirmative duty requirement for the latter. Omissions also do not typically break causal chains. RESTATEMENT (SECOND), *supra* note 41, §452 ("the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm"). An exception is when unless a substantial period of time has elapsed, shifting the duty to prevent harm to the another.

[120] *See* Ned Hall, *Two Concepts of Causation*, in CAUSATION AND COUNTERFACTUALS (J. Collins, N. Hall, and L.A. Paul eds.), 225-276 (2004).

[121] It's not clear that omissions occur at all. One influential view of omissions is that they are literally nothing. *See* MOORE, *supra* note 34.

[122] *See* Helen Beebee, *Causing and Nothingness*, in Collins et al, *supra* note 120, 291-308; McGrath, *supra* note 39; Abrams *supra* note 75.

sufficient conditions for an effect is only sufficient on condition that something doesn't interfere. Judging the non-interference itself as an additional cause is a category mistake. This point was keenly understood by the 5th circuit in the *Katrina Canal* cases.[123] The plaintiffs claimed that the provision in their insurance, excluding coverage for damage caused by a flood, didn't exclude damage caused by the negligent failure to prevent the flood. The court understood that this negligence did not act apart from the flood itself, which was the cause of the damage. The negligence was simply a failure to prevent that which caused the damage.[124]

The principles of absorption for omissions will behave differently than those for an action. If A was under a duty to prevent B from harming C, A's omission is not technically proximate to C's harm, as it is not located in the sequence of causes of C's harm at all.[125] Rather, A is under an affirmative duty, which acts as a warranty of sorts to C that the harm will be prevented. If A wrongfully failed to deliver that result, A will be on the hook to C for the duty owed. This will typically be subservient to B's liability to C and will not negate it.

More recently, and controversially, this came up in the September 11th cases.[126] The World Trade Center was on the hook for failing to make the buildings safe in case of fire; the airlines were on the hook for failing to sufficiently secure their flights from hijacking. In principle, if it were possible to recover from the terrorists themselves, would there be any reason for that recovery not to be for complete indemnification?

The omission cases don't break a causal chain because they are not truly causes and are not on the chain. But even if they were causal, there are further duty-based reasons to allow their causal connection to remain unbroken. What about cases where there is causation, but similar considerations of duty obtain?

E. Other Breaches of Duty

Less obvious are cases where C's contribution is causal, but still remote. The strongest of these are where C's wrongful actions created the circumstances in which D's harm became more likely or tempting. C in other words, provided the means or the reasons for D to harm E. Rabin calls these Enabling Torts.[127] Unlike omissions, these are cases in which C remotely caused harm, mediated

[123] In re Katrina Canal, 495 F.3d 191 (5th Cir. 2007)

[124] *Id.* "there are not two independent causes of the plaintiffs' damages at play; the only force that damaged the plaintiffs' properties was flood. To the extent that negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, it was only one factor in bringing about the flood; the peril of negligence did not act, apart from flood, to bring about damage to the insureds' properties."

[125] *See* Abrams, *supra* note 75.

[126] In Re September 11th Litigation, 280 F. Supp. 2d 279, 295 (S.D.N.Y 2003), arguing that defendant owed a duty to have designed a building able to withstand the effects and spread of fire, particularly by not collapsing. On the horizontal principles, the intentional act of the terrorists absorbs this interaction. The World Trade Center would then be secondarily liable. An interesting question arises regarding the vertical principles: could a terrorist claim that a defective building made his action worse, thereby deflecting some of the primary responsibility for damages? This is not an eggshell skull matter, because the claim is that the condition of the buildings is wrongful.

[127] Though this fails to distinguish between what philosophers mean by enabling versus contributing versus forbearing to prevent. Philippa Foot distinguishes allowing (or letting die) cases that are (i) *Enablings*, which involve the removal of an obstacle to a sequence (in which the obstacle would have prevented the sequence from playing out) from cases that are

through D. Where C's influence is not entirely mediated, the principles of absorption themselves[128] sometimes dictate that C is not entirely absolved. The cases we are concerned with involve complete mediation, where the nature of the duty is such that C is responsible for preventing the risk that D would do what he did. For example, C leaves the keys in the ignition and D steals E's car.[129] C did not merely fail to stop the thief, he contributed by affording D the key. If C is not at fault whenever D's act is voluntary, we negate the meaning of C's duty not to leave the keys. Yet, clearly, C does not absorb D's liability. D is still 100% liable. The same can be said for social host liability[130] and the dram shop rules, where C provides D with intoxicating substances.[131]

When C's contribution is active, the case can be modeled typically. For example, if C wrongfully gives D a gun, which D uses to shoot E (e.g., he sells him a gun without running a background check), C has endangered E, but that danger is not an injury until and unless D's action results in that injury. C's contribution is mediated through D's action. If D is fully absorbent, D is liable to E for 100%. The fact that C sold him the gun doesn't mitigate that liability. But if D cannot be found, E still would have a claim against C. If C can reach D, C recovers all damage from D. D's action is still the ceiling of recovery. We model this case like a typical mediation case.

On the other hand, sometimes indemnification goes the other way. If C has a duty to protect D from harming E, and fails to do so, then it is C, not D, who ultimately is liable to E, even if D is conditionally on the hook if C cannot be found. In this case, D caused the harm to E, but C had a duty to D to prevent that harm. Run this as an impleader: E to D: you shot me. D to C: you were supposed to load with blanks (causal) or you were supposed to catch the bullet (omission).

Summing up, we can state two points about omissions and duties in relation to breaking versus secondary liability:

(1) Omissions cannot break causal chains. If a cause proceeds through an omission (however we conceptualize this) tracing continues;

(2) Affirmative duties don't get broken, even when there are absorbing causes proximate to them, if the duty was to prevent that very sort of cause from causing the harm in question.

(ii) *Forbearances to prevent*, in which a harmful process is in motion and the agent could have prevented it but did nothing. Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect,* 5 OXFORD REV. (1967).

[128] Particularly the vertical principles.

[129] Anderson v. Gengras Motors, 141 Conn. 688, 109 A.2d 502 (1954). See also: HARPER, *supra note* 17, §20.5 ("After all, if I leave a borrowed car on the streets of New York or Chicago with doors unlocked and key in ignition, I am negligent (at least toward the owner) because of the very likelihood of theft"). *See also* Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970): landlords responsible to protect tenants from attacks in common areas, by providing locks, lighting, even security.

[130] Timberwalk Apts. v. Cain, 972 S.W.2d 749 (Tex. 1998) requires duty of care to visitors when there is reason to foresee attack; Monk v. Temple George Assocs., LLC, 869 A.2d 179 (Conn. 2005) involved attack in club parking lot. Club had affirmative duty, since attacks in the lot were foreseeable (urban area, late night)

[131] For Dram shop cases: Cf. DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952, 957-958 (Ky. 1999) (statutory "secondary" dramshop liability of tavern).

IV. Proximate Causation in the Law

Having shown that proximate causation is a well-defined and coherent concept, which plays a normatively attractive role in determining liability, I turn to the legal doctrines of proximate cause/scope of liability. The doctrines of proximate cause, as I have reconstructed them, are operational in, and explain much of, these legal doctrines.

In spelling out this claim, I distinguish between the doctrines of proximate cause and the doctrines of foreseeability and the related risk rule. I discuss the relationship between foreseeability and the doctrines of proximate cause below.[132] It turns out that a case can be made that foreseeability can be derived from the doctrines of proximate cause.

To clarify, this is not an argument against foreseeability or the risk rule as limitations on legal liability. Regardless of their status in relation to proximate cause, properly understood, there may be good normative reasons to limit liability to harms within the risk or to harms foreseeable; there may be more to scope of liability than merely proximate cause. But there remains a domain of proximate cause that governs, at least part (perhaps all) of scope of liability. Ignoring the causal nature of this domain leaves out important features of the attribution of legal responsibility. Not all is reducible to fault or to external policy considerations.

As for the legal doctrines that are clearly about proximate causation, the clearest and most obvious is the doctrine of superseding causes, particularly applied to voluntary human acts, also known as *Novus Actus Interveniens*.

A. The Doctrine of Superseding Causes

Sometimes, a wrongful actor who caused injury is absolved of liability, due to the intervention of a superseding cause.[133] In the words of the Washington Pattern Jury Instructions: "A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an [injury] [event]."[134]

The doctrine typically distinguishes between a merely *intervening cause*: any force which "actively operates in producing harm…after the actor's negligent act",[135] and a *superseding cause*, a particular type of intervening cause which negates liability. Not all intervening causes are superseding causes; in fact, non-superseding intervening causes are typical, as there are always multiple causes for an outcome. Sometimes, a cause that intervenes between tortious conduct and harm is merely the means by which the conduct causes the harm. For instance, if A shoots B, who dies of an infectious wound, the mortal wound does not supersede the bullet as a cause of death. Typically, a superseding cause is subsequent to the original cause and independent of it.[136]

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[132] Section IV.A.2.
[133] RESTATEMENT (SECOND), *supra* note 41, §440; *cf.* RESTATEMENT (THIRD), *supra* note 11, §34 comment b.
[134] 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.05 (7th ed.).
[135] RESTATEMENT (SECOND), *supra* note 41, §441.
[136] The Restatement observes that the act needn't be subsequent. Instead, an act or force is superseding 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", *Id.* §440.

When a cause is deemed superseding, the causal connection between the original tortious conduct and the harm is functionally severed. In *Maynard*,[137] for example, Snapchat claimed that McGee's reckless driving was a superseding cause that broke the causal chain between Snapchat's alleged wrongdoing and the crash.

The doctrine of superseding causes is arguably the heart of the law of proximate cause:[138] it formed the backbone of Hart and Honore's analysis of causation in the law and features centrally in Knobe and Shapiro's recent account.[139] Criticism of this doctrine, both in tone and content, correlates almost entirely with criticism of proximate cause as a causal doctrine.[140] And while the Second Restatement devoted much discussion to developing the doctrine, the Third Restatement attempted to reduce the doctrine to foreseeability, declaring the superseding causes doctrine redundant: "Were it not for the long history of intervening and superseding causes playing a significant role in limiting the scope of liability, this Section would not be necessary"[141]. The argument that an effect has many causes is raised here too, in support of the claim that superseding cause is a relic of an earlier era, in which only one cause was seen as possible for an effect, and in which contributory negligence – itself a form of superseding cause – was a complete bar to recovery in tort.[142] With comparative fault, the thought goes, bright line rules like superseding cause are unnecessary, as each harming defendant contributes in accordance with the degree of his contribution to the harm.[143]

There is growing discomfort with per se rules governing superseding causes, and while this doctrine still has purchase, the tendency has been to weaken it over time.[144] The *last wrongdoer* test treated any act of wrongdoing which caused the harm as superseding all prior causes, regardless of how trivial the contribution or the wrongdoing.[145] That test was seen as too strict, especially in cases where the wrongdoing was negligence or the prior wrongdoing was breach of an obligation to specifically protect the plaintiff from that subsequent wrongdoing.[146]

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137 *Supra* note 2.

138 *See* MOORE, *supra* note 34, 233, attributing this view to Terry and to Beale. *See* Henry T. Terry, *Proximate Consequences in the Law of Torts*, 28 HARV L. REV. 10 (1914) and Beale, *supra* note 29.

139 HART & HONORÉ, *supra* note 47; Knobe & Shapiro, *supra* note 27.

140 RESTATEMENT (THIRD), *supra* note 11, § 34 Comment a. ("The extensive rules for when intervening acts become sufficient to "supersede" an actor's earlier tortious conduct were developed at a time when the prevailing jurisprudence was that law was scientifically based and correct legal principles could be deduced through logical and objective inquiry. Consistent with this philosophy, *the* "proximate cause" of any event could be determined through a neutral, scientific inquiry. Rules regarding which intervening acts prevented prior acts from being the cause of subsequent harm were integral to this inquiry").

141 *Id.* For a trenchant criticism *see* John C. P. Goldberg and Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211 (2009).

142 While this claim is frequently made in the restatements and the treatises, it's worth noting that the claim that there is tension between contributory negligence and superseding cause (such that the doctrine of superseding cause itself is superseded) was rejected by the Supreme Court in *Exxon Co., U.S. A. v. Sofec, Inc.*, 517 U.S. 830 (1996).

143 Some have gone so far as to claim that views like the one argued for in this article were "pseudoscientific and deductive, focusing on causal 'links' in the chain between the defendant's conduct and the plaintiff's injury. For example, an intervening human cause or an act of God might break a direct 'chain' of causation." *See* William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941, 1951 (1991).

144 RESTATEMENT (THIRD), *supra* note 11, § 34 Comment a.

145 Clifford v. Atl. Cotton Mills, 15 N.E. 84, 87 (Mass. 1888) (Holmes, J.) ("[T]he general tendency has been to look no further back than the last wrong-doer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act.")

146 RICHARD EPSTEIN & CATHERINE SHARKEY, CASES AND MATERIALS ON TORTS 426 (12th ed. 2020).

Talk of "breaking" a causal chain,[147] especially, has found disfavor.[148] In their treatise, Harper James & Grey write:

> A better analysis is to regard the intervening force as a risk or hazard and to ask whether its foreseeability was such as to make the defendant's act negligent with regard to it. It is better, in other words, to inquire whether the defendant's duty extends to such a risk as the intervening force, because the question in this form focuses attention on a more significant and less fictitious problem than that of cause.[149]

Even granting that causal chains can be broken, the rules that govern these breakings seem normative rather than scientific or metaphysical. The Second Restatement, for example, lists, as relevant to determining whether an intervening force is a superseding cause, the following: the fact that the intervening force is due to a wrongful act;[150] the degree of culpability of the wrongful act;[151] whether the act was done out of fear or emotional disturbance, in which case it is not a superseding cause (for example, a passenger who injures herself by jumping out of a car to avoid an accident);[152] whether the act was necessary as protection from danger threatened by the original actor's negligence.[153]

In *Watson*, a fire started when a man lit a cigar and threw the match on the ground, which was covered in gasoline, due to the defendant's negligent spill.[154] The court held that, if the throw was negligent (if he hadn't realized it would cause a fire), the match is merely an intervening cause – the gasoline spiller and the thrower jointly caused the fire – but if the throw was intentional (he intended to start a fire), the match is a superseding cause. Causal connection doesn't depend on such mental states, although blame can. Purely as a matter of causation, whether an action caused a particular consequence is not a function of the intention, knowledge, justification, or motive. Regardless of the smoker's intentions, the match caused the fire (as did the gasoline).

In general, there is poor fit between the cases, the doctrines, and the justifications. On the older view, as in the Second Restatement, intervening causes sometimes sever causal connection, but there are exceptions. The third party's culpability is relevant, except for when it's not. On the other hand, the new view, that abandons per se rules in favor of foreseeability, doesn't work either: sometimes an intervention is not foreseeable, yet the original actor is liable anyway. For example, if a pedestrian left unconscious on the road after being hit by a car is run over by a second car,[155] or with injuries to rescuers.[156]

The root of the problem is that these formulations begin at the wrong end of the stick. If you proceed from act to injury, looking for rules for when the act's causal link is broken, the doctrines

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147 Moore refers to them as "fresh causal starts", *supra* note 34, 123.
148 See Posner, J in Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 513 (7th Cir. 2007) (criticizing intervening and superseding cause explanations for no liability as "legal mumbo-jumbo").
149 HARPER, *supra* note 17, §20.5.
150 RESTATEMENT (SECOND), *supra* note 41, §442, example (e)
151 *Id.* Example (f)
152 *Id.* §444; *see also* Jones v. Boyce, 1 Starkie 493, 170 Eng. Rep. 540 (1816).
153 *Id.* §445.
154 Watson v. Kentucky & Indiana Bridge & R.R Co.,137 Ky. 619, 126 S.W. 146, 129 S.W. 341 (1910).
155 KEETON, *supra* note. 13, 306, Bunda v. Hardwick 376 Mich. 640 (Mich. 1965)138 N.W.2d 305.
156 Matthews v. Porter 124 S.E.2d (S.C. 1962) 124 S.E.2d 321, 327.

appear arbitrary. Proximate cause doesn't work that way. There is not going to be a per se rule about when an intervening cause supersedes without the Bacon Maxim, which proceeds in reverse order from effect to candidate causes using the principles of absorption.

To make better sense of this, we'll examine more closely the types of cases that fall under the doctrines of superseding causes. These are customarily divided into two major categories: voluntary human actions and extraordinary natural events.[157]

1. Voluntary or Willful Human Acts (Novus Actus Interveniens)

Sometimes, but not always, if the intervening cause is a willful or voluntary act by a third party, that act counts as a superseding cause.[158] Acts in this category are sometimes also characterized as wrongful human acts, in that the intervening willful act must itself be an act of wrongdoing.[159] In Hart and Honore's formulation: "The general principle of the traditional doctrine is that the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by the defendant, negatives any causal connection".[160]

In these cases, a (typically) later wrongful act supersedes the earlier act, although both contributed to the harm. Both *Maynard*[161] and *Watson*[162] follow this pattern. Another example: A digs a ditch in the road and fails to cordon it off, and B pushes C into the ditch. While A contributed to C's harm, B's willful push supersedes A's contribution. B's push is seen as an independent willful act (*novus actus interveniens*), leaving B's push alone as legally the cause of the harm.[163] While B's intentional push negates A's contribution, a mere negligent push does not.[164]

Commentators and courts have gradually shifted to attempting to fit this doctrine into foreseeability: willful human actions are sometimes not foreseeable, so when they are not, it is foreseeability, rather than a bright line rule of *Novus Actus Interveniens*, that explains why liability is severed.[165] As we saw in the introduction, courts still disagree on this issue. This much seems to be common ground for severing the causal link due to the intervention of a third party's action: (1) the act must be willful or voluntary in the law's usual sense, i.e., the sort of willful human act required for

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157 MOORE, *supra* note 34, 233; Smith, *Id.*, 321-7; Hart and Honore, *supra* note 47. Some commentators and treatise writers, in the aim to reduce the superseding cause doctrine to issues of policy and foreseeability, classify these in accordance with their degree of foreseeability.

158 RESTATEMENT (SECOND), *supra* note 41 §440.

159 JOHN C. P. GOLDBERG, LESLIE C. KENDRICK, ANTHONY J. SEBOK, AND BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS, 355-358 (5th ed., 2021).

160 HART & HONORÉ, *supra* note 47, 326.

161 *Supra* note 2.

162 *Supra* note 154.

163 RESTATEMENT (SECOND), *supra* note 41, §442B, citing Milostan v. City of Chicago, 148 Ill. App. 540 (1909); Alexander v. Town of New Castle, 115 Ind. 51, 17 N.E. 200 (1888). *But see* RESTATEMENT (THIRD), *supra* note 11 §34 which dials this back, stating that in cases of intentional wrongdoing, the relevant question is still the risk test.

164 RESTATEMENT (SECOND), *supra* note 41, §442 B, discussing: Village of Carterville v. Cook, 129 Ill. 152 (1889); Campbell v. City of Pittsburgh, 155 Pa. Super. 439, 38 A.2d 544 (1944).

165 Britton v. Wooten, 817 S.W.2d 443 (Ky. 1991) (intervening wrongdoing is a superseding cause only if it is "utterly" or "completely" extraordinary).

actus reus in criminal law, or the basis for minimal action in tort,[166] of the sort required even for strict liability; reflexes will not count. On the other hand (2) the mere interaction with a willful human act is insufficient to sever the causal link. For example, if A puts poison in B's cup, and C, the waiter, unknowingly serves the cup to B, C's voluntary act does not break the chain. (3) The culpability of the intervening act is relevant to determining whether the chain is broken. Intentional actions are more likely to be superseding causes, whereas actions under compulsion, or from fear or provoked anger, or other innocent actions are not superseding causes.[167] (4) In addition to willfulness there is a requirement of capacity or sufficient agency: "Only the chosen actions of sane, sober, adults can constitute intervening causes".[168]

Michael Moore questions the plausibility of these requirements in purely causal terms, as they rely on what he calls "stone age metaphysics", according to which rare events are "unexplained" and human actions are uncaused.[169] Implicitly assumed is free will libertarianism, in which voluntary choice is caused by the will, which itself is free and uncaused. Voluntary actions, would then be "fresh causal starts, relegating all prior events to non-causal status vis-à-vis the chain of events such fresh starts cause".[170]

Libertarian freewill is obviously a controversial position.[171] Yet it need not concern us in the context of proximate causation, as it is neither sufficient nor necessary for making sense of the doctrine.

Libertarian presuppositions are insufficient because they fail to explain the doctrine's intricacies. The voluntariness requirement requires more than that the intervening act be free in the libertarian sense. Freedom, in which the will is uncaused, is captured by the willfulness requirement. But it still doesn't explain the culpability requirements. Considerations of capacity and coercion might arguably diminish agency and weaken the will, but the role of intentions is irrelevant. The waiter who unknowingly administers the poisonous cup is acting freely.

Fortunately, however, we needn't appeal to libertarianism to make sense of the doctrine or its intricacies. *Novus Actus Interveniens* can be explained using the doctrines of proximate cause. As a first approximation, we can restate the four above claims as such: the willful human act requirement is a requirement of wrongdoing; if the intervening actor has committed a tort (or a crime) in causing the

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166 Liability will not attach if the "act" is entirely not voluntary, cf. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616): the harm "may be judged utterly without his fault…As if a man by force take my hand and strike you or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances…"' discussed in Epstein, *supra* note 34, 166.

167 If A strikes B's carriage, forcing B to leap for safety, then A causes whatever injuries B incurs on hitting the ground. Her jump is not an intervening act (even if she would have been fine, had she stayed put). Jones v. Boyce, 1 Stark. 493 171 E. E. 540 (K.B. 1816); Tuttle v. Atlantic City R.R., 49 A 450 (NJ 1901). See EPSTEIN *supra* note 66, 266.

168 MOORE, *supra* note 34, 245.

169 Also relevant to extraordinary natural events *infra* IV.A.2.

170 MOORE, *supra* note 34, 268. *See* James Angell McLaughlin, *Proximate Causation*, 39 HARV. L. REV. 149, 168 (1925) ("The new element of conscious choice, which is elusive from a mechanical point of view, prevents causation from being direct"). Some argue that libertarian metaphysics underlie criminal law. Sanford Kadish, *Causation and Complicity: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. (1985), 323, 326-327.

171 For instance, in a recent survey of professional philosophers, only 18.8% subscribe to this view, as opposed to 59.2% in favor of compatibilism (the view that the will can be both caused and free) and 11.2% to views that deny free will entirely. David Bourget and David J. Chalmers, *Philosophers on Philosophy: The 2020 PhilPapers Survey*, 23 PHILOSOPHER'S IMPRINT 1, 7 (2023). To be clear, in asserting this, I take no stance on the merits of the question.

harm, that tort (or crime) supersedes the original wrongdoer's cause. When D intervenes between C and E, D will absorb C's causal responsibility if, and only if, D is a suitable candidate for liability. We have already, in the setup, presupposed that D caused the harm (as did C). We have also presupposed that D is proximate relative to C (that is, C's causal contribution is through D). The principles of absorption, therefore, kick in. If D is suitable to absorb liability, there is nothing left to pass on to C. D breaks the causal connection between C and E, not because C hasn't caused E, but because D caused E and there is no further liability to trace back.

The voluntariness requirement is necessary, because, absent this requirement, no tort liability is possible. If D was insufficiently culpable, was under threat or duress, or was of insufficient capacity for liability, D fails to absorb the liability for E, and liability continues to trace back to C.[172] These principles, therefore, are simply the principles that govern when we stop at D or continue to trace back along the nexus of causes. D's proximity is what shields C from E.

An intentional action absorbs full responsibility, whereas a negligent action does not. Negligent actions absorb partial responsibility, leaving, as a remainder, the excess risk or contribution of other parties who made the negligent actor's negligence more dangerous or harmful.

To show how this works, we'll examine some cases, beginning with the cleaner examples of mediation, where C's contribution to effect E is entirely mediated through an intervening action. The question in these cases is whether that intervening action absorbs liability and is thus a superseding cause. We'll then turn to cases involving proximity along causal interactions.[173]

a. Simple Causal Mediation

Maynard[174] (Figure 5(a)) is a mediation case. McGee's driving mediates the influence of Snapchat's defective product. What about absorption? McGee drove willfully and culpably. Unless she can show that her capacity was diminished by speed-filter, there is no reason liability should not be fully absorbed.

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[172] In terms of novus actus, that is. There may be other liability absorbers, such as extraordinary events, which will be discussed below.

[173] As explained in Section II, when introducing mediation and interaction, there is some latitude in modelling choice when representing a causal sequence as mediation or interaction. All cases of mediation are causal interactions: when I hand you a gun and you shoot somebody with it, both my transferring you the gun and your pulling the trigger involved multiple causal forces and conditions. We'll model this as mediation, rather than interaction, because what we care about is the relationship between my action and yours. Should something about those other conditions become relevant to the situation, we could add them to the model. No enriching of the model will alter the direction of the arrows. Similarly, all interaction is a form of mediation: interactions are proximate to their effect, relative to their inputs. If we care about those inputs (or outputs) we will model the situation as an interaction. An important issue that arises in this context is whether the mediation is complete. What we mean by this is whether there is any lingering causal influence from the remote cause to the effect that is over and above what is done by the mediator. In the gun example, your pulling the trigger just is what conveys the influence of my action. But we could model even that as an interaction, between your pulling the trigger and the bullet that I placed in the gun. Normally, this distinction will be taken care of by the principles of absorption themselves (if you intended to pull the trigger, you absorb responsibility for the interaction anyway). Some cases will raise interesting questions about modeling. I start with some straightforward ones that don't.

[174] *Supra* note 2.

Wade v. City of Chicago[175] involved a police chase under heavy traffic conditions. The pursued driver attempted to escape by driving on the sidewalk, where he hit Wade, who sued both the officer and the city. Wade claimed the pursuit caused his injuries and was inappropriate under police guidelines, due to traffic conditions. The officer caused the injury by chasing the driver, who hit Wade. The officer's causal influence is mediated entirely through the driver. The driver's action (driving on the sidewalk), therefore, is proximate relative to the officer's chase.

The question hinges on absorption. Was the driver's action suitable for complete tort liability? He freely chose to flee the officer and drive on the sidewalk. That choice was negligent in the circumstance and uncompelled. The driver was in full capacity. Is this sufficient? Had the driver been overwhelmed with fear, such that his capacity was diminished, this might have been a sufficient excuse to deflect liability. Similarly, had the officer posed a genuine or perceived threat. For this reason, the lawfulness of the pursuit was potentially relevant to establishing that the officer put the driver at unjustified risk, making his response to flee a defensible one. The court rejected this claim on the facts. Our point is just to show its relevance for absorption. The issue is whether the driver has grounds to deflect responsibility by claiming that his choice to drive on the sidewalk was justified or excused. In the absence of establishing such a claim, however, the driver is the absorbing proximate cause, and the officer's choice to pursue him, whether in breach of the department's own rules or not, is remote. Nothing about the alleged lawlessness of the officer's chase affects the volitional nature of the driver's act or its carelessness.

Similarly, in *Martinez v. Lazaroff,*[176] a landlord failed to repair the building's hot water. A tenant father heated water in a pot and carried it back to his apartment, when he collided with and injured his minor child. The family sued the landlord. The New York Appellate Division ruled the father's careless behavior a superseding cause. The father's action is proximate to the injury, relative to the landlord's. The landlord's negligence caused the father to heat the water and, consequently, caused the collision and injury. But this latter causing was mediated entirely through the father's action. The process of holding the landlord responsible must trace through the actions of the father.

The relevant question again is absorption. Was the father's action itself sufficient to absorb liability? The decision to carry the pot down the hall was freely undertaken and uncoerced. Nothing about the landlord's failure affected the volitional nature of the act or its carelessness. Had the father established sufficient desperation impinging on his voluntary capacities, perhaps the matter would be different. The point, however, is just this: judge the father's action on its own. He faces a circumstance of no hot water. If his action was sufficiently tortuous to bear full responsibility, even in a case where the lack of hot water was not due to wrongdoing, the wrongdoing of the landlord is irrelevant.

It's true that the landlord's negligence motivated the father to act as he did, just as the police pursuit motivated the driver to drive on the sidewalk in *Wade*. But if the father's (or the driver's) reaction under those circumstances is neither justified nor excused, their actions absorb responsibility. The father is not given a free pass to act negligently, just because the landlord wronged him.

Why is there no remainder of liability for perilous circumstances which the landlord (or police) created? These are cases of full mediation. Nothing the landlord or officer did increased the danger of

[175] 847 N.E.2d 631 (Ill. App. 2006).
[176] 411 N.Y.S.2d 955 (App. Div. 1978), aff'd 48 N.Y.2d 819 (1979).

the negligent activity once undertaken. The father's walking down the hallway with a bucket of hot water is just as dangerous and risky – ex ante – and the effects of the impact are just as perilous – ex post - as they would be absent the prior wrongdoing. The earlier negligence added nothing to the danger or the harm of the circumstance beyond this. It provided the reason or motivation but did not contribute over and above what the mediating actor contributed.

Martinez does present a different challenge, regarding affirmative duties. The landlord's duty to provide hot water might be argued to include a duty to prevent risks of just this sort of desperate action. Arguably, there are facets of this in *Maynard* and *Wade* as well.

b. Interaction cases

In interaction cases, the injury traces back to an interaction between multiple processes, each the result of a competing act of wrongdoing. The interaction is proximate to the injury, relative to the individual acts. The principles of absorption determine ownership of the interaction. While all cases involve interactions of some sort, the relevant question for determining liability is the relationship between the defendant's contribution and other candidate proximate causes. Interaction cases involve an interaction, rather than full mediation, between these two causes.

Watson[177] is an interaction case: the gasoline's influence is mediated by the cigar, but the cigar's influence is similarly mediated by the gasoline. Together they interact to produce the fire. It is tempting to think of this temporally: the gasoline was already there, so the cigar is the intervening cause. But this is an error. While the later cause in time is frequently the intervener, time is not essential. Causally, what matters is the interaction between the two processes. The interaction itself is typically later than each act. Time will also matter in that, at the later time, there is typically more information, which might render the latter action more culpable.

The Bacon Maxim looks to the horizontal principles of absorption to determine ownership of this interaction. If the cigar was thrown intentionally to cause a fire, the intentional throw absorbs the interaction; if it was thrown negligently, the two acts of negligence are jointly responsible for the interaction. Which is exactly how *Watson* was decided. The same principle should govern if the gasoline spiller intentionally spilled in a spot known to be popular with smokers.

In *Gibson v. Garcia* a negligently driven car crashed into a utility pole which fell on the plaintiff.[178] The pole was negligently maintained, becoming impaired by rot or termites. The relevant causal interaction is between the car and the pole. The pole's fall on the plaintiff was the direct cause of injury, proximate relative to the crash. Any tracing of responsibility must trace through the pole's falling, itself a non-absorbing event. The pole fell as a consequence of the crash, an interaction between the car and the rotten pole: each contributed through the other. This is a straightforward case of negligence meets negligence. The principles of absorption require joint liability.[179]

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[177] *Supra* note 154.

[178] 96 Cal.App.2d 681 (Cal. Ct. App. 1950).

[179] If you prefer a theory of causation that rules out the rotten pole's condition as an active force or cause, this can be modeled as an affirmative duty case as well: the utility company's responsibility is to protect against normal impact. Their

Union Pump[180] (Figure 5(b)) is also an interaction case. Allbritton slipped on a wet surface that was the result of the fire. Her walking interacted with the water, resulting in her fall. Walking along that route was negligent, so she absorbs part of the responsibility, but not necessarily all, as the path was more perilous than it would otherwise have been, due to the water. The water was the result of Texaco's efforts, but those efforts were a justified response to the fire. The fire, assume, was the consequence of Union Pump's negligence. The relevant question concerns how much of the risk Allbritton assumed by taking that shortcut. The answer to that question determines whether her own contribution absorbs all the responsibility for her fall. Was the bridge wetter than Allbritton had reason to expect? It doesn't seem so. Was there a compelling reason to take that risk (i.e., take the shortcut)? It doesn't seem so either, especially since the injury occurred on her return trip.

In the ditch case[181] (Figure 8), A digs a ditch in the sidewalk leaving it uncovered. B shoves P into the ditch. If P is negligently pushed, i.e., with no intent to push her into the ditch, A and B are jointly liable.[182] But what if P is pushed in deliberately?[183] A creates a danger that causally contributes to P's injury. But the contribution is via interaction with B's action. P's injuries are the result of the interaction of P's fall and the impact with the ditch bottom. P's fall is a consequence of B's shove and the opening of the hole. When B shoves with the intention of pushing P into the ditch, the absorption principles dictate that B owns the interaction, so the shove absorbs liability for the injury. If the shove is negligent, however, B can claim that his shove was made worse by the existence of the unknown ditch, for which A is responsible. The negligent shove doesn't absorb all the responsibility. In that case, we trace back to the ditch, which, if negligently dug or negligently unprotected, absorbs the remaining responsibility.

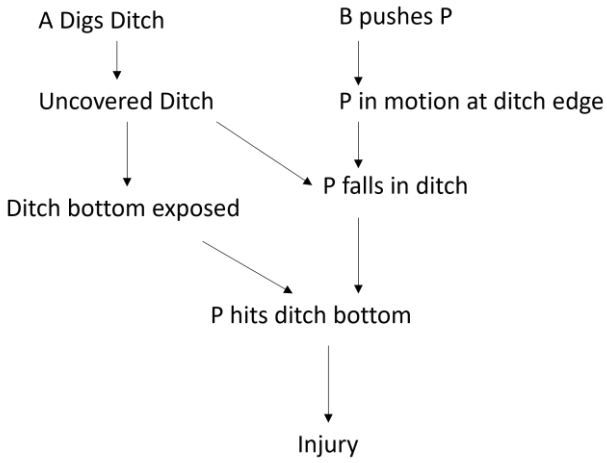

Figure 8: Ditch

poor maintenance of the poll is a breach of that duty. Therefore, they must make good for the consequences of their breach. This is not a case that entitles them to full indemnification, for the same reasons that negligence doesn't absorb full liability.

[180] *Supra* note 7.

[181] Discussed in RESTATEMENT (THIRD), *supra* note 11, §34(e), illustrations 2 and 4.

[182] *Village of Carterville*, *supra* note 164.

[183] Milostan v. City of Chicago, 148 Ill. App. 540, 546–47 (1909); Alexander v. Town of New Castle, 17 N.E. 200, 202 (Ind. 1888).

Another way to see this is via the impleader exercise: suppose the digger of the ditch were liable. P would sue the digger and recover. The digger would then sue the shover for contribution. Digger's claim against the shover is complete, in the case of intention: you, by your intentional shove, caused me to be liable. What can the shover claim in response? On the other hand, in the negligence case, the shover has a reply: you, in digging your ditch, made my shove worse.

In *Cole*, a "strange boy" deliberately misled the plaintiff into thinking the elevator was present, by opening the shaft doorway and gesturing.[184] The plaintiff walked in and fell. She sued the elevator company for allowing the door to be opened from the outside. The court held that the actions of the boy superseded the negligence of the elevator company. Putting aside the question of whether a child can absorb responsibility,[185] the interaction between the misleading act and misunderstanding, in the communication between the plaintiff and the boy, is proximate to the injury, relative to the elevator company's making an openable door from the outside. Plaintiff's walking in is proximate to that communication. Assuming plaintiff walked in justified in the belief that the elevator was present, responsibility kicks up to the conveyer of the false information. Assuming the boy deliberately misled her, liability is thereby absorbed.

In both the ditch case and *Cole*, the first defendant creates a danger that a later defendant exploits. The interaction with the first defendant's danger is wholly absorbed by the intentional, but not the negligent, wrongful act of the second.[186] There are also cases where the first defendant wrongfully puts the plaintiff in danger, where the second defendant's *negligence* seems to absorb all of the responsibility. This is due both to a subtle difference in the order of interaction and to the culpability transmission principle discussed above.[187]

In *Coates*,[188] a drunk driving defendant injured the plaintiffs (call this injury I_1). The plaintiffs were placed in an ambulance which, on the way to the hospital, was struck by another drunk driver, causing a second, more significant set of injuries (I_2). The second accident is proximate to I_2, relative to the first. The first driver did in fact cause both I_1 and I_2 but his contribution to I_2 is entirely mediated by the second accident. The second accident was negligent, though, so who absorbs it? Wasn't Coates only in the ambulance in the first place due to defendant's putting him there?

Prosser and Keeton discuss the following scenario: A knocks B down, leaving him unconscious in the street, where C intentionally runs over B.[189] A is not liable for the injuries caused by C. Both this scenario and the one in *Coates* raise a similar situation: plaintiff is vulnerable (and injured) due to a prior wrongful act by the defendant, which enables a second defendant to harm the plaintiff. While *Coates* involves negligence, and this scenario intentions, that makes little difference to the *causal* structure of the case (it affects absorption).

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184 Cole v. German Sav. & Loan Soc'y, 214 F. 113 (8th Cir. 1903).

185 If not, this might make this case more like an "extraordinary event", discussed in Section IV.A.2.

186 As mentioned, that liability is absorbed doesn't rule out the possibility that the first defendant will still have conditional liability for breach of an affirmative duty to prevent this very risk. In such cases, the first defendant is potentially liable to the plaintiff but has a claim of indemnification against the second injurer, whose wrongdoing is relatively proximate to the injury.

187 *Supra* Section III.A.2.

188 *Supra* note 50.

189 KEETON, *supra* note 13, 317.

On first blush, things are simple. A knocked B down, causing him to be on the ground, injured. There he is on the ground. Now C runs B over. That injury is a direct result of C's action, which C caused all by himself. But not so fast. C's running B over is a causal interaction between C's motion and B's stationary position on the ground.[190] A's knocking down B down causes B to be on the ground. That position (or B in that position) interacts with C's action, causing B's injury. The interaction of B and C is proximate to B's injury. The principles of absorption determine who owns that interaction. C intentionally brought the interaction about, whereas B is completely innocent. But, since B is innocent, we trace back one step in the chain to see how B got into that position. B is on the ground because A wrongfully put him there. A's putting B on the ground is therefore proximate to the interaction. Does this mean that A is responsible? No. The principles of absorption still render C's intentional collision the owner of the causal interaction between B and C.

On the other hand, had C's collision been accidental (i.e. negligent), C and A would have equal claim to the causal interaction after all. And this is indeed what we find.[191] Drivers have been liable for injuries involving cars left across the highway, causing a further collision, or for bystanders hit whilst attempting rescue.[192] Prosser and Keeton admit that such cases may be "straining anticipation to the breaking point to say that the driver should have in mind the possibility that the person might be left unconscious in the highway, and be run over there by another car", and that while these events have been "called foreseeable by the courts…that word obviously, has traveled a long way from its original meaning".[193] On the account presented here, foreseeability is not part of the equation. The question is whether the negligent second driver absorbs complete responsibility. If he does not, we continue to trace back to the most proximate cause that does.

In *Coates*, there are two further complications: one involving the ambulance, the other involving the negligent, rather than intentional, second driver. The interaction that causes the second injury involves the ambulance with Coates and the second vehicle. The second driver was negligent, so he absorbs responsibility for the second crash, as the ambulance driver was not at fault.

But what about the fact that the first driver's accident caused Coates to be in the ambulance? If liability traces through the ambulance driver back to the first driver, the first accident is a proximate cause. But the culpability transmission principle[194] rules this out. If we chain the first driver to the second injury, we get a causal connection, but arguably no longer have negligence. Coates' being in an ambulance is no longer a dangerous position, at least not relative to Coates' prior position of being on the road.[195] Relative to the first driver's negligence, the ambulance's being hit is a coincidence. It would be no different if the ambulance were struck by lightning.[196] When I hit you and put you in an

[190] There are some theories of factual cause that would solve this problem by treating a stationary position as non-causal. For example, Epstein's theory, employing the paradigm of "force" would take A hit B as asymmetric, rather than an interaction between A and B. The paradigm of 'dangerous conditions' would render C, who placed A in a dangerous condition, as a cause of A's hitting B.
[191] KEETON, *supra* note 13, *citing* Bunda v. Hardwick, 376 Mich. 640, 138 N.W. 2d 305 (1965).
[192] Matthews v. Porter 124 S.E.2d at 327 (1962).
[193] KEETON, *supra* note 13, 306-7.
[194] *Supra* Sec. III.A.2.
[195] For restoring to a position of safety, cf. Brower v. New York Central H.R.R. 103 A. 166 (N.J. 1918) and discussion in EPSTEIN & SHARKEY, *supra* note 146, 425-6. *See also* discussion of *Henningsen*, *infra* note 202 and *Horton*, *infra* note 203.
[196] Berry v. The Borough of Sugar Notch,191 Pa. 345, 43 A. 240 (1899).

ambulance, I put you in no more danger relative to the road than you would have been just driving before I hit you. This is different from the person left on the highway.

This distinction is also at work in resolving the apparent tension between two cases involving railroad companies that negligently dropped their passengers off at the wrong location at night. In *Price*, the plaintiff had to spend a night at a hotel where she was injured by a fire.[197] Her injuries at the hotel were ruled remote. On the other hand, in *Hines v. Garrett*, plaintiff was raped after a railroad company dropped her off one mile past her stop, where she was forced to walk back on her own through an area "habitually frequented and infested by hoboes, tramps, and questionable characters".[198] The railroad company was liable, despite the intervening actions of the rapist, because "the very negligence alleged consists of exposing the injured party to the act causing the injury."[199] In both cases, missing the stop caused the plaintiff's injuries, though that cause was remote relative to the intervening cause. In both cases, the intervening cause absorbs responsibility. Yet in *Price* that absorption breaks the causal chain entirely, whereas in *Hines* it merely subordinates the railroad company's contribution to secondary status. The difference is brought out in the culpability transmission principle: placing the passenger in a hotel exposes her to no further risk and is thus not negligence to her; whereas leaving her stranded in a dangerous area at night is.

We see this more clearly by running the impleader argument. If the first driver is liable, he has a claim against the second driver: "you crashed into the plaintiff". What claim does the second driver have in response? The second driver negligently crashed into the ambulance. Is the claim, "why was there someone in there?" That will not do. Negligent drivers have no legitimate expectation that the vehicles they hit will be empty. This differs from *Watson*, where both the spiller and the smoker have claims against one another: "you spilled gasoline" v. "you dropped the cigar."

Had the ambulance driver been drunk or negligent, he'd absorb part of the liability too. On the other hand, had the ambulance driver been speeding because the injuries to his passengers were dire and in need of immediate medical care, his dangerous driving would not absorb responsibility. In this case, the original driver is once again a proximate cause, as his responsibility is not fully mediated: the ambulance driver's choice to speed fully mediates the influence of the first accident, but the circumstances of that choice are such that it is either wholly or partially blameless.[200] Reckless driving by the ambulance driver, on the other hand, would not be so.

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[197] Central of Georgia Ry. Co. v. Price, 32 S.E. 77, 77-78 (Ga. 1898).

[198] 108 S.E. 690, 692, 695 (Va. 1921).

[199] *Id.*, The railroad company's liability, on our analysis, is conditional. Should the rapist be found, the railroad company would have a claim of indemnity against him. They would not be splitting the damages between them. In a similar case to *Coates*, the Oklahoma court got it wrong, ruling the first accident a proximate cause in Atherton v. Devine, 602 P.2d 634, 636-637 (Okla. 1979). The *Atherton* court relied on *Hines* to claim that wrongful acts don't supersede in cases like this.

[200] This would mirror the structure of Bigbee v. Pacific Telephone and Telegraph Co., 665 P.2d 947, 952 (Cal. 1983): plaintiff was trapped in a telephone booth with a jammed door, located in a parking lot fifteen feet from a major thoroughfare. The plaintiff was struck by a drunk driver as he was unable to wrestle the door open in time to escape. The interaction between driver and the plaintiff was owned by driver (for hitting him) and the telephone company (for causing him to be stuck). What if the driver had intentionally hit him? The correct resolution would be that the telephone company should be conditionally liable (for causing him to be stuck) but they'd have a claim in indemnity against the driver.

c. Position of Apparent Safety

A guiding thought in our discussion of *Coates* was that placing the plaintiff in the ambulance took him out of the zone of danger, placing him in a position of relative safety, at least relative to the risk of being exposed on the road. That the ambulance itself was hit was not a danger particular to being in an ambulance; once Coates is in the ambulance, he is no longer in harm's way, but has been restored to a position of safety. Discussion of positions of safety underlies two classic cases, which served as the basis of demonstrating the apparent hopelessness of proximate cause in a seminal essay by Leon Green.[201] The two cases are *Henningsen v. Markowitz*[202] and *Pittsburgh Reduction Co. v. Horton*.[203]

In *Henningsen*, defendant Markowitz illegally sold a gun to Richard Kevans, a minor. When Richard brought the gun home, his mother asked him to return it, but Markowitz refused to take it back. The mother hid the gun for safekeeping, until Richard turned of age, but six months later, Richard found it anyway. While Richard and a friend took turns shooting, Richard's friend hit and injured Charlie Henningsen. Denying Markowitz's claim that he was not the proximate cause of Henningsen's injury, the court reasoned that the "active force" of Markowitz' wrongful act (selling the gun to a minor) had not "come to rest".

The terminology of an active force coming to rest comes from Beale: "where the defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act".[204] Whatever one thinks of Beale's theory of active forces coming to rest,[205] the use of this doctrine in *Henningsen* as compared with *Horton* is of special significance, because the judge in *Henningsen* specifically cited Beale's discussion of *Horton* in establishing the theory of active forces coming to rest. Yet, that logic seems to point in the opposite direction from the one in *Henningsen*.

In *Horton,* Charlie Copple, aged 10, found a dynamite cap, negligently abandoned by the defendant. Charlie brought the dynamite home, not knowing what it was. His mother examined the cap and returned it to Charlie granting permission to play with it. Over the course of a week, Charlie would play with the cap, and his mother would clean up after him, picking it up, and giving it back to him, allowing him to play again. Charlie took the cap to school and traded it with Jack Horton, the plaintiff, also a minor, who while playing with the cap, injured himself. The court, in denying the claim against the defendant, reasoned that the mother's "course of conduct broke the causal connection between the original negligent act of appellant and the subsequent injury of the plaintiff….establish[ing] a new agency…the possession [by the boy]…was thereafter referable to the permission of his parents, and not to the original taking."[206] Beale approvingly cites this case as an example of reaching an apparent condition of safety.

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[201] Green, *supra* note 60, *see* Knobe & Shapiro, *supra* note 27, 167-8; *See* Richard A. Epstein, *Toward a General Theory of Tort Law: Strict Liability in Context*, 3 J. TORT L., 1, 25-27 (2010).
[202] 230 N.Y.S. 313 (1928).
[203] 113 S.W. 647 (Ark. 1908).
[204] *Supra* note 29, 651.
[205] Calling the existence of a gun in the boy's family's possession an "active force" has been criticized, although Epstein, *supra* note 201, 26, suggests that changing the terminology from active force to dangerous conditions renders this far more sensible: selling the gun to the minor creates a danger that is not neutralized until the gun is removed from the household.
[206] *Horton*, *supra* note 203, 648-649.

How can these two cases be reconciled? Both involve a negligent act of endangerment, in which a minor comes to possess a dangerous object, which is then used to injure a plaintiff. In both, the parents should have interfered, and did, by wresting control of the object, but, ultimately, through their carelessness, the object made it back into the hands of the child, who brought about exactly the sort of result that made giving it to him wrongful in the first place. Why the difference?

In fact, the courts got both cases right, which can be seen by carefully applying Bacon's Maxim. In both cases, the injury was caused directly by a minor, who doesn't absorb responsibility. The causal influence is traced back along the path of causes until it is absorbed. In both cases there is negligent intervening activity by the mother that fails to prevent the minor from possessing and using the object, but the difference between them hinges on both the act/omission distinction, as well as the nature of the duty breached.

Begin with *Horton*, the easier case to show. The injury was most directly caused by Horton to himself. As a minor, Horton doesn't absorb, so trace back to Charlie who gave him the dynamite. Charlie, also a minor, doesn't absorb either. Charlie got the dynamite from his mother. True, he originally found the dynamite, but possession changed hands between Charlie and his mother multiple times, mediating the influence of the original possession. On each occasion when the mother gave Charlie the dynamite, but especially on the very last occasion, she negligently handed him the dynamite. All we need for absorption is to trace to that last occasion. On that occasion, the mother committed an act sufficiently wrongful to absorb responsibility for the harm caused. In order to continue tracing back – over several cycles – to the defendant's original wrongdoing, the mother would need to show excess risk or harm not covered by her own negligence. This will frequently turn on the facts of the case, but, generally, would require showing that the cap was more dangerous than the mother had reason to believe. Negligence doesn't require actual knowledge of the danger, just the assumption that a reasonable person would not have given the cap to her child. It's not clear what further danger the defendant contributed beyond the danger that the mother should already have perceived, making her handing the cap to Charlie negligent. Imagine the mother had found the cap herself and decided to give it to Charlie. Her negligence would be the same as it was in *Horton*. Would we then hesitate to say that the mother is completely responsible for her negligence? She only gets to pass part or all of that responsibility to the more remote cause – the source of the cap – if she can show she was not under a duty to recognize the danger in giving Charlie the cap.

Henningsen. Here too the most proximate cause of the injury is the shot by the friend. The friend, who doesn't absorb, received the gun from Richard, who also doesn't absorb. Richard got the gun from Markowitz. But what about the mother? Didn't she possess the gun too? Yes, but the mother's role is different. This difference plays out in two ways. First, the mother did not give Richard the gun. She tried to prevent him from having the gun and hid it from him. Richard found the gun himself and took it out of the mother's possession. The mother's causal contribution to Richard's having the gun is one of omission: she failed to prevent him from possessing it. Omissions work differently from actions, at least with superseding causes, since omissions, unlike acts, do not "break the causal chain".[207] And while we can just chalk this difference up to black letter law and leave it at that, we have already explained above[208] why they don't break the chain. The better way to think of omissions in the

[207] RESTATEMENT (SECOND), *supra* note 41, §452.
[208] *Supra* Section III.D.

context of causing harm is as failures to prevent harm. Richard already has the gun. The mother was supposed to remove that gun from his possession to a position of safety. Suppose that she not only failed to do so, but negligently failed to do so. Had she tried harder, the gun would have been out of harm's way. This would be enough to make the mother negligent and therefore on the hook. But would this detract from the original seller's responsibility? If omissions cause harm by failing to prevent something else from causing the harm, the harm that they contribute is parasitic on the harm caused by the other cause of the harm. And the affirmative duty that the omission is a breach of, is the duty to prevent that harm from materializing. The duty is to protect third parties from being shot; not to protect Markowitz from being liable. Even if Henningsen can recover from the mother for failing to keep a gun out of her son's possession, the mother still has a good claim against Markowitz for giving her child a gun in the first place.

We can see this by running the impleader exercise. The mother would claim against Markowitz: "why did you give my son a gun?" or "why did you put me in the position that I didn't ask for where I now had to remove that gun?" What can Markowitz claim in response? "Why did you not protect it better?" That might be a good claim for Henningsen to make, but it is not a good claim for Markowitz to make. The mother is under no obligation to Markowitz. If anything, the duty runs the other way. Markowitz put the mother in an unasked-for difficult position that was the result of his wrongdoing. Imagine I left explosives in your backyard. You discover these explosives and attempt to disarm them. If you fail to disarm them, even if you fail due to your own negligence, surely that doesn't lessen my own responsibility for putting them there in the first place and for putting you in that position. You may have wronged others in not trying harder, but you haven't thereby wronged *me*.

In other words, in *Horton*, the mother actively contributes to the harm by giving her son the dynamite cap. She is a full participant in contributing to the harm. All she had to do was not give it to him. In *Henningsen*, on the other hand, a duty to remove the gun was wrongly thrown into the mother's lap. Even if she had failed to adequately perform that duty, this would not change the fact that Markowitz gave her son the gun. In fact, she attempted to neutralize the threat, but failed. That cannot absolve Markowitz, unless Markowitz had reason to rely on her so doing.

Ultimately, Richard recovered the gun himself, despite his mother's attempts to hide it. The causal chain from Richard back to Markowitz is direct and unbroken: causally, because, as omissions, the mother's contributions are not causal, and normatively, because even if we view the mother's actions as mediating influence, they won't absorb, due to the direction of the duty, as shown in the impleader argument.[209]

[209] This analysis would also work well for Clark v. E.I. Du Pont de Nemours Powder Co., 146 P. 320 (Kan. 1915), which, while it involves explosives, is more similar to the structure of *Henningsen*. In *Clark* the court ruled that explosives buried and found two years later by another child still had the inherent mischief to trace back to the defendant who left the glycerin. On the other hand, it fails to capture Pollard v. Oklahoma City Ry. Co., 128 P. 300 (Okla. 1912), which is similar to *Horton*. *Pollard* involved an omission: the parents told the child to get rid of the explosives, which he failed to do. The court ruled that several intelligent and responsible human beings intervening between the original negligence and the injury" suffice to "show conclusively such independent, intervening, efficient causes as to compel us to say that they in fact were the proximate cause of the injury, and that the original negligence of the company was so remote and the chain of events was so broken that they became independent, and were not the natural or probable consequences of the original or primary cause" (128 P., 303).

2. Extraordinary Natural Events

Another form of superseding cause is an "extraordinary" or "abnormal" natural event.[210] Here is the Restatement:[211]

> An intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent conduct prevents the actor from being liable for the harm, if
>
> > (a) the operation of the force of nature is extraordinary, and
> >
> > (b) the harm resulting from it is of a kind different from that the likelihood of which made the actor's conduct negligent.

Hart and Honore focus on the abnormality of the event,[212] dividing these into two kinds: events that are generally abnormal (vis major or "acts of god" such as meteorites, unusual winds or rains, floods) versus events that are not unusual per se but are extraordinary coincidences in the circumstances (such as a lightning strike or a tree falling on a speeding vehicle).[213]

Getting these cases right involves careful attention to the causal order. A rooftop that was negligently fastened gets carried away by an extraordinarily powerful wind, hitting plaintiff standing far away;[214] a gas station owner who left inflammable materials and electric wires out, despite a warning of an impending flood, but the flood was so powerful that it carried these materials to his neighbor's warehouse setting it ablaze.[215] If the defendant's negligence made no difference, the act is likely not even a cause and possibly not negligence. To be a cause in fact, but superseded, the act presumably needs to have been a difference maker, or a substantial factor, yet still ultimately insignificant relative to the natural event.

Careful examination of these cases reveals a very tight relationship with foreseeability. The relationship between "abnormal" and "unforeseeable" is an interesting one.[216] While there are potential differences between these concepts, there is a strong correlation between events that are unforeseeable and events in which an unexpected intervening event occurs.

Unlike with willful acts, where the absorption principles determine responsibility among wrongdoers along the causal chain, with natural events the superseding cause is not owned by a wrongdoer. I propose two ways to reconstruct this doctrine. On the first, the doctrine is truly one of proximate cause, using Bacon's Maxim. On the second, the doctrine follows from external constraints

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[210] In Nichols v Marsland (1876) 2 ExD 1 The defendant diverted a natural stream on his land to create ornamental lakes. Exceptionally heavy rain caused the artificial lakes and waterways to be flooded and damage adjoining land. The defendant was held not liable as the cause of the flood was an act of God.

[211] RESTATEMENT (SECOND), *supra* note 41, §451.

[212] HART & HONORÉ, *supra* note 47, 163.

[213] *Berry, supra* note 196 MOORE, *supra* note 34, 245-256; Epstein, *supra* note 66, 269.

[214] Kimble v. Mackintosh Hemphill Co 359 Pa 461, 59 A 2d 68 (1948).

[215] Gerber v. McCall, 175 Kan. 433, 264 P.2d 490 (1953) ("acts of defendant, even though held to be negligent, were not the proximate or legal cause of plaintiffs' damage. The proximate cause of their damage was the flood!").

[216] HART & HONORÉ, *supra* note 47, 280, distinguish between abnormality and non-foreseeability; MOORE, *supra* note 34, 252, points out correctly that normality and foreseeability might pick out different epistemic vantage points: what is foreseeable to a defendant may be more limited than what is in fact normal.

regarding foreseeability. In both, there is a tight connection to foreseeability; what differs is the order of explanation.

a. As a Doctrine of Proximate Cause

In principle, an injury is recoverable, only if it is the result, in the legal sense, of wrongdoing. Truly accidental harm is not recoverable in tort. If I am struck by a driver, my right to bodily integrity has been violated. Consequently, I am entitled to recovery from the parties responsible for my injury, as they have violated my rights. But if I am struck by lightning, while my body has been harmed, my right to bodily integrity has not been violated. Injuries consequent of natural events are not legal harms: they are not violations of my rights and I have nobody to blame for them.

The doctrine of superseding causes, in the context of extraordinary natural events, essentially says, that, as a matter of law, my injury is caused by the natural event, rather than by a violation of my rights. In other words, the doctrine purports to highlight the natural cause of my injury as *the* cause of the injury, or, at least, as so much more significant than any other cause, that it renders all other contributions, or all contributions prior to it, as causally irrelevant, or trivial.[217]

What is it about the natural cause that renders it the exclusive owner of the interaction? Clearly, it is not that the natural cause is at fault, in the usual sense of the word. Yet, if we focus on the causal importance of the natural cause to the exclusion of all others, there is tension between this idea and Mill's point about causal interactions.[218] Still, a criterion like this is not entirely unfamiliar. We employ it outside the torts and crimes context, when determining the cause or causes of death in medical and insurance contexts.

A normative case can be made for a principle of this sort in that if we don't adopt such a principle, we risk blurring entirely the distinction between torts and accidental harm. What is an accident, really, if any contribution, however small and far back, is ultimately sufficient to establish tort liability?

This account would have the following structure: A did *X* which contributed to the harmful consequence to B. But *X*'s contribution to the harm is remote relative to the interaction of the process due to *X* together with *Y*, an extraordinary natural event. The proposed principle of absorption at that interaction dictates that the extraordinariness of *Y* renders that interaction an "accident". This accident is proximate to the harm relative to the wrongdoing. No liability traces back to the wrongful act, because the accident, which occurs at the interaction, is the absorbing proximate cause of the harm to B.[219]

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[217] Cf. RESTATEMENT (THIRD), *supra* note 11, §36: ("When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under §27, the harm is not within the scope of the actor's liability.")

[218] Whether we can make sense of the idea of more or less of a cause is controversial. MOORE, *supra* note 34, 118-121, 274-277, suggests a scalar notion of causality, in which some causes are "de minimis"; *see also* Alex Kaiserman (2017), *supra* note 67. For a review of recent work on degrees of causation see Alex Kaiserman, *'More of a Cause': Recent Work on Degrees of Causation and Responsibility*, 13 PHIL. COMPASS (2018). For a probabilistic account see Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L REV., 1399 (1980).

[219] I think that cases like this are always better modeled as interactions rather than mediations. For natural events and causes we are looking at the impact of the interacting forces themselves. Simple mediation works better, if at all, with agential causes, when D's action is a response to C's.

For example, A left gasoline and wires out despite warnings of a flood. These burned B's warehouse, when the flood waters carried them over.[220] The fire is the result of the interaction of the materials and the wood. The materials are there because A left them out and they were carried away by the flood. But that latter event is an extraordinary intervener.[221]

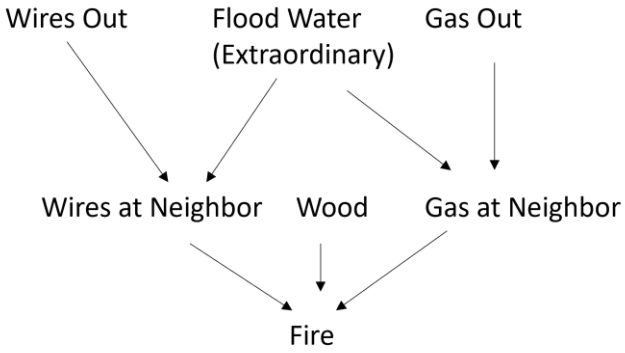

Figure 9: Flood

For this analysis to work we must properly identify the intervening event. Causes prior to that event are rendered disconnected but causes subsequent to the event are not. In the flood case (Figure 9), the gasoline and the wires act subsequently to the flood, but they themselves are not absorbing causes. Ownership of the causal line must be traced. The wires and gasoline were carried by the floodwaters. That interaction broke the causal connection between the defendant's leaving them out and their arrival and subsequent activity at the warehouse.

Suppose we find this plausible, what does it say about foreseeability? It turns out that A will only be liable when the harm to B is foreseeable. When it is not foreseeable, this is precisely because the interaction with Y is unforeseeable.[222]

If this is right, then it turns out that foreseeability, at least in some cases, such as extraordinary or abnormal events, follows from the doctrines of proximate cause themselves. How far can the notion of abnormality be stretched to cover foreseeability? It might turn out that extraordinary natural causes are not so extraordinary after all, if unforeseeable outcomes are always extraordinary.

What if an event is not foreseeable but still unextraordinary? These will be the more difficult cases for the factfinder. Both foreseeability and abnormality are arguably matters of degree.[223] Our purpose here is not to draw bright lines for what counts as foreseeable or extraordinary. Rather, it is the analytical relationship between the two. On the account that sees extraordinary events as chain breakers, it is the extraordinary nature of the event that counts. This nature is required to render the

[220] Based on the fact pattern of *Gerber*, s*upra* note 215.
[221] Or is the extraordinary intervener the flood carrying it beyond a certain distance? This trades on an ambiguity between the extraordinary nature of the force itself (a flood) or on the extraordinary effects the flood had.
[222] RESTATEMENT (SECOND), *supra* note 41, §442 ("The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about").
[223] HART & HONORÉ, *supra* note 47, 165-168; MOORE, *supra* note 34, 245-247.

event a non-wrongful injury. Foreseeability, of course might still matter independently as a filter on negligence in terms of duty.

b. As Following from an Independent Foreseeability Requirement

The second route takes foreseeability as an *independent* constraint. It is plausible, at least in negligence, that foreseeability is a necessary condition for liability.[224]

Such a constraint offers another avenue to the doctrine of superseding cause in cases of natural events. The doctrine is very simple: Unforeseeable consequences are not legal harms. In the case of an extraordinary natural event, the consequence is unforeseeable. Therefore, the consequence is not legally caused. We get the doctrine of superseding natural causes for free.

What follows would be the bifurcation of the doctrine of superseding causes into two distinct doctrines: for wrongful human actions, it is a doctrine of proximate causation, for extraordinary natural events, it is a doctrine of foreseeability. The classification of both under the same heading would be misleading, but the doctrines end up in the same place.

Which is it? On the level of theory, the first path has two primary difficulties: the first is making sense of the natural event as the sole absorbing cause; the second that it renders extraordinary events rather ordinary – at least if every unforeseeable consequence is, by definition, an extraordinary natural event. The problems with the second route are that it bifurcates the doctrine, and that it is dependent on the plausibility of foreseeability as an independent constraint. Part of what makes this hard to settle is the slippery nature of both "extraordinariness" and "foreseeability". Were these to be clearly fixed, we could ask what does or should happen in cases in which extraordinary events are in fact foreseeable or ordinary ones are not.

This does suggest two ways to test the distinction. Put stress on either the foreseeable/normal distinction or on the distinction between human acts and natural forces. The former can be brought to light by looking to cases where the force is both foreseeable and extraordinary. As indicated, there is some difficulty defining these, but to the extent we can, if the extraordinary natural force doctrine follows from Bacon's Maxim, as a doctrine of proximate cause, we expect cases where foreseeable extraordinary forces are judged nonetheless superseding. Alternatively, if the doctrine is really just an application of the foreseeability test, we should expect foreseeable extraordinary forces that don't supersede. Arguably, we get this in contrived coincidence cases, the case where an actor intentionally exploits a natural force.

The other stress can be placed in contrast with *novus actus interveniens*. If the doctrines of superseding cause are unified across both human actions and natural forces, we should expect foreseeability to play the same role in both. So, the question becomes whether there are cases that are equally foreseeable, but in which one form supersedes more easily than the other. Presumably, human action

[224] A serious obstacle to accepting foreseeability as necessary is the eggshell skull rule. Mark Geistfeld argues that the rule is consistent with a foreseeability requirement, as long as the distinction is made between causation of predicate injury (which requires foreseeability) and the damages stage (for which directness is sufficient), *supra* note 31.

will supersede more easily than natural forces. In other words, a perfectly foreseeable wrongful action will supersede.

One further complication, and a reason to think the doctrines are bifurcated, is that human action allows for the subordination of causal contributions, involving backup or secondary liability, in a manner that natural causes do not. If A had a duty to protect C from B, A can be liable to C, conditional on B's unavailability or insolvency, and has a claim against B for indemnity. There is no analog of that if B is a natural cause rather than a person.

Another possibility is to reject foreseeability as a necessary condition for liability, but to consider it as a *sufficient* condition. This is, to my knowledge, an unexplored view, but it would run roughly as follows: If A's wrongful conduct has caused B injury in a manner that was foreseeable, A's connection cannot be broken. On this view, A's causing of the harm is still subordinate to the proximate causes. But A, as one who foreseeably wrongfully injured, is on the hook, as it were. This would explain the doctrine of intentionally exploiting a natural event. This would extend the analysis we gave above about subordinating causes beyond mere affirmative duties, to any breach of duty that foreseeably caused. It would not affect the application of the Bacon Maxim, however, as it is still the case that more proximate absorbing causes come first. Furthermore, the remote foreseeing cause would still have a claim of indemnification against them. This will matter at the stage of apportionment of damages, to which we turn next.

B. Apportionment

The modern doctrines of apportionment of damages assign each contributor a percentage, proportional to their own fault or causal input. Importantly, this holds even when multiple actors are liable jointly and severally. Each can owe the plaintiff all the damages, but each has a potential claim against the others for contributions pro rata. When defendants cause divisible harms, liability is apportioned by causation.[225] But when the harm is indivisible, apportionment is by degree of fault. The guiding principle is that once the class of proximate causes of the indivisible injury are specified, all wrongdoers whose wrongdoing proximately caused the injury are equally causes of the injury. The question of dividing up responsibility, given that one has wrongfully caused, is merely a matter of assigning a number by the factfinder corresponding to degrees of blame. No further causal distinctions are relevant at that point.

Apportionment is only among proximate causes. If the argument presented here is correct, the modern doctrine has been loose on this point, and needs to be more careful in distinguishing proximate from remote causes. Even when harm is indivisible, there remains the apportioning by causation, along a causal path. The question of percentage for each party to a causal interaction differs from the question of internal allocation within each path leading to the interaction. In other words, if the gasoline and the match interact to cause the fire, whatever percentage the gasoline gets is unaltered by the number of contributors to the presence of gasoline.[226] That number is divided among these contributors, and only them, in accordance with the principles of vertical absorption. The same goes for the match. The impact of the match or gasoline is not a function of the number of contributors at

[225] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §26 (2000).
[226] Cf. *Watson*, *supra* note 154.

fault. Yet the modern law of contribution seeks to treat all defendants who are jointly and severally liable as bearing a percentage of fault or culpability which has nothing to do with how or how much they caused. Much of the judicial rhetoric surrounding this doctrine suggests that the Millian insight about multiple causes renders these distinctions insignificant. This once again confuses the vertical and horizontal. Remote causes are not parties to the interaction in the same manner that proximate ones are. The complete set of most proximate causes to the harm are responsible for 100% of the injury, each in accordance with the contribution of their own path. It is an error to add more remote causes to the contribution.

When C is rendered remote, relative to D, in causing E, D, if he absorbs, is responsible for all of the harm caused by the C-D-E path. Sometimes, as discussed, C can be conditionally liable, and therefore on the hook to E for what D caused. For example, if C had an affirmative duty to E to prevent D from causing this harm. In such a case we might allow E to recover directly from C.

When this occurs, however, C should have a claim against D in indemnity, rather than in contribution. D's percentage should be for 100% of the injury. Treating C and D as jointly causing, in a case like this, confuses horizontal interactions with vertical mediation. To treat them otherwise, allows D, who caused the harm, to pass off responsibility to C, merely because C failed to stop him. But C's duty was not to D. It was a duty to E to protect E from D.[227]

Interestingly, indemnification can also go the other way. If C caused E harm, and D had a duty to C to prevent that harm from materializing then it is D, the duty holder, who must indemnify C, rather than the reverse. This has to do with the nature and direction of the duty itself. In this case, C was wronged by Ds failure. This, we argued above, might be what explains *Henningsen*. The mother's breach was of a duty to protect the plaintiff from being shot with the gun that defendant dangerously gave to her son. It was not a duty to the defendant to protect him from liability.

Compare the following two cases:

1. C falls asleep on guard duty, and D burgles E's apartment. In this case, C is liable to E, but can get indemnity from D. D has no claim against C.
2. C is in charge of inspecting the food at D's restaurant. C fails to inspect the food. E, a customer, gets food poisoning.

In the second case, D has a claim against C. C's duty to was to D to protect D from incurring liability. These cases will frequently be governed by prior contractual relations between C and D.

[227] Amazingly, the Third Restatement, rejects this reasoning, *supra* note 225, 22(e). ("Unlike pure vicarious liability, however, a person whose negligence consists only in failing to prevent an intentional tortfeasor from injuring the plaintiff is still negligent. The policy of allocating a loss according to each person's share of responsibility supports having the negligent tortfeasor and the intentional tortfeasor, as between themselves, each bear their own comparative shares. That is accomplished by contribution, not indemnity"). Once again, the older doctrines requiring indemnity from the intentional actor, or the active cause, are dismissed as dated "developed before comparative responsibility". The errors consequent to misplaced confidence in the Mill insight are astounding.

The general lessons for apportionment are two:

1) Avoid double counting. When apportioning, don't double count causal paths. Each path is apportioned the percentage assigned to that path – whatever that is. This percentage should be unaffected by the number of contributors to that path. If C harmed E through D, and A harmed E through B, the CDE and ABE paths apportion liability between themselves. Whatever the internal division between C and D, should not affect the amount incurred by A and B, and vice versa.
2) Path Ownership. Only the owners of the path pay. If a proximate cause along a path absorbs liability, the proximate actor does not split contribution with the remote actor. The remote actor will only be liable if the proximate actor doesn't completely absorb, or, in cases of conditional liability, until and unless the proximate actor pays. Any liability that the remote actor incurs, entitles the remote actor to indemnity from the proximate actor.

Conclusion

Proximate causation is a well-behaved feature of causal structure, independent of its legal and practical uses. The concept is inherently relative, in that some causes are proximate relative to other causes in relation to an effect. But that relativity is no less objective. Causal mediation just is how causation objectively works.

The law makes essential use of this concept in determining liability. The normative features that distinguish between wrongdoers and innocent intermediate causes are appropriate, not because causation itself is sensitive to these distinctions, but because the doctrines of proximate cause, following Bacon's Maxim, aim at the absorption of liability. If one wrong is proximate to the harm, relative to another, and it, on its own, is a suitable absorber of liability, the causal proximity of the former cause is what determines liability.

The doctrine, as developed in this article, is primarily geared at application to torts. The absorption principles discussed are particularly suited to tort law and its underlying principles of compensation and corrective justice.

The concept of proximate causation is broader than that. It applies anywhere causation does, both within and beyond the law.[228] In the law, particularly, it is of obvious relevance to criminal law and to insurance.[229] But while the concept of proximity is the same in these contexts (and in non-legal ones), the principles of absorption differ. Criminal law, for example, is not limited, in assigning liability, by the constraint of making the plaintiff whole, at least not in the sense that tort compensation is.[230] Holding multiple wrongdoers liable in punishment neither overcompensates nor under-penalizes wrongdoing. Considerations of deterrence and desert each play potentially stronger roles, such that, on the one hand, the case for holding remote wrongdoers responsible might be stronger, and on the

[228] The distinction between proximate and ultimate causes is important, for example, in evolutionary theory. *See* Ernst Mayer, *Cause and Effect in Biology*, 134 SCIENCE 1501, 1503 (1961).
[229] More recently also in employment discrimination law. *See* Sandra F. Sperino, *The Emerging Statutory Proximate Cause Doctrine*, 99 NEB. L. REV., 285 (2020).
[230] *Cf.* Alex Kaiserman, *Responsibility and the 'Pie Fallacy'*, 178 PHILOS. STUD., 3597 (2021).

other, foreseeability and principles governing mens rea, might play a greater role in determining when causal chains break or persist. And of course, in criminal law, inchoate crimes, such as attempts, are punishable as well.

But even then, the method of the Bacon Maxim remains relevant. Understanding the causal structure of interactive behavior constrains the possibilities of blame. If A caused through B, any justification for holding A responsible will still have to trace through B. If B reacts to A, we don't blame A over B, unless we can show why we don't blame B. We might blame both (or neither). But the proximity principle limits us in this way at least.

Proximate cause, both in name and in content, is defensible after all. Despite the longstanding protestations of its critics, proximate cause is governed by logic, not just practical politics.[231]

[231] *Cf.* Andrews in *Palsgraf*, supra note 55.