CHAPTER OUTLINE

- Introduction
- Terminology Problems
- Actual Cause
- Cutoff Test of Proximate Cause
- Overview of Steps Needed to Analyze Proximate Cause

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:

- Identify the two questions that must be asked to determine if proximate cause has been established.
- State the two tests for actual cause.
- Explain how the facts of time, place, and history can be used to establish actual cause.
- Understand the cutoff test of proximate cause.
- Explain the application of the thin-skull rule and the manner-of-injury rule when an unforeseeable injury occurs.
- Explain when an intervening cause can be a superseding cause.
INTRODUCTION

Plaintiffs must show that their injury or other loss was the natural and probable result or consequence of the defendant's negligent conduct. “Natural and probable consequences are those which human foresight can anticipate because they happen so frequently they may be expected to recur.” This brings us to proximate cause, the third element of negligence. Proximate cause is defined as a cause that is legally sufficient to impose liability for the results of one’s wrongful act or omission. There are two components of proximate cause: actual cause and legal cause:

- **Actual cause.** The defendant was the cause in fact of the harm or other loss suffered by the plaintiff.
- **Legal cause.** The loss or other harm was the foreseeable consequence of the original risk created by the defendant.

In most negligence cases involving one defendant and one injury, legal cause is relatively easy to establish once actual cause is established.

**EXAMPLE**

Tom carelessly leaves garden tools on the front walkway of his home. One day, a neighbor injures her elbow after tripping on one of the tools.

If the tool had not been carelessly left on the walkway, the neighbor would not have been injured. The neighbor will have little difficulty establishing that this carelessness was the actual cause of the elbow injury. Legal cause is also easy to establish in this example. The risk of carelessly leaving tools on the walkway is a bodily injury by someone tripping over the tools. That’s what happened. The elbow injury was a foreseeable result of the original risk that Tom took when he carelessly left the tools on the walkway. Tom, therefore, was both the actual cause and the legal cause (and hence the proximate cause) of the elbow injury.

When multiple parties and injuries are involved, however, legal cause may not be as clear.

**EXAMPLE**

Sam drives his car down the street at an excessive rate of speed and hits Paul’s car, breaking Paul’s leg. While Paul is lying in the road, another car accidentally runs over Paul’s arm. When the ambulance finally arrives and takes Paul to the hospital, a doctor carelessly treats Paul, resulting in an injury to Paul’s knee. After being treated, Paul discovers that someone at the hospital has stolen his wallet.

We have three injuries (leg, arm, and knee) and a property loss (the missing wallet). Our concern is whether Sam is the proximate cause of them all. Of course, Paul has other parties he can go after. He can try to sue the second car’s driver who injured Paul’s arm, the doctor who injured Paul’s knee, the hospital where the doctor worked, and the thief (if caught) who took his wallet. He might sue them all or ignore anyone who is judgment proof (has insufficient assets to pay a potential judgment). There might be joint and several liability among Sam and others involved. For our purposes, however, we will assume that Paul is suing only Sam for the three injuries and the lost wallet.

It can be argued that Paul would not have suffered three injuries and a stolen wallet if Sam had not been speeding on the day he hit Paul. In this sense, Sam caused all four results. But was he the proximate cause of them all? That is the question we will address in this chapter. To answer it, we will focus on the two components of proximate cause: actual cause and legal cause. See Exhibit 15–1 for a summary of the tests for each that we will examine in this chapter.
TERMINOLOGY PROBLEMS

One final caution about terminology before we begin. Unfortunately we are stuck with the phrase *proximate cause* even though not all courts use the phrase in the same way.

- Some courts use *proximate cause* to mean its two components—actual cause and legal cause.
- Other courts use *proximate cause* to mean legal cause only; they cover actual cause (cause in fact) separately.

In this chapter, we will follow the first approach and treat proximate cause as having two components: actual cause and legal cause.

The other difficulty with the law of proximate cause is that it covers more than the topic of causation. According to one court:

“Proximate cause”—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor’s responsibility for the consequences of his conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. “The fatal trespass done by Eve was cause of all our woe.” But 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.” As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.\(^2\)

Hence the law of proximate cause will tell us when parties will not be liable for all the harms they have caused by their wrongful conduct. In this sense, proximate cause is as much about policy as it is about causation.

ACTUAL CAUSE

We begin by a close examination of *actual cause* (cause in fact). There are two tests to determine whether the defendant was the actual cause of the harm or other loss suffered by the plaintiff: the *but-for test* and the *substantial-factor test*. The latter is fully adequate and often easier for a plaintiff to establish. It is important, however, that you understand both tests.

The but-for test asks the following question: Would the plaintiff have been injured but for what the defendant did or failed to do? Under this test, if the plaintiff would have been injured regardless of what the defendant did or failed to do, the defendant did not cause (was not the actual cause of) the injury.
EXAMPLES

- Sam carelessly drives his car into Fred’s barn. But for the way Sam drove, the damage to the barn would not have occurred. Sam, therefore, is the actual cause of the damage to Fred’s property.

- Dwayne is an ambulance driver. One day he gets a call from the plaintiff’s home for an ambulance to take the plaintiff to the hospital. Dwayne takes the call at 9:00 A.M. Because of Dwayne’s careless driving, he arrives at the plaintiff’s home 45 minutes later than he would have arrived if he had not been careless. When he does arrive, the plaintiff is already dead. According to the coroner’s report, the plaintiff died at 9:01 A.M. Dwayne was not the actual cause of the death. Dwayne was careless and unreasonable in driving to the plaintiff, but the plaintiff would have died even if Dwayne had driven with great caution and skill. But for what Dwayne did or failed to do, the plaintiff would still have been dead when he arrived to take her to the hospital.

- Mary is a doctor whose license to practice medicine has been suspended for a year because she illegally prescribed drugs to several patients. In secret, however, Mary continues her practice. During this time, she performs a routine operation on George. George suffers serious complications following the operation and dies. His estate sues Mary for negligence. At the trial there is no evidence that Mary was careless or unreasonable in performing the operation. The estate introduces evidence that Mary performed the operation while her license was suspended. The lack of a license, however, was not the actual cause of George’s death. Even if Mary had had a license, the death would still have occurred. But for Mary’s not having a license, it cannot be said that George would not have died. There was no evidence that Mary did not use adequate professional skill in performing the operation. It may be that a separate criminal proceeding can be brought against Mary for practicing without a license, but the estate loses its negligence action for failure to establish actual cause.

The but-for test is sufficient for most tort cases on the issue of causation. This includes negligence cases as well as those charging intentional torts or strict liability torts. There is, however, an alternative test: the defendant will be considered the actual cause of the plaintiff’s injury if the defendant was a substantial factor in producing the injury. Every time you establish actual cause by the but-for test, you have also established that the defendant was a substantial factor. But the converse is not necessarily true:

EXAMPLE

While hunting, Helen and Jane carelessly shoot their guns at the same time through some bushes, trying to hit an animal. Both bullets, however, hit the plaintiff, who is killed instantly. Either bullet would have killed the plaintiff. Here, the but-for test leads to a bizarre result. Helen says, correctly, that but for her bullet, the plaintiff would have died anyway. Jane says, correctly, that but for her bullet, the plaintiff would have died anyway. Hence, both Helen and Jane use the but-for test to show that she individually was not the actual cause of the plaintiff’s death.

The plaintiff’s estate would not be able to win a negligence action against anyone if the but-for test were the only test to determine cause in fact in such a case. Hence the need exists for an alternative test. If either Helen or Jane was a substantial factor in producing the death, then either one is the actual cause of the death. When two people fire a bullet at a person who is killed by the impacts, the law will say that they are both substantial factors in producing the death so long as each was independently sufficient to cause the same harm. In this case, therefore, the substantial-factor test leads to the establishment of actual cause, even though the but-for test would not.
It is usually easier for a plaintiff to establish actual cause by the substantial-factor test than by the but-for test, but in most cases, both tests will lead to the same result. In tort law, it is sufficient if the plaintiff proves actual cause by the broader substantial-factor test. In analyzing any tort problem on the issue of actual cause, you should apply both tests, but always keep in mind that the substantial-factor test will be sufficient.

In our hunting example, assume that it took the shots of Helen and Jane to kill the plaintiff—neither shot was sufficient in itself. Under these facts, both tests of actual cause would lead to the same result:

- But for Helen’s bullet, the plaintiff would not have died (it took both bullets to kill the plaintiff).
- But for Jane’s bullet, the plaintiff would not have died (it took both bullets to kill the plaintiff).
- Helen’s bullet played a significant role (was a substantial factor) in the plaintiff’s death.
- Jane’s bullet played a significant role (was a substantial factor) in the plaintiff’s death.

Note that the substantial-factor test requires only that the defendant be a substantial factor. It is not necessary that the defendant be the sole or only cause of the plaintiff’s injury in order to be the actual cause of the injury. It is not even necessary to show that the defendant was the dominant factor in producing the injury. Being a substantial factor is enough.

**Assignment 15.1**

When you phrase an actual-cause issue or question, you list relevant facts along with one of the tests for actual cause. For example, “But for the defendant’s excessive speed on a slippery road at night, would the plaintiff’s car have been struck by the defendant’s car?” Reread the facts of the case presented at the beginning of the chapter involving Paul’s injured leg, arm, and knee, and his lost wallet.

a. For each of Paul’s injuries and his property loss, phrase the actual-cause question using the but-for test. (Write four separate questions.)

b. For each of Paul’s injuries and his property loss, phrase the actual-cause question using the substantial-factor test. (Write four separate questions.)

You do not have to answer the questions; simply phrase them.

**Evidence of Causation**

What do we mean when we say that there is evidence of causation—whether we are using the but-for test or the substantial-factor test? How does one establish a connection between cause and effect? For the vast majority of cases, our most sophisticated tool in assessing causation is common sense based upon everyday experience. Our common sense depends heavily on the factors of time, space, and history. These factors present us with some fundamental hypotheses about life and human nature. *(A hypothesis is an assumption or theory to be proven or disproven.)*

**Time:** When did the injury occur? After the defendant’s acts or omissions? The shorter the time between the plaintiff’s injury and the acts or omissions of the defendant, the more convinced we are that those acts or omissions caused the injury. The more time that elapses between the defendant’s acts or omissions and the injury of the plaintiff, the more skeptical we are that those acts or omissions caused the injury.
EXAMPLES

- Tom becomes sick seconds after drinking a beer. Common sense tells us that drinking the beer may have caused the sickness since the two events (drinking and sickness) came so close together. We would be less inclined to reach this conclusion, however, if Tom’s sickness occurred two weeks later.
- Mary and Claire belong to the same social club. Mary has a pet-walking business in which all of her clients are members of the club. (Every morning, an employee of Mary’s business goes to the homes of clients to get their pets for walks.) Her business drops by 80 percent within one week after Claire tells many other club members that Mary is incompetent. Common sense tells us that Claire’s derogatory statement may have caused some or all of Mary’s decline in business, since the decline occurred so soon after Claire made the statement. We would be less inclined to reach this conclusion if the decline occurred a year later.

In the first example, notice that we did not say that the beer caused the sickness because the sickness occurred seconds after drinking it. Nor did we say that the beer could not have caused the sickness if it occurred two weeks later. Rarely can such definitive conclusions be made on the basis of time evidence alone. All we can say is that our common sense suggests these conclusions, although we are willing to look at any other evidence that may suggest different conclusions. We need to be alert to the logical fallacy known as *post hoc ergo propter hoc* (“after this, therefore, because of this”). We cannot conclude that X caused Y simply because Y occurred right after X occurred. The sequence of events can, along with other facts, help us identify causation, but chronology alone is almost never conclusive.

In the second example (the one about the pet-walking business), we did not say that the derogatory statement caused the decline in business because the decline occurred one week after the derogatory statement was made. Nor did we say that the statement could not have caused the decline if it occurred a year later. All we can say is that time evidence is one of the relevant pieces of information that we need to consider.

**Space:** Did the injury occur in the same area or vicinity where the defendant acted or failed to act? The more closely we can link the defendant’s acts or omissions to the area or vicinity of the plaintiff’s injury, the more convinced we are that those acts or omissions caused the injury. The greater the distance between the area or vicinity of the injury and the area or vicinity of the defendant’s acts or omissions, the more skeptical we are that those acts or omissions caused the injury.

**EXAMPLES**

- One of Bob’s jobs at a printing plant is to pour a certain ink, which has a heavy odor, into the presses. Bob develops a respiratory problem. He says that the problem is due to breathing the ink fumes. Common sense tells us that the ink fumes may have caused the respiratory problem since he worked so close to the ink. We would be less inclined to reach this conclusion, however, if Bob worked 500 yards away from the presses that use the ink.
- Lena is a department store clerk where she is in charge of one of the five cosmetics counters. Occasionally she works at the other four counters. The store suspects that she is stealing cosmetics (which would constitute the crime of larceny and the tort of conversion). All of the missing cosmetics were at Lena’s main counter and at those counters where she occasionally has worked. Common sense tells us that Lena may have taken the cosmetics since she was physically present at those counters where the goods were missing. We would be less inclined to reach this conclusion, however, if Lena never worked at the counters that experienced the missing cosmetics.
These observations about time and space evidence are simply hypotheses or assumptions about life and human nature. They are nothing more than points of departure in our search for causation. We must never close our minds to evidence that may point to other conclusions. Some illnesses, for example, may not appear until months or years after an accident, yet we can still be convinced that one caused the other. So, too, we can be convinced that actions taken in New York can lead to damage or injury in California. There is nothing ironclad about the hypotheses. The facts of each individual case must be carefully scrutinized. The predisposition of our common sense, however, tells us to begin this scrutiny with the hypotheses on time and space.

Assume that for years a railroad has stationed a guard at a point where the track crosses a highway. One day, the railroad removes the guard. Two days later, a train crashes into a car at the intersection. Was the absence of the guard the actual cause of the injury? Was the absence of the guard a substantial factor in producing the injury? Among the evidence to be introduced by the plaintiff’s attorney are time and space evidence. The attorney will present evidence to show that the crash occurred soon after the guard was removed (time) and that the crash occurred at the very intersection where the guard was once stationed (space). Common sense tells us, according to this attorney, that the accident would not have happened if the guard had been there, or at the very least, that the absence of the guard was a substantial factor in producing the crash. Time-and-space evidence is critical on the issue of causation, but not necessarily determinative. Other evidence might show that the job function of the guard was not to try to prevent the kind of collision that occurred and that even if the guard had been present, the collision would have occurred anyway. Again, the time and space evidence is but a point of departure.

Another important source of causation evidence is history. Here again, a basic hypothesis is in play.

History: In the past, have the same or similar acts or omissions by the defendant or people like the defendant produced this kind of injury? The more often this kind of injury has resulted from such acts or omissions in the past, the more convinced we are that the acts or omissions of the defendant caused the injury. If this kind of injury has never or has rarely been produced by such acts or omissions, we are more skeptical that the defendant’s acts or omissions caused the injury.

Of course, just because something has happened in the past does not necessarily mean that it happened in this particular case. The predisposition of our common sense, however, tells us that history does tend to repeat itself. Hence, our common sense leads us to inquire about the past. In the railroad crossing case, for example, the plaintiff’s attorney may try to introduce evidence that collisions between trains and cars never occurred when the guard was on duty, as a way of proving that it is more likely than not that the absence of the guard caused the collision.

Hence, evidence of time, space, and history is critical in beginning to collect evidence of actual causation. We are drawn to search out such evidence on the basis of some basic hypotheses about time, space, and history. Such evidence will not always be conclusive—either way—on the issue of actual causation. All of the facts and circumstances of a given case must be examined. Start your examination, however, with the evidence of time, space, and history.

**Weight of the Evidence**

Let us shift our focus for a moment away from the tests for actual causation (but-for and substantial-factor) to the standard of proof needed to establish actual causation. By standard of proof we mean how convincing the evidence of
To prove causation, attorneys often hire consultants to help explain why and how things went wrong. If they are engineers or scientists, they are sometimes called forensic engineers or scientists. Exponent, Inc. is a company consisting of these individuals. One of the cases for which they were hired involved the death of 113 people at the Hyatt Regency Hotel in Kansas City. An estimated 2,000 people had gathered in the lobby area to enjoy a tea dance. Suddenly, the two walkways that spanned the lobby collapsed. Forensic engineers from Exponent, Inc. sifted through the wreckage for four days. Speculation that the accident had been the result of “harmonic vibrations” caused by dancers on the walkway were disproved by mathematical models of walkways and by the sequence of events. Combined testing, materials, and stress analysis led the engineers to testify that the collapse had occurred when a bolt end on a rod that attached the walkways to the ceiling had pulled through a walkway beam.

Photo courtesy of Exponent, Inc.

something must be before a fact finder can accept it as true. (The fact finder is usually the jury; if there is no jury, it is the judge.) The overall persuasiveness of evidence is referred to as the weight of the evidence. The standard of proof, therefore, can be phrased as the “weight” that evidence of something must have before a fact finder can accept it as true. Here our focus is on how convincing the plaintiff’s evidence must be that the defendant was the actual cause of the plaintiff’s injury. There are several different “weights” that evidence can have. Evidence of something can be overwhelming, highly likely, more likely than not, fifty/fifty, possible, etc. In most tort cases, the minimum standard of proof that must be met is preponderance of the evidence. Under this standard, a party must prove that its version of the facts is, more likely than not, accurate as alleged. The preponderance-of-the-evidence standard (“more likely than not”) is the minimum degree of believability (the minimum weight) that a plaintiff’s evidence must have in order for a fact finder to be able to accept the plaintiff’s version of who was the actual cause of his or her injury. Using the two tests for actual cause, the standard would be expressed as follows:

Plaintiff must produce evidence that is convincing enough for a fact finder to conclude it is more likely than not that the defendant was a substantial factor in producing the injury, or

Plaintiff must produce evidence that is convincing enough for a fact finder to conclude it is more likely than not that but for what the defendant did, the plaintiff’s injury would not have occurred.

A mere possibility that the defendant was a substantial factor in producing the injury is not enough. (Likewise, a mere possibility that, but for what the defendant did, the plaintiff would not have been injured is not enough.) Anything is possible. A fifty/fifty possibility is also not enough. In mathematical terms, believability must be at least greater than 50 percent. This is what is meant by the more-likely-than-not (preponderance of the evidence) standard.
CHAPTER 15  NEGLIGENCE: ELEMENT III: PROXIMATE CAUSE

CASE

Parra v. Tarasco, Inc. d/b/a Jiminez Restaurant
Appellate Court of Illinois, First District

Background: Ernest Parra died when he choked on a piece of food at Jiminez Restaurant. This suit alleges that the restaurant negligently failed to post instructions in the restaurant on how to aid a choking victim and negligently failed to summon emergency medical assistance. The Illinois Choke-Saving Methods Act requires every restaurant to “have posted in a conspicuous location that is visible to patrons and employees on the premises, but which location need not be in the actual dining areas, instructions concerning at least one method of first aid assistance to choking persons.” Jiminez Restaurant failed to post these instructions. The trial court dismissed the complaint for failure to state a negligence cause of action. The case is now on appeal before the Appellate Court of Illinois.

Decision on Appeal: Judgment affirmed. Plaintiff has not adequately alleged causation and, therefore, has not stated a negligence cause of action.

OPINION OF COURT

Justice GORDON delivered the opinion of the court . . . 

[Plaintiff has] failed to adequately allege that failure to post the sign was the proximate cause of decedent’s death. The violation of a statute or ordinance designed for the protection of human life or property can be prima facie evidence of negligence, but the injury must have a direct and proximate connection with the violation. Plaintiff must include sufficient factual allegations that such violation was the proximate cause of his injuries. It is not sufficient to merely plead conclusions. Horcher v. Guerin, 94 Ill. 2d 244, 248–50, 236 N.E.2d 576 (complaint merely alleges conclusion that violation of building code [requiring windows in operating condition] was proximate cause of injury from fire; however, nothing indicates causal connection between inoperative windows and actual injury of plaintiff).

In order to state a cause of action, plaintiff must allege the ultimate facts which give rise to the cause of action, and liberality of pleading will not relieve plaintiff of the requirement that the complaint contain sufficient, factual averments and set out every fact essential to be proved.

In determining whether proximate cause has been sufficiently set forth, it is important to “distinguish the causal connection between what the defendant did and the plaintiff’s injury from the connection between the plaintiff’s injury and the class of the injuries from which the statute was intended to afford protection [choking to death].” (N.J. Singer, 2B Sutherland Statutory Construction, sec. 55.05, at 287–88 (5th ed. 1992) (footnotes omitted.).) While clearly decedent’s choking to death is precisely the class of injury for which the statute intends to afford protection; however, the necessary causal connection here runs between what defendant allegedly did—failure to post the sign, and plaintiff’s injury—choking to death on his food.

The complaint here merely alleges that defendant: “5a. failed to post in a conspicuous location that was visible to patrons and employees in the premises instructions concerning first aid assistance to choking persons; b. failed to instruct their employees in first aid assistance to choking persons; c. failed to assist the plaintiff decedent who was choking after failing to post in a conspicuous place instructions concerning first aid assistance to choking persons. 6. That as a direct and proximate result of the aforesaid negligent acts or omissions of the defendants, the plaintiff decedent . . . suffered personal injuries and died on March 18, 1989.”

This broad, conclusory language fails to provide the necessary factual allegations which would establish a causal relationship between not posting the sign and decedent’s death. There is no allegation, for example, that anyone tried to perform the Heimlich Maneuver but performed it incorrectly because the sign was not posted, or failed to undertake such an attempt because of a failure to post the sign.

Plaintiff additionally alleges in the complaint that defendant “failed to promptly summon emergency medical personnel.” . . . [But] there is no factual allegation in the complaint which even hints at a causal connection between decedent’s death, and any action or inaction by defendant. In fact, there is no allegation that anyone in the restaurant had any knowledge that decedent was choking. There is no allegation that defendant’s employees had discovered decedent choking and refused to call, or delayed calling, for medical assistance. There is no allegation that, but for the failure of defendant to summon an ambulance, decedent would have lived. Cf. Acosta v. Fuentes, 150 Misc. 2d 1013, 571 N.Y.S. 666, 669 (1991) (if the patron choking on his food was “already doomed to die” before the restaurant’s employees called an ambulance and moved him outside, then no causal connection has been shown between defendants’ action or inaction and decedent’s death).

We conclude that the trial court properly found that plaintiff’s allegations of negligence based on defendant’s failure to post a sign, or failure to secure or render first aid, did not state a cause of action. . . .
CHAPTER 15 NEGLIGENCE: ELEMENT III: PROXIMATE CAUSE

ASSIGNMENT 15.2

a. Write a complaint for Parra that adequately alleges causation. Make up whatever facts you need to draft this complaint. Be sure that Justice Gordon would not have the same problems with your complaint that he had with the complaint actually used in the litigation, even if your state does not require the same kind of pleading specificity that Justice Gordon required.

b. Assume that none of the employees in the Illinois restaurant spoke English, and that none of the customers in the restaurant at the time of the choking spoke English. Also assume that there are instructions clearly posted in the restaurant on what to do if someone chokes on food, but the instructions are in English. Would the result in the Parra case be the same? What would the complaint have to allege?

General Causation and Specific Causation

There are some specific areas of tort law that have unique causation problems and terminology. An example is a toxic tort, which is a wrongful injury or damage caused by repeated exposure to poisons in chemicals, asbestos, radiation, waste, or other substances. When we study toxic torts later in the book, particularly in Chapter 20, we will see that some courts insist that plaintiffs establish general causation before they are allowed to establish specific causation. General causation addresses whether a substance is capable of causing a particular injury or condition in the general population. Example: Can cigarettes cause lung cancer? Proof of general causation is made primarily by offering scientific and medical evidence found in the literature of the field in question. Specific causation, on the other hand, addresses whether a substance caused the injury of a specific plaintiff. Example: Was the lung cancer caused by this plaintiff’s smoking?

CUTOFF TEST OF PROXIMATE CAUSE

As indicated earlier, there are two components of proximate cause. Thus far we have been discussing the first component, actual cause, which answers the question of who was the cause in fact of the harm or other loss. Now we turn to the second component, legal cause, which answers the question of whether the harm or other loss was the foreseeable consequence of the original risk. See Exhibit 15–1.

In most negligence cases involving a single defendant and a single injury, legal cause is relatively easy to establish once actual cause is established. Cases involving multiple defendants and injuries, however, can sometimes pose difficulties. The law does not always make defendants liable for every injury they actually cause. As a matter of policy, courts impose a cutoff of liability. Defendant’s liability will be limited to those injuries that were the foreseeable consequence of the original risk the defendant took by his or her carelessness or negligence.

EXAMPLE

Jim carelessly pushes Alice, who falls down and breaks her ankle. Two weeks later, while walking on crutches, Alice falls and breaks her wrist. Soon thereafter, she catches pneumonia because of her generally run-down condition due to the ankle and wrist injuries.

Let’s look at Alice’s ankle injury, wrist injury, and pneumonia from the perspective of both actual cause and legal cause to determine whether Jim was the proximate cause of each.

toxic tort Personal injury or property damage wrongfully caused by repeated exposure to poisons in chemicals, asbestos, radiation, waste, or other substances.
general causation In toxic tort cases, capable of bringing about or producing a particular injury or condition in the general population.
specific causation In toxic tort cases, bringing about or producing a particular injury or condition in a specific plaintiff.
1. **Ankle injury.** But for the push by Jim, Alice would not have injured her ankle. Jim, therefore, is the actual cause of the ankle injury. Was the ankle injury a foreseeable consequence of the original risk Jim took by carelessly pushing Alice? Yes. Bodily injury is a foreseeable consequence of being pushed. Therefore, Jim is the legal cause of the ankle injury. Since he is also its actual cause, we can conclude that he is the proximate cause of the leg injury.

2. **Wrist injury.** But for the push by Jim, Alice would not have been on crutches and would not have injured her wrist. Jim, therefore, is the actual cause of the wrist injury. Was the wrist injury a foreseeable consequence of the original risk Jim took by carelessly pushing Alice? Yes. Being in a weakened condition and in need of crutches is a foreseeable consequence of a serious injury that results from being pushed. It was this weakened condition that led to the fall Alice took while on crutches. Therefore, Jim is the legal cause of the wrist injury. Since he is also its actual cause, we can conclude that he is the proximate cause of the wrist injury.

3. **Pneumonia.** But for the push by Jim, Alice would not have had pneumonia, because she would not have been in a generally run-down condition. Jim, therefore, is the actual cause of the pneumonia. Was the pneumonia a foreseeable consequence of the original risk Jim took by carelessly pushing Alice? Yes. Being in a generally run-down condition is a foreseeable consequence of a serious injury that results from being pushed. It was this generally run-down condition that resulted in Alice’s catching pneumonia. Therefore, Jim is the legal cause of the pneumonia. Since he is also its actual cause, we can conclude that he is the proximate cause of the pneumonia.

Next, we’ll take a closer look at the more complex example presented at the beginning of the chapter.

**EXAMPLE**

Sam drives his car down the street at an excessive rate of speed and hits Paul’s car, breaking Paul’s leg. While Paul is lying in the road, another car accidentally runs over Paul’s arm. When the ambulance finally arrives and takes Paul to the hospital, a doctor carelessly treats Paul, resulting in an injury to Paul’s knee. After being treated, Paul discovers that someone at the hospital has stolen his wallet.

Assume that we have been able to establish that Sam is the actual cause of the three injuries and the theft. But for Sam’s speeding, none of these results would have occurred. We now want to focus on the legal-cause component of proximate cause by asking whether the injuries and theft were foreseeable consequences of the original risk that Sam took. We will limit our discussion to Sam’s liability. Other parties might be sued in this example (e.g., the second driver and the doctor). As indicated earlier, joint and several liability might exist. But in order to concentrate on proximate cause in cases of multiple injuries or losses, we will limit our discussion to Sam’s liability.

1. **Leg injury.** Was Paul’s leg injury from Sam’s car a foreseeable consequence of the original risk Sam took by driving at an excessive rate of speed? Yes. Bodily injury is certainly a foreseeable consequence of speeding. Therefore, Sam is the legal cause of the leg injury. Since he is also its actual cause, we can conclude that he is the proximate cause of the leg injury.

2. **Arm injury.** Was Paul’s arm injury from the second car a foreseeable consequence of the original risk Sam took by driving at an excessive rate of speed? Yes. Car accidents are not unusual. Increased driving hazards are common at the scene of accidents due to rubbernecking and the quick decisions other drivers must make as they adjust to what has just occurred. In this tense environment, there is a danger of further accidents. That is what occurred here. The original risk Sam
took by speeding was to injure Paul in a street setting where accident victims are vulnerable to further accidents and injuries after an initial accident. Therefore, Sam is the legal cause of the arm injury. Since he is also its actual cause, we can conclude that he is the proximate cause of the arm injury.

3. Knee injury. Was Paul’s knee injury from the careless doctor at the hospital a foreseeable consequence of the original risk Sam took by driving at an excessive rate of speed? Yes. Sam’s carelessness placed Paul in the position of needing emergency medical attention. Medical errors or mistakes are not uncommon (see Chapter 18). One of the risks of speeding is that the injured party might be subjected to further injury while undergoing medical treatment. Therefore, Sam is the legal cause of the knee injury. Since he is also its actual cause, we can conclude that he is the proximate cause of the knee injury.

4. Stolen wallet. Was Paul’s stolen wallet a foreseeable consequence of the original risk Sam took by driving at an excessive rate of speed? No. It is highly unforeseeable that a victim of careless driving will have his or her property stolen while being treated in the hospital. This is not a foreseeable consequence of speeding. Even if we can say that Sam was a substantial factor—an actual cause—in bringing about the loss of the wallet, he is not its legal cause. The law makes a policy decision to cut off liability for this loss because it is beyond the foreseeable risk that Sam took by speeding. Because Sam is not the legal cause of the loss of the wallet, he is not the proximate cause of the loss. Proximate cause requires both components to be present: actual cause and legal cause.

ASSIGNMENT 15.3

In the example involving Sam driving at an excessive rate of speed and hitting Paul, would Sam be the proximate cause of the lost wallet if it was stolen while Paul was lying on the street immediately after the accident?

ASSIGNMENT 15.4

Peter is a passenger in a bus that is carelessly speeding. The bus crashes into another car. Peter is forced forward, injuring his arm. Moments after the crash, lightning strikes a tree, which falls on the part of the bus where Peter is sitting, injuring his leg. Is the bus company the proximate cause of the arm injury and the leg injury?

Mitigation of Damages

The conclusion that defendants are liable for the injuries they proximately cause is subject to the requirement that the plaintiff must take reasonable steps to mitigate the consequences of those injuries. This requirement is called the mitigation-of-damages rule (or the avoidable-consequences doctrine), and we will look at it in greater detail in Chapter 16. Plaintiff, for example, cannot refuse all medical attention and then hold the defendant responsible for the aggravation of the injury caused by the plaintiff’s refusal to see a doctor.

Foreseeability of the Extent and Manner of the Harm

Under the foreseeability test of legal cause, there is a cutoff of liability for unforeseeable consequences of the original risk. There are two important qualifications of this cutoff test that pertain to the extent and manner of the harm that results.
Foreseeability of the Extent of the Harm: Thin-Skull Rule

The extent of the plaintiff's injury does not have to be foreseeable if the general nature or type of harm was foreseeable. This is the effect of the thin-skull rule (also called the eggshell-skull rule). A thin skull is a generic phrase that means a high vulnerability to any particular kind of harm. The cutoff test of legal cause will not prevent liability in thin-skull cases.

EXAMPLE
Dave carelessly runs down the corridor and bumps into Pauline as she is turning the corner. Pauline is one month pregnant at the time. The accidental bump causes a miscarriage.

EXAMPLE
Alice is driving thirty-five mph in heavy traffic. When she carelessly takes her eyes off the road, she runs into the rear of the Jack's car. Only a slight dent is put in the car. Jack, however, dies because the collision activated a rare disease.

There is no doubt that Dave is the actual cause of Pauline’s miscarriage and Alice is the actual cause of Jack’s death. What about legal cause? Is there any reason to cut off liability because of the unforeseeability of the extent of the injuries that resulted? In both examples, Pauline and Jack had a very high vulnerability to injury—they have what is called thin skulls. Pauline’s miscarriage and Jack’s death were not foreseeable, but the extent of the harm need not be foreseeable if the general nature or type of harm they received was foreseeable. The general nature or type of harm that was foreseeable to Dave from the corridor bump and to Alice from the rear-end collision was bodily harm of the victims. Miscarriage and death are bodily harms. Therefore, Dave is the legal cause of Pauline’s miscarriage and Alice is the legal cause of Jack’s death. Since both components of proximate cause have been met, we can conclude that Dave is the proximate cause of the miscarriage and Alice is the proximate cause of the death. As courts often say, the defendant “takes the plaintiff as he finds him.” There is no cutoff of liability. Defendants will be deemed to be the proximate cause of the foreseeable and unforeseeable consequences of their negligence if those consequences fit within the general nature or type of harm that was foreseeable.

A plaintiff with a thin skull may have a preexisting condition, consisting of a disease, injury, or other medical problem that existed before the defendant’s tort against the plaintiff. The defendant, of course, will not be responsible for the original existence of the preexisting condition, but will be responsible for its aggravation—for making it worse—even if the preexisting condition was not foreseeable.

Suppose that the plaintiff goes insane or commits suicide because of despair over the initial injuries caused by the defendant. Courts differ as to whether the defendant will be held responsible. Some courts would say that insanity or suicide is so extreme that the cutoff principle of proximate cause will prevent liability for such a drastic consequence. (See the discussion of superseding cause later in the chapter.) Other courts, however, will carry the thin-skull rule to its logical extreme and hold that the defendant is the proximate cause of the insanity or suicide if such results are within the general nature or type of harm that was foreseeable from the original risk the defendant took.

The thin-skull rule is not limited to negligence. Defendants who commit intentional torts (e.g., battery) can also be liable for foreseeable and unforeseeable injuries that result from their intentional torts.

thin-skull rule If the general nature or type of harm was a foreseeable consequence of the original risk, the defendant will be liable for the harm even if the extent of the harm was not foreseeable. Also called eggshell-skull rule.

preexisting condition A medical problem that existed prior to the defendant’s wrongful conduct; the defendant may have caused an aggravation of the problem but not the problem itself. (See glossary for an additional definition.)
ASSIGNMENT 15.5

Richard Williamson is an attorney who represents Leo Crowley in a breach-of-contract case involving millions of dollars. Crowley loses the case because Williamson failed to file the complaint before the statute of limitations expired. (Assume that this failure constitutes negligence and legal malpractice, which we will discuss in Chapter 18.) Crowley is so despondent at the loss of his case that he commits suicide. Is Williamson the proximate cause of the suicide?

manner-of-injury rule  The manner of the plaintiff's injury does not have to be foreseeable if the general nature or type of harm was foreseeable.

Foreseeability of the Manner of the Harm: Manner-of-Injury Rule

The manner of the plaintiff’s injury does not have to be foreseeable if the general nature or type of harm was foreseeable. This is the effect of the manner-of-injury rule.

EXAMPLE

Defendant is carelessly navigating a steamboat that rams into a bridge. The plaintiff was one of the workers repairing the bridge at the time. When the boat hit the bridge, the plaintiff fell onto a blowtorch he was using, resulting in blindness in both eyes.

In this case, it was foreseeable that some damage to the bridge and some kind of injury to someone on the bridge would occur from the careless navigation of a steamboat in the area of the bridge. Personal and property damage was foreseeable. But the manner in which the injury would result in this particular plaintiff—falling on the blowtorch—was not foreseeable to the defendant, who did not even know that the plaintiff was there working with a torch. Drowning or a severe concussion to anyone on the bridge may have been foreseeable to the defendant, but the manner in which the injury occurred in this case was not. The rule in such cases is that the manner in which an injury occurs does not have to be foreseeable in order for the defendant to be the proximate cause of the injury, as long as the general nature or type of harm was foreseeable. The general nature or type of harm that was foreseeable in the bridge case was bodily injury and property damage. This is sufficient to cover the blowtorch mishap. As one scholar commented, if “I foresee the risk in general, I need not foresee the details.”

The defendant is liable for the harms he negligently caused so long as a reasonable person in his position should have recognized or foreseen the general kind of harm the plaintiff suffered.

The American Law Institute, in its Restatement (Second) of Torts, would agree that the particular manner of the occurrence of the harm need not be foreseeable in order for the defendant to be the proximate cause of the injury (or as the Restatement would phrase it, the “legal cause” of the injury). It is important to the Restatement (and to the courts that follow it) to assess whether the injury was a normal or ordinary consequence of the risk that the defendant created. Liability should be cut off, according to this view, only if we can say that the harm that resulted was unusually rare, or what it calls “highly extraordinary.”

ASSIGNMENT 15.6

Tom, an adult, gives a loaded gun to Bob, a young boy. Tom asks Bob to deliver the gun to Jack. Bob takes his friend Bill with him to make the delivery. Upon arrival, Bob accidentally drops the gun on Bill’s toe. The toe breaks. When the gun falls, it discharges immediately, killing Jack. Bob suffers a nervous breakdown over the incident. Is Tom the proximate cause of Bill’s broken toe? Of Jack’s death? Of Bob’s nervous breakdown?
As we examine proximate cause, it is important that this element be kept in perspective with the other elements of negligence discussed thus far—duty (Chapter 13) and breach of duty (Chapter 14). A discussion of proximate cause assumes that the plaintiff has already been able to establish that a duty of reasonable care (the first element) exists between the plaintiff and defendant, and that the defendant has breached that duty (the second element) by unreasonable conduct. Note the role that foreseeability plays in each element:

**Element I: Duty**
Defendant owes plaintiff a duty of reasonable care if the defendant’s act or omission has created a *foreseeable* risk of injury or other loss to the plaintiff’s person or property.

**Element II: Breach of Duty**
Defendant breaches a duty of reasonable care by failing to take precautions against injury to the plaintiff when the *foreseeability* of serious injury outweighs the burden or inconvenience of taking those precautions (see Exhibit 14–4 in Chapter 14).

**Element III: Proximate Cause**
Defendant is the proximate cause of an injury if the defendant is its actual cause (cause in fact) and its legal cause (the injury was a *foreseeable* consequence of the original risk the defendant took).

The foreseeability analysis that you must do to determine whether a duty exists (first element) is substantially the same foreseeability analysis that you must do to determine whether proximate cause exists (third element), or more accurately, whether the cutoff test of proximate cause will prevent the defendant from being liable for harm he or she has caused in fact. The very definition of the cutoff test requires you to refer back to the original risk created by the defendant. The relationship between the first element, duty, and the third element, proximate cause, is so close that you will sometimes see the proximate cause issue phrased in terms of duty: was the defendant under a duty to protect the plaintiff against the injury that resulted?

**Intervening Causes**
An *intervening cause* is a new and independent force that produces harm after the defendant’s act or omission. We have already looked at intervening causes in some of the examples we have studied in this chapter. Here we examine such causes more closely.

**EXAMPLE**
Car #1 crashes into plaintiff’s truck. While the plaintiff’s truck is disabled in the middle of the road, car #2 crashes into the truck, but does not stop. Plaintiff sues car #1.

The plaintiff’s truck has been damaged twice, once by the defendant (car #1) and once by the intervening cause (car #2), which has disappeared. Assume that the damage from the defendant’s initial crash is $1,000 and that the damage from the crash of the intervening cause is $700. Is the defendant liable for the entire $1,700? To determine when a defendant is liable for harm from intervening causes, we must first distinguish four kinds of intervening causes:

- An *intervening force of nature* is a subsequent natural occurrence that is independent of human interference; it is an *act of God*. For example: The ABC Company carelessly builds a dam. Slight cracks become visible. A month...
after the dam is built, a severe tornado hits the area and the dam collapses. The tornado is an intervening force of nature.

- An **intervening innocent human force** is a subsequent occurrence caused by a human being who was not careless or wrongful. For example: Cynthia carelessly runs into the plaintiff as he is crossing the street. While the plaintiff is on the ground, Tom’s car hits the plaintiff. Tom was driving carefully when he hit the plaintiff. Tom is an intervening innocent human force.

- An **intervening negligent human force** is a subsequent occurrence negligently caused by a human being. For example: Alex carelessly runs into the plaintiff. Plaintiff is rushed to the hospital but is given negligent medical treatment by a nurse, causing further injury. The nurse is an intervening negligent human force.

- An **intervening intentional or criminal human force** is a subsequent occurrence caused intentionally or criminally by a human being. For example: George carelessly runs into the plaintiff. While at the hospital, the plaintiff sees his archenemy, who tries to poison him. The archenemy is an intervening intentional or criminal human force.

If any of these intervening forces can be classified as a **superseding cause** (sometimes called a supervening cause), the cutoff test of proximate cause will prevent the defendant from being responsible for the harm caused by the intervening force. If the intervening force is not a superseding cause, then the defendant will be found to be the proximate cause of the harm caused by the intervening force. Our question, therefore, becomes, When is an intervening force a superseding cause?

An intervening force becomes a superseding cause when the harm caused by the intervening force is beyond the foreseeable risk originally created by the defendant’s unreasonable acts or omissions, and/or when the harm caused by the intervening force is considered highly extraordinary.

Hence, foreseeability and the original risk created by the defendant again become critical factors. Alternatively, the “highly extraordinary” test of the Restatement that we saw earlier can be used as a guide.

Intervening intentional or criminal human forces are often considered superseding causes, because they are either outside the scope of the original risk (and hence do not meet the test of the legal-cause component of proximate cause) or are highly extraordinary. Examine again the example just given involving the archenemy’s attempt to poison the plaintiff in the hospital. George initially hit the plaintiff in an automobile collision and is the proximate cause (i.e., the actual cause and the legal cause) of the plaintiff’s injuries sustained in the collision, but he is not the proximate cause of the poisoning. The latter was highly extraordinary and far beyond the original risk that George created by his careless driving. The injuries are the natural and foreseeable consequence of bad driving. The intentional and criminal act of poisoning is not reasonably connected with George’s bad driving.

Intervening intentional or criminal human forces are **not** always considered superseding causes. What the defendant does or fails to do may increase the risk of such an intervention, making the latter neither unforeseeable nor extraordinary. Suppose the defendant gives loaded guns to a group of juvenile delinquents, who intentionally shoot the plaintiff. Or suppose a motel fails to provide any security in a section of the motel where a burglary or robbery of patrons is highly likely, and such a burglary or robbery in fact occurs. In these cases, the intentional or criminal intervening force was part of the foreseeable risk created by the defendant’s acts or omissions. Such intervening forces are not superseding; defendant is the proximate cause of the harm produced by them.

Intervening innocent or negligent human forces are treated the same way. If their intervention was part of the original risk, then they were foreseeable and do not become superseding causes. In those cases, for example, where the plaintiff is
further injured in a hospital (whether innocently or negligently) after being brought there for treatment for the injury originally caused by the defendant, the hospital injuries are usually considered to be part of the original risk and not highly extraordinary. So, too, if the plaintiff receives a second injury by a third party (whether innocently or negligently) at the scene of the accident. In all these cases, the defendant has rendered the plaintiff highly vulnerable to further injury. It is not uncommon for individuals to receive injuries in hospitals or on the road after the first injury, although it may be highly unusual for such second injuries to be produced intentionally or criminally.

What about intervening forces of nature? Here it is important to ask whether the injury or damage is of the same kind as would have occurred if the intervening force of nature had not intervened at all. If the same kind of injury or damage results, the intervening force of nature is not a superseding cause. Suppose, for example, that the defendant carelessly leaves explosives in an area where people would be hurt by an explosion. Because of the manner of storage, assume that the explosives could detonate on their own. Hence, unreasonable storage creates a risk of serious personal and property damage to people in the area. One day, lightning strikes the explosives, leading to serious personal and property damage. The lightning may have been unforeseeable, but the damage or injury caused by the intervention of the lightning was the same kind of damage or injury that the defendant’s method of storage risked. Defendant is the proximate cause of what the lightning produced. The resulting damage or injury is not highly extraordinary, even though it may have been unforeseeable that it would occur in this way.

A different result is reached in many, but not all, courts when the intervening force of nature causes a totally different kind of injury than that originally foreseeable by the defendant’s act or omission. Suppose, for example, that a truck company carelessly delays the delivery of the plaintiff’s food goods, and the goods are destroyed by a storm. The destruction was not within the original risk created by the defendant (spoilage due to the delay), and some courts would therefore say that the intervening force of nature was a superseding cause.

The Columbine Massacre

In 1999, two high school students in Columbine, Colorado, Dylan Klebold and Eric Harris, killed twelve students and a teacher and wounded over twenty others. In the aftermath of the massacre, the police learned that Harris and Klebold were avid consumers of violent video games and movies containing obscenity, pornography, and sexual violence. One movie the pair viewed was *The Basketball Diaries*, in which a student massacres his classmates with a shotgun. Some of the Columbine survivors sued video game makers and movie producers, alleging that violent movie and video games caused the Klebold and Harris shootings. The complaint alleged that “but for the actions of the Video Game Defendants and the Movie Defendants, in conjunction with the acts of the other defendants herein, the multiple killings at Columbine High School would not have occurred.”

The video and movie defendants argued that there was no proximate cause because Klebold and Harris were superseding causes. The court agreed and dismissed the complaint:

The Video Game and Movie Defendants . . . had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers. Plaintiffs do not allege that these Defendants had any knowledge of Harris’s and Klebold’s identities, let alone their violent proclivities. Nor, for that matter, did the Video Game and Movie Defendants have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games. Plaintiffs allege that children who witness acts of violence and/or who are interactively involved with creating violence or violent
images often act more violently themselves and sometimes recreate the violence. The defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. But a speculative possibility is not enough. Foreseeability is the touchstone of proximate cause and the superseding cause doctrine. A superseding cause relieves the original actor of liability when the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor’s conduct. . . . I hold in this case that Harris’s and Klebold’s intentional violent acts were the superseding cause of [the deaths]. Moreover . . . their acts were not foreseeable. Their criminal acts, therefore, were not within the scope of any risk purportedly created by Defendants.7

OVERVIEW OF STEPS NEEDED TO ANALYZE PROXIMATE CAUSE

- Actual Cause
  Apply the two tests for actual cause. First ask if the plaintiff’s injury or loss would have occurred but for the acts or omissions of the defendant. Then apply the substantial-factor test, especially when more than one cause may have produced the plaintiff’s injury or loss. Was the defendant’s act or omission a substantial factor in producing the plaintiff’s injury or loss? Plaintiff can establish actual cause by either test.

- Burden of Proof
  Determine if there is enough evidence for the fact finder (e.g., a jury) to say it is more likely than not that but for the defendant’s act or omission, the injury or loss would not have occurred. Or determine if there is enough evidence for the fact finder to say that it is more likely than not that the defendant’s act or omission was a substantial factor in producing the plaintiff’s injury or loss. If there is enough evidence to meet either test, then the most common standard of proof (preponderance of the evidence) has been met.

- Legal Cause
  Turn the clock back to the time of the defendant’s original act or omission (e.g., speeding). What risk did the defendant take by this act or omission? Was a foreseeable consequence of this risk the kind of injury or loss that the plaintiff suffered? If so, defendant was the legal cause of the injury or loss. If the defendant was the actual and the legal cause, he or she was the proximate cause.

- Thin-Skull Rule
  If the plaintiff has a thin skull (i.e., a high vulnerability to any particular kind of harm) so that the extent of his or her injury was not foreseeable, determine whether the injury fits within the general nature or type of harm that was a foreseeable consequence of the original risk. If so, there is no cutoff of liability.

- Manner-of-Injury Rule
  If the manner in which the plaintiff’s injury occurred was not foreseeable, determine whether the injury fits within the general nature or type of harm that was a foreseeable consequence of the original risk. If so, there is no cutoff of liability.

- Intervening Human Force
  Determine whether an intervening human force was a causal factor in producing the injury or loss. If so, determine whether this human force was innocent, negligent, intentional, or criminal. Then ask if the intervening human force was within the scope of the original risk taken by the defendant. Was it foreseeable.
to the defendant? Did the human force proceed naturally out of what the defendant did or failed to do? Affirmative answers to these questions will make the defendant the proximate cause of what the intervening human force did.

- **Intervening Force of Nature**
  Determine whether an intervening force of nature was a causal factor in producing the injury or loss. If so, ask whether the injury or loss was the same kind that would have occurred if the force of nature had not intervened. If so, the defendant is still the proximate cause of the injury or loss.

- **Highly Extraordinary**
  Can it be said that the injury or loss was highly extraordinary in view of what the defendant did or failed to do? If not, then the likelihood is that a court will find that the defendant was the proximate cause of the injury or loss.

Examine both components of proximate cause (actual cause and legal cause) in the following situations to determine if the defendant was the proximate cause of the resulting injuries or other losses in the negligence suits indicated.

a. Tom carelessly drives his motorcycle into Dan’s horse. The horse goes wild and jumps over a five-foot fence (which it has never done before) and runs into traffic. Henry tries to turn his car away from the horse and accidentally hits Pete, who is a pedestrian on the sidewalk at the time of the collision. Pete sues Tom for negligence.

b. Same facts as in (a), except that Henry just misses Pete, rather than hitting him with his car. Pete and Henry begin an argument over Henry’s driving. Henry hits Pete in the jaw. Pete sues Tom for negligence.

c. Mary gives a loaded gun to a ten-year-old girl who is Mary’s neighbor. The girl takes the gun home. The girl’s father discovers the gun but fails to take it away from his daughter. The girl shoots Linda with the gun. Linda sues Mary for negligence.

d. Harry carelessly hits Helen, a pedestrian, with his car in a busy intersection downtown. While Helen is lying on the ground, a person in another car accidentally hits Helen, causing further injuries. This other person is a hit-and-run driver who does not stop after hitting Helen. Helen sues Harry for negligence.

e. Pat carelessly leaves her keys in her car. A thief gets in the car and starts to speed away. Moments later, the thief hits Kevin with the car one block away from where Pat parked the car. Kevin sues Pat for negligence.

f. Same facts as in (e), except that the thief hits Kevin one month after he has stolen the car, in another section of the city.

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**CASE**

**Mussivand v. David**

45 Ohio St. 3d 314, 544 N.E.2d 265 (1989)

Supreme Court of Ohio

**Background:** George David has a venereal disease, but does not tell the woman with whom he is having an affair. She contracts the disease from him and then gives it to her husband, Tofigh Mussivand. The latter sues David for negligence in failing to tell his wife that he had the disease. This failure allegedly caused Mussivand to contract the disease. The trial court granted David’s motion to dismiss. The case is now on appeal before the Supreme Court of Ohio.

**Decision on Appeal:** The case should not have been dismissed. A husband can bring an action against his wife’s paramour (lover), alleging that the paramour was
negligent in failing to notify the wife that the paramour was at risk of passing venereal disease to the wife, who in turn could (and did) pass it to the husband.

OPINION OF COURT

Justice RESNICK delivered the opinion of the court. . . .

The complaint basically states that [Mussivand] contracted a venereal disease due to the acts of [David]. . . . A “venereal disease” is defined as “a contagious disease, most commonly acquired in sexual intercourse or other genital contact; the venereal diseases include syphilis, gonorrhea, chancroid, granuloma inguinale, lymphogranuloma venereum, genital herpesvirus infection, and balanitis gangraenosa.” Dorland’s Illustrated Medical Dictionary (26 Ed. 1985) 394. . . .

Recently several jurisdictions have allowed tort actions for negligent, fraudulent or intentional transmission of genital herpes where the person infected with genital herpes fails to disclose to his or her sexual partner that he or she is infected with such a disease. Maharam v. Maharam (1986), 123 A.D.2d 165, 510 N.Y.S.2d 104; Long v. Adams (1985), 175 Ga. App. 538, 333 S.E.2d 852. Thus, courts have placed upon persons who have a venereal disease such as genital herpes or gonorrhea the duty to protect others who might be in danger of being infected by such a disease. In other words, people with a venereal disease have a duty to use reasonable care to avoid infecting others with whom they engage in sexual conduct. . . .

David argues that possibly Mussivand’s wife, not he, was the cause of Mussivand’s injuries. “Whether an intervening act breaks the causal connection between negligence and injury, thus relieving one of liability for his negligence, depends upon whether that intervening cause was a conscious and responsible agency which could or should have eliminated the hazard, and whether the intervening cause was reasonably foreseeable by the one who is guilty of the negligence. . . .” Cascone v. Herb Kay Co. (1983), 6 Ohio St. 3d 155, 451 N.E.2d 815.

In Jeffers v. Olexo (1989), 43 Ohio St. 3d 140, 144, 539 N.E.2d 614, 618, we equated foreseeability with proximate cause. This is misleading since they are not equatable. Rather, in order to establish proximate cause, foreseeability must be found. In determining whether an intervening cause “breaks the causal connection” between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by one who was guilty of the negligence. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. Thus we do not equate foreseeability with proximate cause. Instead, if David knew his paramour was married, then it can be said that it was reasonably foreseeable that she would engage in sexual intercourse with her husband. In addition, if David did not inform her of the fact that he had a venereal disease, she could not be an intervening cause and, as such, David’s liability to Mussivand would not be terminated. David’s negligence would then be the proximate cause of Mussivand’s injury.

We do not, however, mean to say that David, subsequent to his affair with Mussivand’s wife, will be liable to any and all persons with whom she may have sexual contact. A spouse, however, is a foreseeable sexual partner. Furthermore, the liability of a person with a sexually transmissible disease to a third person, such as a spouse, would be extinguished as soon as the paramour spouse knew or should have known that he or she was exposed to or had contracted a venereal disease. She or he then would become a “conscious and responsible agency which could or should have eliminated the hazard.” Cascone, supra. For example, if David told Mussivand’s wife he had a venereal disease or if she noticed symptoms of the disease on herself, she then would have the duty to abstain from sexual relations or warn her sexual partner. Whether Mussivand’s wife knew, or should have known, of her exposure to a venereal disease is a question of fact to be decided by the trier of fact. . . .

For the foregoing reasons we cannot say that Mussivand could not prove any set of facts entitling him to recover in negligence from David. Accordingly, the trial court erred in granting David’s motion to dismiss. . . .

ASSIGNMENT 15.8

a. What test does the court use to determine when an intervening cause breaks the chain of causation and cuts off liability?

b. Why did the court say that Mrs. Mussivand may not have broken the chain of David’s causation?

c. Suppose David does tell his paramour (Mrs. Mussivand) that he has VD. She tells him she doesn’t care because this is the last time she will have sex with him before returning to her husband. She says, “I will never tell my husband about you or our affair.” Mr. Mussivand contracts VD from her. Is David the proximate cause of Mr. Mussivand’s VD?

d. Could Mr. Mussivand sue Mrs. Mussivand for negligence?
Gaines-Tabb v. ICI Explosives, USA, Inc.
160 F.3d 613 (1998)
United States Court of Appeals, Tenth Circuit

Background: In 1995, a terrorist bomb killed 163 people when it exploded at the Alfred P. Murrah Federal Building in Oklahoma City. Timothy McVeigh and Terry Nichols were later convicted of murder for their role in the bombing. The material allegedly used to construct the bomb was ammonium nitrate (AN) that was manufactured by ICI Explosives and eventually sold as fertilizer by Mid-Kansas Co-op. It was purchased in Kansas from Mid-Kansas Co-op by either McVeigh or Nichols. This suit was brought on behalf of victims of the bombing. They sued ICI for negligence, among other theories. The trial court (district court) dismissed the negligence action. The case is now on appeal before the United States Court of Appeals for the Tenth Circuit.

Decision on Appeal: The judgment for ICI is affirmed. Proximate cause has not been established. The terrorist’s act was a supervening cause that cut off the manufacturer’s liability.

OPINION OF COURT

Judge EBEL delivered the opinion of the court . . . .

Individuals injured by the April 19, 1995, bombing of the Alfred P. Murrah Federal Building (“Murrah Building”) in Oklahoma City, Oklahoma, filed suit against the manufacturers of the ammonium nitrate allegedly used to create the bomb . . . . [The main cause of action asserted in the complaint was negligence.] The district court dismissed the complaint for failure to state a claim upon which relief may be granted, and the plaintiffs appealed. We affirm. Specifically, we hold that: plaintiffs cannot state a claim for negligence . . . . because they cannot show, as a matter of law, that defendants’ conduct was the proximate cause of their injuries. . . .

ICI manufactures ammonium nitrate (“AN”). Plaintiffs allege that AN can be either “explosive grade” or “fertilizer grade.” According to plaintiffs, “explosive-grade” AN is of low density and high porosity so it will absorb sufficient amounts of fuel or diesel oil to allow detonation of the AN, while “fertilizer-grade” AN is of high density and low porosity and so is unable to absorb sufficient amounts of fuel or diesel oil to allow detonation.

Plaintiffs allege that ICI sold explosive-grade AN mislabeled as fertilizer-grade AN to Farmland Industries, who in turn sold it to McPherson, Kansas. Plaintiffs submit that a “Mike Havens” purchased a total of eighty 50-pound bags of the mislabeled AN from Mid-Kansas. According to plaintiffs, “Mike Havens” was an alias used either by Timothy McVeigh or Terry Nichols, the two men tried for the bombing. Plaintiffs further allege that the perpetrators of the Oklahoma City bombing used the 4000 pounds of explosive-grade AN purchased from Mid-Kansas, mixed with fuel oil or diesel oil, to demolish the Murrah Building . . . .

Plaintiffs allege that ICI was negligent in making explosive-grade AN available to the perpetrators of the Murrah Building bombing. Under Oklahoma law, the three essential elements of a claim of negligence are: “(1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) the plaintiff’s injury resulted from the breach of the duty.” Lockhart v. Loosen, 943 P.2d 1074, 1079 (Okla. 1997) . . . .

“Whether the complained of negligence is the proximate cause of the plaintiff’s injury is dependent upon the harm (for which compensation is being sought) being the result of both the natural and probable consequences of the primary negligence.” Lockhart, 943 P.2d at 1079 . . . . Under Oklahoma law, “the causal nexus between an act of negligence and the resulting injury will be deemed broken with the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable.” Minor v. Zidell Trust, 618 P.2d 392, 394 (Okla. 1980). Such an intervening cause is known as a “supervening cause.” Id. To be considered a supervening cause, an intervening cause must be: (1) independent of the original act; (2) adequate by itself to bring about the injury; and (3) not reasonably foreseeable. See id.; Henry v. Merck and Co., 877 F.2d 1489, 1495 (10th Cir. 1989).

“When the intervening act is intentionally tortious or criminal, it is more likely to be considered independent.” Id.

“A third person’s intentional tort is a supervening cause of the harm that results—even if the actor’s negligent conduct created a situation that presented the opportunity for the tort to be committed—unless the actor realizes or should realize the likelihood that the third person might commit the tortious act.” Lockhart, 943 P.2d at 1080 . . . . If “the intervening act is a reasonably foreseeable consequence of the primary negligence, the original wrongdoer will not be relieved of liability.” Id. at 1079 . . . .

“In determining questions relating to the foreseeability element of proximate cause, the courts have uniformly applied what might be termed a practical, common sense test, the test of common experience.” 57A Am. Jur. 2d Negligence § 489 (1989). Oklahoma has looked to the Restatement (Second) of Torts § 448 for assistance in determining whether the intentional actions of a third party constitute a supervening cause of harm. See Lay v. Dworman, 732 P.2d 455, 458–59 (Okla. 1986). Section 448 states:

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

Comment b to § 448 provides further guidance in the case before us. It states:

There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these two sorts, an intentionally criminal or tortious act of the third person is not a superseding cause which relieves the actor from liability.

Thus, under comment b, the criminal acts of a third party may be foreseeable if (1) the situation provides a temptation to which a “recognizable percentage” of persons would yield, or (2) the temptation is created at a place where “persons of a peculiarly vicious type are likely to be.” There is no indication that a peculiarly vicious type of person is likely to frequent the Mid-Kansas Co-op, so we shall turn our attention to the first alternative.

We have found no guidance as to the meaning of the term “recognizable percentage” as used in § 448, comment b. However, we believe that the term does not require a showing that the mainstream population or the majority would yield to a particular temptation; a lesser number will do. Equally, it does not include merely the law-abiding population. In contrast, we also believe that the term is not satisfied by pointing to the existence of a small fringe group or the occasional irrational individual, even though it is foreseeable generally that such groups and individuals will exist.

We note that plaintiffs can point to very few occasions of successful terrorist actions using ammonium nitrate, in fact only two instances in the last twenty-eight years—a 1970 bombing at the University of Wisconsin-Madison and the bombing of the Murrah Building. Due to the apparent complexity of manufacturing an ammonium nitrate bomb, including the difficulty of acquiring the correct ingredients (many of which are not widely available), mixing them properly, and triggering the resulting bomb, only a small number of persons would be able to carry out a crime such as the bombing of the Murrah Building. We simply do not believe that this is a group which rises to the level of a “recognizable percentage” of the population. Cf. Restatement (Second) of Torts § 302B, comment d (1965) (“Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.”).

As a result, we hold that as a matter of law it was not foreseeable to defendants that the AN that they distributed to the Mid-Kansas Co-op would be put to such a use as to blow up the Murrah Building. Because the conduct of the bomber or bombers was unforeseeable, independent of the acts of defendants, and adequate by itself to bring about plaintiffs’ injuries, the criminal activities of the bomber or bombers acted as the supervening cause of plaintiffs’ injuries. Because of the lack of proximate cause, plaintiffs have failed to state a claim for negligence.

We AFFIRM the dismissal of plaintiffs’ complaint.

In the complaint, Plaintiffs allege in a general way the detonation of AN fertilizer bombs in “Europe and especially Northern Ireland” prior to 1970 and the unsuccessful attempt in the United States to use AN to bomb certain facilities in New York.

ASSIGNMENT 15.9

a. What negligent act was alleged against ICI?

b. Would the result in Gaines-Tabb have been different if McVeigh or Nichols told the clerk at the Mid-Kansas Co-op that the AN was going to be used to “make the government pay for its crimes”?

c. The Mussivand case held that proximate cause could be established. The Gaines-Tabb case held the opposite. Explain the difference. Are the two cases consistent?
CHAPTER 15  NEGLIGENCE: ELEMENT III: PROXIMATE CAUSE

CHECK THE CITE

Palma was in a BP gas station making a purchase. He was injured in an altercation with someone who was apparently attempting to siphon gas from one of the pumps. Palma then sued BP for negligence. What acts of negligence did Palma allege against BP? Why did the court conclude that BP was not the proximate cause of the injuries Palma received in the altercation? Read the case of Palma v. BP Products North America, Inc., 594 F. Supp. 2d 1306 (S.D., Fla. 2009). To read the opinion online (“Palma v. BP Products North America”): (1) Run a Google search for the names of the parties. (2) Run a citation search (“594 F.Supp. 2d 1306”) or a party search (Palma BP Products) in the Legal Opinions and Journals database of Google Scholar (scholar.google.com).

PROJECT

In Google, Bing, or another general search engine, run one of the following searches:

1. “Oklahoma bombing” causation
2. Columbine causation

Make a list of the different causation issues and defendants involved in the disaster you selected. Briefly describe what causation issue was raised and against which defendants. You can consult as many websites as you wish, but you must quote from at least three separate sites.

ETHICS IN A TORTS PRACTICE

You are a paralegal working in the law office of O’Brien & O’Brien. When you were hired, you were never asked if you had taken an ethics course in your paralegal curriculum and none of the attorneys at the firm have ever discussed ethical rules with you. To your knowledge, there has never been an ethical violation at the firm since you have been there. Does this silence about ethics constitute a violation of ethics even if the firm is never charged with violating the ethical code?

SUMMARY

Proximate cause is a cause that is legally sufficient to impose liability for the results of one’s wrongful act or omission. There are two components of proximate cause: actual cause and legal cause. Actual cause answers the question of who was the cause in fact of the harm or other loss; legal cause answers the question of whether the harm or other loss was the foreseeable consequence of the original risk. States differ in their use of terminology in this area of the law. (In some states proximate cause means only legal cause; in such states, actual cause is treated separately.) Legal cause determines when liability is cut off for injuries or other losses for which the defendant was the actual cause. There are two tests for actual cause. First, is it more likely than not that but for the defendant’s unreasonable acts or omissions, the injury or loss would not have been suffered by the plaintiff? (This test is used when there is only one alleged cause.) Second, is it more likely than not that the defendant’s unreasonable acts or omissions were a substantial factor in producing the injury or loss suffered by the plaintiff? (This test is often used when there is more than one alleged cause.)

In assessing actual cause, our common sense relies on time (how soon after the defendant’s act or omission did the injury occur?), space (how close was the defendant’s act or omission to the area where the injury occurred?), and historical data.
(in the past, have acts or omissions similar to the defendant’s led to this kind of injury?). Time, space, and historical evidence, however, are almost never conclusive on the issue of actual cause; they are merely starting points. The standard of proof used by the fact finder to decide the actual-cause issue is preponderance of the evidence. Under the mitigation-of-damages rule, injured parties must take reasonable steps to alleviate their injury. A wrongdoer will not be liable for any increase or aggravation of injury caused by the injured party’s failure to take such steps.

The legal-cause component of proximate cause is determined by asking whether the plaintiff’s injury was the foreseeable consequence of the original risk the defendant took by his or her carelessness. Under the thin-skull rule, if the general nature or type of harm was a foreseeable consequence of the original risk, the defendant will be liable for the harm even if the extent of the harm was not foreseeable. Under the manner-of-injury rule, if the general nature or type of harm was a foreseeable consequence of the original risk, the defendant will be liable for the harm even if the manner in which the harm occurred was not foreseeable.

An intervening cause is a new and independent force that produces harm after the defendant’s act or omission. It can be an intervening force of nature (act of God), an intervening human force, an intervening negligent human force, or an intervening intentional or criminal human force. An intervening cause is a superseding cause if it is beyond the foreseeable risk originally created by the defendant's unreasonable acts or omissions. Superseding causes are those that lead to injuries or losses that are highly extraordinary.

### KEY TERMS

- **proximate cause**: 258
- **standard of proof**: 263
- **aggravation**: 268
- **judgment proof**: 258
- **weight of the evidence**: 264
- **thin-skull rule**: 269
- **joint and several liability**: 258
- **preponderance of the evidence**: 264
- **preexisting condition**: 269
- **actual cause**: 259
- **toxic tort**: 266
- **manner-of-injury rule**: 270
- **but-for test**: 259
- **general causation**: 266
- **intervening cause**: 271
- **substantial-factor test**: 259
- **specific causation**: 266
- **act of God**: 271
- **hypothesis**: 261
- **mitigation-of-damages rule**: 268
- **superseding cause**: 272

### REVIEW QUESTIONS

1. What is proximate cause?
2. What is actual cause?
3. What is legal cause?
4. What are some of the major differences in how different courts use the terminology of proximate cause?
5. When is someone judgment proof?
6. What is the but-for test of actual cause?
7. What is the substantial-factor test of actual cause, and when is it used?
8. What is the role of time evidence in the determination of actual cause?
9. What is meant by *post hoc ergo propter hoc*?
10. What is the role of space evidence in the determination of actual cause?
11. What is the role of historical evidence in the determination of actual cause?
12. How can time, space, and historical evidence be misinterpreted?
13. What is the preponderance of the evidence?
14. What is a toxic tort?
15. What is the distinction between general causation and specific causation in toxic torts cases?
16. What is the test for legal cause?
17. What is an intervening cause?
18. What is an intervening force of nature?
19. What is an act of God?
20. What is an intervening innocent human force?
21. What is an intervening negligent human force?
22. What is an intervening intentional or criminal human force?
23. When is an intervening cause a superseding cause?
CHAPTER 15 NEGLIGENCE: ELEMENT III: PROXIMATE CAUSE

HELPFUL WEBSITES

- Proximate Cause
tortssymposium.law.wfu.edu/papers/zipursky.pdf
works.beypress.com/mark_grady/6
en.wikipedia.org/wiki/Proximate_cause
law.jrank.org/pages/8783/Negligence-Proximate-Cause.html
www.expertlaw.com/library/personal_injury/
negligence.html

ENDNOTES

4. Id. at p. 466.
5. American Law Institute, Restatement (Second) of Torts § 435(2)(1965).

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