UCLA
UCLA Law & Economics Series

Title
Proximate Cause Decoded

Permalink
https://escholarship.org/uc/item/2313h061

Author
Grady, Mark F.

Publication Date
2002-12-01

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

PROXIMATE CAUSE DECODED

Mark F. Grady*

Copyright (c) 2002 Regents of the University of California; Mark F. Grady

Some have seen the doctrine of proximate cause as an especially incoherent feature of negligence law. This Article demonstrates that the doctrine is far more regular than many have supposed. Proximate cause is really two doctrines at the same time, one directed toward cases with multiple causes and another directed toward cases with multiple risks. Each doctrine includes distinct paradigms leading to either liability or nonliability. When we sort problem cases between these paradigms, we can reliably predict how the courts will decide them.

Introduction 2
I. Proximate Cause is a Dualism 5
II. Five Direct Consequences Paradigms 12
A. Divide et Impera 14
1. Liability Paradigm NIT (No Intervening Tort) 15
2. Liability Paradigm EFR (Encourage Free Radicals) 18
3. Liability Paradigm DCE (Dependent Compliance Error) 27
4. Nonliability Paradigm NCP (No Corrective Precaution) 31
5. Nonliability Paradigm IIT (Intervening Independent Tort) 35
B. Rules for Breaking Direct Consequences Code 39
III. Five Reasonable Foresight Paradigms 40
A. Divide et Impera 40
1. Nonliability Paradigm MSR (Minimal Systematic Relationship) 41
2. Liability Paradigm RFH (Reasonably Foreseeable Harm) 46
3. Nonliability Paradigm RIR (Reasonable Ignorance of the Relationship) 49
4. Nonliability Paradigm CLMH (Correlated Losses/Moral Hazard) 51
5. Nonliability Paradigm AS (Adverse Selection) 52
B. Rules for Breaking Reasonable Foresight Code 53
Conclusion 54

* Dean and University Professor, George Mason University School of Law. This Article is dedicated to Professor Gary Schwartz, who helped me with it when I was a professor at UCLA School of Law. He was the best colleague a torts professor could ever have. Besides Gary, I also thank Ken Simons and Ernest Weinrib for their helpful comments. Finally, I owe a great debt to Professor Wesley J. Liebeler to whom I submitted the first draft of this Article, long ago, as a student in his UCLA Law and Economics seminar.

Introduction

No common law doctrine is more puzzling than the proximate cause limitation on negligence liability. What is it and what does it mean? The doctrine has spawned a huge legal literature and has inspired numerous scholarly battles, many of them involving issues and claims that go way beyond proximate cause. Perhaps as a result, many believe that proximate cause is basically incoherent, that its cases cannot be predicted, and even that they illustrate some fundamental disorder of the common law.

This Article will argue that proximate cause is far more coherent and predictable than many of its critics allege. Here is the core idea: People cannot always avoid negligence. Remember that civil negligence, unlike its criminal counterpart, is basically objective: Did the defendant use the precaution legally required? In other words, did the driver check his blind spot before he changed lanes; did the auto repairperson remember to tell his customer that a tire looked worn; did the store employee notice that a customer had leaned a heavy bolt of fabric against the counter? Civil courts, again unlike their criminal counterparts, usually do not care why the defendant lapsed. Was he tired; was she normally careful; was he understandably upset? None of these questions make a difference when the issue is whether the defendant committed a breach of duty.[1]

Given that the basic standard is so exacting, it is impossible for people to make sure that they will meet it. Despite their best efforts, they will be negligent some of the time. Doctors, for example, have a very good understanding of this reality, as do the rest of us. Though we do not mean to be negligent, we buy insurance in case we slip up.

What are the implications of the courts' harsh standard? First and most obviously, unless

[1] Although irrelevant to breach of duty, these questions can make a difference when the issue is punitive damages or even proximate cause, as I demonstrate below.

liability is limited in some way, people will avoid the activities in which their own breach of duty is predictably likely or especially costly, even if these activities are valuable to them and to the community. Probably the most obvious limitation is that a person should not be liable when the only connection between his lapse and the plaintiff's injury was the purest chance, a total coincidence.

A little less obviously, another implication of the courts' harsh breach-of-duty standard is that others who come along later should be encouraged to recognize prior negligence and neutralize it if they can. Maybe the person who created the dangerous situation, though negligent, was doing the best he could. Comprehensive duties to neutralize prior negligence would, again, make people want to stay in bed. Suppose, however, that a person has a relationship with the victim that gives him a duty of care--maybe he is the victim's employee or doctor or relative. In this case, the person who sees prior negligence about to cause harm should take steps to head it off. In an aggravated case, where the second person does nothing even though the risk was patent to this second person, it may even make good sense to cut off the first person's liability and make the second person the sole tortfeasor, especially if the first wrongdoer was trying his best.

These two implications of the law's harsh breach-of-duty standard are different, but they are consistent. The first implication--that people should be immune from the coincidental harm caused by their inadvertent negligent acts--is associated with the "reasonable foresight" doctrine of proximate cause, the position of Judge Benjamin Cardozo in Palsgraf v. Long Island Railroad Co.[2] The second implication is associated with the "direct consequences" doctrine of proximate

[2] 162 N.E. 99, 99-101 (N.Y. 1928).

cause, the position of Judge William S. Andrews in the same famous case.[3]

If it were just a matter of identifying and clarifying these two implications, proximate cause probably would not be the puzzle it remains. In fact, a number of subsidiary ideas are involved, all however basically related to the two main points just mentioned. Here is a list of the major proximate cause ideas, starting with the two already discussed:

1. People who have been inadvertently negligent should not be liable when their lapse has caused harm only through a coincidence.

2. When a person has inadvertently created a risk, a second person who also has a duty to the victim and who sees the risk should use corrective precaution to prevent the harm.

3. Responsible people should avoid creating opportunities for irresponsible people to do harm. (For example, interior decorators should relock the front door before they leave for the day.)

4. When a person has been negligent, and that negligence has put the victim in a place where he is especially vulnerable to a second person's inadvertent negligence, the first wrongdoer and the second wrongdoer should share responsibility.

These four ideas explain most of proximate cause doctrine. By looking at the cases, we can get a better notion of how these ideas come into conflict with each other and how the courts resolve the conflicts.

I. Proximate Cause Is a Dualism

Legal realists believed that judges needed to choose between conflicting formulations of a legal rule based on policy considerations. When they saw that proximate cause doctrine possessed two sets of glosses, they assumed that they needed to choose the better one as the rule

[3] Id. at 101-05 (Andrews, J., dissenting).

of decision. A good example is Judge Learned Hand's decision in Sinram v. Pennsylvania Railroad Co.,[4] in which he considered the legislative merits of the reasonable foresight test and the direct consequences test. The defendant's tug negligently smashed the barge that later sank, but after this collision, and with full notice of it, one plaintiff's bargee loaded another plaintiff's coal onto the damaged vessel without making the slightest attempt to see whether it was still seaworthy.[5] As a consequence, the underwriter's coal was lost.[6] Hand concluded that

> being free to choose, we accept the doctrine of Palsgraf v. Long Island R.R. Co. . . . [T]he bargee's neglect, though . . . a wrong, is to be taken only as part of the nexus, ignoring its tortious quality. As wrong it is irrelevant; as an unlikely event it may be critical. This we have repeatedly held. . . . Such notions aside, the usual test is said to be whether the damage could be foreseen by the actor when he acted; not indeed the precise train of events, but similar damage to the same class of persons.[7]

Judge Hand continued in this vein and argued that the defendant could not reasonably foresee that the bargee would shirk his inspection duties:

> In the case at bar it appears to us that the master of the No. 35, in approaching the barge at too great speed, or at the wrong angle, need not have considered the possibility that if he struck her, she might be injured, that her bargee might be so slack in his care of her as to let her be loaded without examination, and might so expose her to the danger of sinking.[8]

---

[4] 61 F.2d 767 (2d Cir. 1932).

[5] Id. at 768.

[6] Id.

[7] Id. at 771 (citations omitted).

[8] Id.

Hand's test makes it appear as if liability depends on a large ex ante probability of the chain of events that leads to the harm. This "probability" test does indeed come from Judge Cardozo's opinion in Palsgraf v. Long Island Railroad Co., and many commentators see it as incoherent.[9] The full test is whether before the accident the type of harm that befell the plaintiff was "reasonably foreseeable," which most interpret as "sufficiently probable."[10]

A second case with facts similar to Sinram reveals the difficulty with Hand's approach. In The City of Lincoln,[11] the defendant's steamer negligently ran into the plaintiffs' barque Albatross in the North Sea. Because of the collision, the Albatross's navigation equipment was lost, including the ship's log, used to calculate distance traveled, and the steering compass.[12] The master of the Albatross made for the Thames, steering by another compass that he found in the hold. Nevertheless, because of the loss of the log he was unable to calculate the distance he ran. Subsequently, the Albatross's master spotted a lightship, which he and the crew thought was the Kentish Knock Lightship, and he turned north.[13] Unfortunately, the master and the crew were mistaken, and the Albatross immediately grounded and had to be abandoned. The registrar held

---

[9] See, e.g., Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 99-100 (1975) (asserting that "unexpected damages" cases decided in the shadow of Palsgraf "come out every which way"); Clarence Morris, Proximate Cause in Minnesota, 34 Minn. L. Rev. 185, 193 (1950) (arguing that "cases in which consequences are neither typical nor wildly freakish" are commonly determined by the quality of advocacy); William L. Prosser, Proximate Cause in California, 38 Cal. L. Rev. 369, 396 n.120 (1950) (questioning whether the foreseeability of "risk fragments" is an adequate or coherent test). Finally, although Leon Green was writing a year before the Palsgraf decision, his famous critique of proximate cause doctrine has become orthodox. He charged:

> The deplorable expenditure and stupendous waste of judicial energy which has been employed in converting this simple problem [of causation] into an insoluble riddle beggars description. Only by a patient process of eliminative analysis can the rubbish of literally thousands of cases be cleared away.

Leon Green, Rationale of Proximate Cause 4-5 (1927).

[10] See, e.g., Sinram, 61 F.2d at 771.

[11] 15 P.D. 15 (C.A. 1889).

[12] Id. at 15-16.

[13] Id. at 16.

that the grounding of the barque was not caused by any negligence by the master and crew of the Albatross and that the owners of the City of Lincoln were liable for her initial impact damages and for her sinking. The British Court of Appeal affirmed.[14] If we use Judge Hand's "probability" test as the ruling doctrine, it is difficult to distinguish The City of Lincoln from Sinram. Here are some questions that commentators have raised about the meaning and coherence of the probability test:

1. How low of an ex ante probability will yield nonliability, and is the threshold of liability different in different types of cases?

2. Of what event or events do we need to estimate the probability? Is it just the ultimate event (the sinking) or intermediate events that define how the ultimate event happened? If we are to be concerned with intermediate events, do some of them possess special importance so that, for instance, a low probability that a bargee will shirk his duties will be more exculpatory than a low probability that critical navigation equipment will be lost?

If we use the low-probability test in the way that Judge Hand recommends, where the character of intervening events is irrelevant, it is hard to see a distinction between Sinram and The City of Lincoln. In each case the defendant's negligence resulted in an initial collision and a subsequent sinking. In Sinram, the critical intervening cause that broke the chain of responsibility running to the tug captain who negligently caused the initial impact was the bargee's subsequent failure to inspect for damage before he loaded the plaintiff's coal. In The City of Lincoln, the corresponding intervening event was the loss of the navigation equipment. Nevertheless, the loss of the navigation equipment, however improbable before the accident occurred, preserved the defendant's liability for both the initial impact and the sinking. Before

---

[14] Id. at 20.

the respective collisions, was the Sinram bargee's failure to inspect really less probable than the loss of the navigation equipment in the wreck of the City of Lincoln? This is the kind of mind-boggling question that leads many to despair of the coherence of proximate cause.

As we will see, ex ante probability is not the whole story. Despite Judge Hand's claim to the contrary, the type of intervening event and the type of intervening actor are often much more significant to the issue of proximate cause than the mere ex ante probability of the intervening event, whatever it was. In fact, information that can be known only after the accident has happened is usually more important in proximate cause analysis than purely ex ante probabilities of various concatenations of events. Although Judge Hand reached the proper result--and even emphasized the critical fact, which was the bargee's reckless failure to inspect his barge--Judge Hand stated the wrong reason (the low probability that an accident would happen in that way).

Proximate cause doctrine is a dualism that applies to two situations: multiple risks and concurrent efficient causes. The type of situation determines which doctrine applies. It is even best to imagine that there are two doctrines or tests of proximate cause, one for each situation. When the situations overlap, as sometimes happens, both doctrines apply to the case, and the requirements of each must be satisfied for liability to exist. One could even think of each doctrine as presenting a different perspective on cases. Some cases look at first to entail multiple risks; on a second look, they appear to involve concurrent efficient causes. Moreover, each doctrine of proximate cause (really, each of the two basic perspectives) possesses distinct "paradigms."

The reasonable foresight doctrine[15] applies to cases of multiple risks: The same untaken

[15] This doctrine is associated with Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (Wagon Mound I), [1961] 1 A.C. 388, 426 (P.C.) (appeal taken from Austl.), and Judge Cardozo's opinion in Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928).

precaution would have reduced two different risks.[16] One risk was clearly "foreseeable" to a reasonable person in the position of the injurer prior to the accident. This can be called the primary risk. The other would not have been clearly "foreseeable." It is the ancillary risk. The reasonable foresight doctrine establishes the conditions under which an injurer who has breached a duty with respect to a primary risk will be liable for an actual harm that has arisen from an ancillary risk. I have put quotations around "foreseeable" because a better test is whether, viewing the accident ex post, we can see that a merely coincidental relationship existed between the accident and the defendant's breach of duty. Thus, Sinram truly would have raised a question under the reasonable foresight doctrine (and would have yielded nonliability under that doctrine) if, because of the negligent collision, the barge had to be taken to a special repair wharf and there was struck by lightning. In this situation, the relationship between the harm and the defendant's breach would have been coincidental. Likelihood does not play a large role in reasonable foresight cases. In one case, a defendant was liable for allowing combustible gases to accumulate in his hold, even though the most immediate cause of a subsequent explosion was lightning.[17] Whether the lightning was or was not likely made no difference. The issue was whether a systematic relationship existed between the explosion and the defendant's allowing combustible gases to form.

The direct consequences doctrine of proximate cause examines concurrent causes to see whether the person responsible for the second cause has cut off the liability of the person responsible for the first cause. A single accident can have several causes in fact, each of which

---

[16] See Mark F. Grady, Untaken Precautions, 18 J. Legal Stud. 139 (1989). In order for negligence liability to exist, the same untaken precaution, for example, having a bargee on board the barge, must simultaneously be a breach of duty, a cause in fact (a but-for cause of the harm), and a proximate cause.

[17] Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 195-96 (6th Cir. 1933).

was necessary to produce the harm. This is the definition of concurrent efficient causes. For instance, suppose that Abigail was injured when her playmate Betty jumped onto a parked truck and jostled its load so that a heavy iron bar fell onto Abigail's foot. There were two causes in fact of the accident: the truck company's failure to load the truck more securely and Betty's failure to stay off the truck. These two causes are concurrent efficient causes. The harm to Abigail's foot would not have occurred either if the company's employees had properly loaded the truck or if Betty had stayed off the truck. The direct consequences doctrine of proximate cause answers the question of when a second concurrent efficient cause (Betty's failure to stay off the truck) cuts off the liability of the person responsible for the first cause (the truck company).

It is impossible to keep the two doctrines separate because they are really just different perspectives on different cases, or maybe even different perspectives on the same case. Which doctrine applies to a case can depend on how you look at it. Nevertheless, this recognition makes the doctrine clearer, not less clear. When one first looks at the hypothetical case of Abigail and Betty, it appears to involve multiple risks. The same untaken precaution (tying down the iron bars) would have reduced the risk of a bar falling off the truck into traffic as well as the risk of a person jostling the bar onto others while the truck is parked. But, another look at the same case and it seems to entail concurrent causes. Two different precautions left untaken, by two different people, had to concur in order to produce the accident: The company employees had to load the bars improperly, and Betty had to jump up on the truck and jostle the bars. In order to take place, the accident required both causes.

Neither perspective is inherently more correct than the other. Fortunately, not every accident sets up both at the same time. Many cases involve purely multiple risks, and others purely

concurrent causes. Nevertheless, when a court gets one of these dual-perspective cases, it will require that both proximate cause doctrines be satisfied before holding the defendant liable.

Courts applying the reasonable foresight doctrine behave as if they are concerned with reducing the insurance component of the negligence rule. People cannot perfectly avoid inadvertent negligence. For this reason, as I have argued elsewhere, some inadvertent negligence is efficient.[18] The liability that remains after people have used reasonable efforts to take due care constitutes the insurance component of negligence liability; it is liability that exists without inducing any beneficial behavioral response. Everyone faces an expectation of negligence liability. Liability that is too extensive will cause people to reduce their activity levels.[19] The reasonable foresight doctrine bars liability for merely coincidental accidents. Making people liable for these accidents would punish their inadvertent lapses too severely and would cause them to reduce their activity levels.

On the other hand, courts applying the direct consequences doctrine behave as if they are seeking to accomplish several objectives in tension with one another. The first is to increase the incentive to use corrective precaution, that is, precaution that makes up for someone else's prior negligence. When someone has been inadvertently negligent, often someone else possesses an opportunity to head off the risk before it hurts the plaintiff. One objective of the courts is to cut off the original wrongdoer's liability if it will increase the incentive of someone else to use corrective precaution. This aspect of proximate cause focuses liability on the person who has the opportunity to use corrective precaution, because that person is left as a sole tortfeasor. Other objectives are in tension with this one. Notably, courts are also concerned with preserving the

---

[18] See Mark F. Grady, Efficient Negligence, 87 Geo. L.J. 397, 400-02 (1998).

[19] See Steven Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. Legal Stud. 463, 485-90 (1980).

liability of people who have negligently encouraged irresponsible people to behave negligently or worse. In addition, courts behave as if they wish to retain the liability of people who have negligently subjected others to a risk of someone else's inadvertent negligence. Applications of the direct consequences doctrine are basically trade-offs among these conflicting objectives.

The two major doctrines of proximate cause, direct consequences and reasonable foresight, are not mutually exclusive; instead, they represent different perspectives, both of which can sometimes apply to the same accident. The best way to approach proximate cause is to break it down into these two perspectives and then to subdivide the pieces. Each of the perspectives contains distinct paradigms. The paradigms overlap only across perspectives, never within them. Hence, Paradigm IIT (independent intervening tort) from the direct consequences perspective can overlap Paradigm MSR (minimal systematic relationship) from the reasonable foresight doctrine, but paradigms within a perspective never overlap. Nevertheless, close cases sometimes arise at the margin between two paradigms. These cases present familiar problems of characterization.

II. Five Direct Consequences Paradigms

Direct consequences cases involve concurrent efficient causes and successive causes. As discussed above, concurrent efficient causes are multiple causes of the same harm. In proximate cause situations, one of these is the original cause for which the defendant, or one of the defendants, is responsible. Then, someone else commits a second tort; this second tort is also a but-for cause of the same harm. The second cause is a possible supervening cause. This potentially supervening cause almost always exists later in time than the original cause.[20]

---

[20] The time sequence defined in the text is typical; however, an exception is British Columbia Electric Railway. v. Loach, [1916] 1 A.C. 719 (P.C. 1915) (appeal taken from B.C.). In Loach, the defendant railroad disabled itself from using corrective precaution, and the disablement, which began before the plaintiff's negligence, continued after it, so that the defendant was not able to stop its train when its engineer saw the plaintiff negligently sitting on the tracks.

Successive causes are practically the same, except that the second cause aggravates the harm so that the original cause is the but-for cause of two divisible harms, the one from the first impact (in the normal case) and the other from the second impact. The second cause is a but-for cause of only the second impact. Hence, the second impact has two but-for causes. Because the proximate cause issue arises on the second-impact harm, these cases are for present purposes the same as cases of concurrent efficient causes.

Direct consequences cases fall into five mutually exclusive paradigms. In all except the first, which is the default paradigm, events take the following pattern. At T1 the original wrongdoer is negligent. Then, at T2, someone else commits a tort (either negligence or an intentional tort). At T3 the plaintiff suffers harm, which has two causes in fact (but-for causes): the original wrongdoer's negligence and the intervening party's (last wrongdoer's) tort. The original wrongdoer is sometimes the sole defendant. At other times, the plaintiff has also joined--or the original wrongdoer has impleaded--the last wrongdoer. The question is: Under what circumstances will the last wrongdoer's intervening tort cut off the original wrongdoer's liability? The liability of the last wrongdoer will not be in question; her liability usually will be obvious. In those cases in which proximate cause becomes an issue, the plaintiff usually wants to sue the original wrongdoer because that person has more available assets or is not a friend or neighbor. Hence, in the following discussion, unless otherwise specified, the original wrongdoer is the defendant.

Based on the pattern of judicial decisions, one can imagine that courts had several theories

---

Id. at 721-22. Similarly, in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), a contributory negligence case that can also be analyzed as a proximate cause case, the plaintiff's bargee deliberately absented himself prior to the defendant's negligence in retying the barge lines, and the bargee's absence continued after the defendant's negligence so that he was unable to take a corrective precaution (to call for help when he would have been able to see that his barge was sinking). Id. at 170-71.

when they created the direct consequences doctrine. The most basic reason for cutting off an original wrongdoer's liability is to focus liability on a responsible person who has failed to use corrective precaution. Maybe the plaintiff did not want to sue this person because she was a friend or neighbor, even though her negligence was especially egregious relative to the actual defendant's negligence. Correspondingly, the most basic reason for retaining an original wrongdoer's liability is to make others like him see that one party's negligence can render others vulnerable to a third party's compliance lapse. A driver who has struck a pedestrian should realize that another driver, because of the original driver's lapse, may negligently kill the pedestrian. The original wrongdoer's negligence has made the plaintiff more vulnerable to someone else's inadvertent lapse or, in a similar type of case, has encouraged irresponsible people to use his negligence as an opportunity to hurt the plaintiff.

Some cases that courts analyze under the direct consequences doctrine really present situations in which the harm is unforeseeable. Although these cases yield no liability for the original wrongdoer, they share more with cases falling under the reasonable foresight doctrine than with cases in which someone has omitted corrective precaution. The following analysis divides direct consequences cases into five paradigms. In two of these paradigms, the doctrine cuts off the original wrongdoer's liability. In the remaining three, the original wrongdoer's liability is preserved.

A. Divide et Impera

Each of the five direct consequences paradigms has an old lineage. Over the years, the boundaries between them have evolved. Moreover, one--Paradigm DCE (dependent compliance error)--has shifted from nonliability to liability (for the original wrongdoer).

1. Liability Paradigm NIT (No Intervening Tort)

Paradigm NIT is the default paradigm under the direct consequences doctrine; it describes "directly caused harm" and yields liability for the original wrongdoer, who is also the only wrongdoer. No tort by anyone else intervenes between the defendant's negligence and the plaintiff's harm. This paradigm also represents the lack of a direct consequences reason to cut off the defendant's liability. A Paradigm NIT case will yield negligence liability unless the type of harm was "unforeseeable" under one of the reasonable foresight paradigms.

Many cases raise no serious proximate cause problem. Suppose that a speeding and unobservant driver strikes a pedestrian walking carefully in a crosswalk. The case would result in liability for the driver under Paradigm NIT. Between the time of the defendant's negligence (speeding and failing to look) and the plaintiff's being struck, no tort by anyone else intervened. The same case falls under Paradigm RFH (reasonably foreseeable harm), which is the default paradigm under the reasonable foresight doctrine. Hitting a pedestrian is exactly the type of harm that one would expect from speeding without keeping a careful lookout. Most negligence cases fall within this pattern. The harm is both direct and reasonably foreseeable; if there is a problem regarding liability, it arises under some other element of the tort, such as breach of duty, cause in fact, or actual damages.[21]

The City of Lincoln,[22] discussed above, is an NIT case. Between the time of the defendant's negligence in colliding with the plaintiff's ship and the time when it ultimately sank, no tort intervened. Many events occurred during this intervening period--the loss of the navigation

---

[21] See Grady, supra note 16, at 143-55.

[22] Another Paradigm NIT case is American Express Co. v. Risley, 53 N.E. 558 (Ill. 1899), in which the plaintiff was injured when a chute that the defendant's employees negligently allowed to protrude from the defendant's express car was nonnegligently bumped by another train so that it struck the plaintiff. Id. at 558-59.

instruments, the crew's attempt with makeshift instruments to get the damaged ship back to port, the crew's mistake in thinking they had seen the lightship that marked the mouth of the Thames River--but none amounted to intervening negligence or any other tort. Hence, the defendant's own negligence in crashing into the Albatross remained the direct cause of her sinking.

Many commentators are amazed at how complex the facts of a case can be and still yield liability. So long as no tort intervened between the defendant's negligence and the harm caused, the defendant will be held liable. The famous case of Bunting v. Hogsett[23] is a good illustration. The defendant owned a small mine railroad that crossed the Southwest Pennsylvania Railroad mainline tracks. In fact, the defendant's little private railroad arced around the mainline tracks and formed a circle that crossed the mainline tracks twice. The defendant's locomotive, known as a “dinky engine,” supplied ore and coke to the defendant's smelting furnace. The plaintiffs were passengers on the Southwest Pennsylvania Railroad train as it approached the first of the two intersections with the defendant's dinky line. Both locomotives were approaching the intersection at the same time. Because the dinky engineer was not maintaining a proper lookout, he did not see the passenger train until the last moment. When the dinky engineer finally saw the passenger train looming toward him just as he was about to cross the intersection, he threw the dinky engine into reverse, shut off the steam, and then bailed out. Nevertheless, the rear end of the train and the dinky engine collided. Although this first collision did not cause any injuries aboard the passenger train, it jarred open the throttle on the dinky engine. Still in reverse and without an engineer aboard, the dinky engine, which the collision had completely stopped, then began to back up over the dinky tracks.[24]

---

[23] 21 A. 31 (Pa. 1891).

[24] Id. at 31.

Meanwhile, immediately after the first collision, the engineer on the passenger train applied his airbrakes, and through yet another stroke of bad luck, the passenger train stopped directly on top of the second intersection with the dinky tracks. At the same time, the driverless dinky engine was wending its way back around the arc, gathering speed. The passenger train engineer could see what was happening but was powerless to prevent a second collision, because once he had set his airbrakes, they could not easily be released. The speeding dinky engine crashed directly into the middle of the passenger train. This second collision caused serious injuries to the plaintiffs, who had been fine up to this point.[25]

In a special verdict, the jury found that the defendant's dinky engineer was negligent in failing to keep a proper lookout, but that once collision became imminent, the dinky engineer behaved reasonably in jumping out. The trial court entered judgment for the plaintiffs on this special verdict, and the defendant appealed.[26]

The court held that the plaintiffs could recover from the owners of the dinky engine, even though the accident resulted from a highly unforeseeable sequence of events. If the engineer of the passenger train had possessed a chance to avoid the second collision, liability of the dinky company possibly would have been cut off under Paradigm NCP (no corrective precaution). In the actual case, however, causation proceeded directly from the time of the original collision,[27] and the dinky railroad was liable under Paradigm NIT, because it was solely negligent in producing both collisions. Moreover, proximate cause also existed under the reasonable foresight doctrine, yet to be discussed, because the type of harm that the plaintiffs sustained, namely,

---

[25] Id.

[26] Id.

[27] Id. at 33.

collision harm, was exactly the type that the dinky engineer should have predicted when he neglected to look out for the passenger train. (Even more accurately, as we will see, a highly systematic relationship exists between a train collision and an engineer's failure to maintain a lookout.)

Forces of nature and acts of God will preserve the defendant's liability unless they create the kind of coincidence that bars liability under the reasonable foresight doctrine. Another case involving direct harm is Johnson v. Kosmos Portland Cement Co.,[28] already mentioned.[29] The defendant failed to clean explosive gases out of the hold of a barge on which the plaintiffs' decedents were working. A lightning bolt exploded the gases, and the defendant was held liable. The lightning bolt was not an intervening tort, so the causation remained direct.[30]

In order to cut off the defendant's liability, an intervening tort must be complete. If the intervening party commits a breach of duty, but his good luck prevents that breach from being a cause in fact of the plaintiff's harm, then the original defendant's liability will remain intact.[31]

2. Liability Paradigm EFR (Encourage Free Radicals)

Negligence law is an effective deterrent only against people who have assets. Theoretically, everyone is liable to everyone else under exactly the same circumstances. Nevertheless, from an early date common law courts created special rules that punish solvent people for negligently creating tempting opportunities for judgment-proof people. It is as if the courts are saying,

---

[28] 64 F.2d 193 (6th Cir. 1933).

[29] See text accompanying note 17.

[30] See Johnson, 64 F.2d at 194-96.

[31] See Robinson v. Post Office, [1974] 1 W.L.R. 1176, 1186-88 (Eng. C.A. 1973) (holding the defendant Post Office, which provided a defective ladder that wounded the plaintiff, was liable for encephalitis caused by a tetanus shot, even though the plaintiff's physician had recklessly omitted the test dose that was supposed to reveal an adverse reaction to tetanus serum, because a test dose would have done no good in this case, as the onset of the plaintiff's reaction, a severe case of encephalitis, was highly delayed beyond the normal waiting time for a test dose).

"Because we can only influence the solvent and identifiable people, let us stop them from encouraging the others to wreak havoc." We can call the judgment-proof people "free radicals," because they are not only judgment-proof but also are looking to bond with trouble. Examples are children, persons with mental illness, criminals, and anonymous crowds of people (which typically include solvent as well as insolvent people). The underlying question in these cases is whether the defendant really did encourage the free radicals or whether their behavior existed more or less independently of the defendant's conduct or went far beyond the encouragement that the defendant's conduct (or omission) provided.

Perhaps the first case of this type, and certainly one of the most famous early cases, is Dixon v. Bell,[32] decided in 1816. The defendant kept a loaded gun in his apartment. One day when he was away from his apartment, he sent his thirteen-year-old servant to his landlord to have the landlord get the gun, unload it, and give it to the servant so that she could bring it back to the defendant. The landlord got the gun, took the priming out, told the girl that he had done so, and then gave the gun to the girl. She put it down in the kitchen, but later picked it up to play with the plaintiff's eight-year-old son, saying she was going to shoot him. She pointed the gun at him and pulled the trigger; the gun went off, injuring the plaintiff's son.[33] The plaintiff's declaration basically alleged that the defendant was liable because he had encouraged a free radical.[34] The English court upheld the jury verdict for the plaintiff.[35]

---

[32] 105 Eng. Rep. 1023 (K.B. 1816).

[33] Id. at 1023-24.

[34] The plaintiff's declaration alleged that the defendant had "wrongfully and injuriously sent a female servant...to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be entrusted with the care or custody of it." Id. at 1023.

[35] Id. at 1024. There are other famous early cases that describe this same basic paradigm. One is Lynch v. Nurdin, 113 Eng. Rep. 1041 (Q.B. 1841), where the defendant's driver had left the defendant's horse and cart in Compton Street for a half an hour while the driver was inside an adjoining house. Compton Street was normally thronged, and

Another early EFR case is Guille v. Swan,[36] in which the defendant, by ascending in a balloon, encouraged a crowd to trample the plaintiff's crops. The crowd certainly was not composed of people who would be free radicals under most circumstances; however, the anonymity that the crowd afforded made them effectively judgment-proof and reckless with the plaintiff's property.

A more modern case that illustrates the doctrine is Satcher v. James H. Drew Shows, Inc.,[37] where the plaintiff's wife, Mrs. Satcher, went to an amusement park and bought a ticket to ride on the bumper cars. This ride was owned and operated by the defendant, James H. Drew Shows, Inc.[38] Bumper cars run on an oval metal floor and are propelled by electricity, which each car receives from an aerial that rubs against the metal roof. Each bumper car has its own steering wheel and accelerator pedal and can travel anywhere on the metal floor of the ride. Bumper car drivers frequently try to bump into other drivers; those who are being assaulted frequently try to dodge their assailants.

The plaintiff's wife paid her admission and took a seat in a bumper car. Then, a group of mental patients was led up to the ride. The patients apparently were on an excursion to the amusement park. When the attendant turned on the electricity to start the ride, the mental patients began to converge on the plaintiff's wife and to crash into her car from different

---

on this day it was busier than usual, because an adjoining street was blocked. The defendant's driver knew that groups of children would be coming down Compton Street and that they would be interested in his horse and cart. Nevertheless, he dawdled in the house while his cart and horse were sitting in the street. The plaintiff, a child between six and seven years old, had his leg crushed beneath the wheels of the cart when another boy, who was playing on the cart, caused it to move, the plaintiff to fall off, and the wheels accidentally to run across the plaintiff's leg. Id. 1042-43.

[36] 19 Johns. 381 (N.Y. 1822).

[37] 177 S.E.2d 846 (Ga. Ct. App. 1970).

[38] See id. at 847.

angles. After the ride was over, the plaintiff's wife found that her neck had been permanently injured. In his petition, the plaintiff alleged that the defendant had been negligent by allowing the mental patients to converge on his wife and to injure her. The appellate court held that the trial court erred in dismissing the plaintiff's complaint;[39] the defendant had encouraged free radicals.

Another modern EFR case is Weirum v. RKO General, Inc.[40] The defendant radio station broadcast a contest in which a disk jockey traveled throughout Los Angeles in a fast car. He would stop occasionally to give prizes to those teenagers who were the first to get to each location at which he stopped. That location was announced by another disk jockey back at the studio. Although the radio station knew that teenagers were racing to meet the disk jockey, it continued the contest until two teenagers racing at high speeds ran the plaintiff's deceased off the road.[41] Although there were concurrent efficient causes of the accident--the original negligent broadcast followed by the teens' negligent racing--the second negligence (by the teens) did not cut off the defendant's liability.[42] Instead, the defendant remained jointly liable with the teens and, given the general insolvency of teenagers, probably had to pay most of the damages.

The theory behind these cases is that, although negligence law is the most basic form of safety regulation, not every person possesses enough assets or good judgment to be deterred by it. Therefore, those people with assets and good judgment should be discouraged from inciting others to wrongdoing.

An ex ante probability test is much more prominent and reliable in Paradigm EFR than in

---

[39] Id.

[40] 539 P.2d 36 (Cal. 1975).

[41] Id. at 38-39.

[42] See id. at 42.

other paradigms. In order for liability to exist, a reasonable person in the defendant's position, before the accident, must have been able to foresee that his act or omission would likely encourage free radicals. Unless it had appeared somewhat probable to a reasonable radio station, ex ante the accident, that teenagers would speed over the highway seeking to be the first to claim the station's prize, the Weirum radio station would not be liable.

In the United Kingdom, Lord Reid announced this test of likelihood as the basic test of liability in a famous EFR case that came before the House of Lords. In Home Office v. Dorset Yacht Co.,[43] seven boys who had been sentenced to Borstal training--boot camp for juvenile offenders--were working on Brownsea Island in Poole Harbor under the supervision of three Home Office guards. Their records included convictions for breaking and entering, larceny, and grand theft auto. Five had a record of previous escapes from Borstal institutions. Lying at moorings off the island were at least two yachts. In breach of their instructions, the Home Office guards, who were supposed to be watching the boys, simply went to bed, leaving the trainees to their own devices. The seven boys swam out to an unattended yacht moored off the island and started it moving. They collided with another yacht owned by the plaintiffs, who sued the Home Office for their damages. This is a classic EFR case in which the guards' willful omission to post a guard all too obviously encouraged free radicals to wreak havoc.[44]

The trial court ruled in favor of the plaintiffs, and the defendant appealed to the Court of Appeal, which affirmed. The defendant then appealed to the House of Lords. The defendant argued that the boys' criminal wrongdoing broke the chain of causation.[45] Lord Reid in his

---

[43] [1970] 2 A.C. 1004 (appeal taken from Eng.).

[44] Id. at 1025.

[45] See id. at 1009-10.

influential opinion stressed that the Home Office would be liable if it should appear ex ante "very likely" that the boys would damage property in seeking to escape from their warders.[46] Answering this question in the affirmative, he held the Home Office liable.

The pattern of EFR cases indicates that a defendant will not be liable for free radical depredations unless it negligently encouraged them. Hence, the defendant's ex ante foresight of these bad consequences is relevant both to breach of duty and proximate cause. If it were not very likely that the Weirum teens would crash into someone, but only somewhat likely, it seems reasonable that the case would come to the same result. Speeding over a highway can cause death, whereas the escape of Borstal boys without homicide records would most likely cause only property damage. In those cases in which the potential consequences are worse, as in Weirum as compared to Dorset Yacht, the Learned Hand formula would ratchet down the threshold probability so that something less than a "very likely" wrong could be sufficient to hold the encouraging defendant responsible for that wrong.

In formulating his "very likely" test, Lord Reid may have had a more troubling limitation in the back of his mind. Suppose that the defendant did encourage free radicals to commit a wrong, but that the opportunity he created was not particularly scarce. If someone flashes a money clip

---

[46] The key passage of Lord Reid's judgment reads as follows:

> The[ ] cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the "very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskillful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely.

Id. at 1030. A similar case of liability is Elgin, Aurora and Southern Traction Co. v. Wilson, 75 N.E. 436 (Ill. 1905), in which the defendant's railroad switch guard, instead of remaining at his post, went to watch a baseball game. While he was gone, a boy threw the switch, causing the train on which the plaintiff was riding to crash. The defendant, whose employee was guilty of the same type of deliberate negligence committed by the Home Office guards, was liable. Id. at 436, 439.

full of one-hundred-dollar banknotes as he is paying a bill, he probably would not be liable to a person hurt by a fleeing thief. There are many other opportunities for theft that are just as tempting. It seems reasonable that the defendant, in order to be liable, must negligently provide some special encouragement of wrongdoing that does not exist in the normal background of incitements and opportunities.[47] The famous case of Ross v. Hartman[48] held that a motorist was liable to people hurt by a fleeing car thief, but most similar cases now hold the opposite.[49] A car thief loose in a city has many more opportunities for wrongdoing than do Borstal boys confined to an island. Under Paradigm EFR, a defendant who encourages free radicals will be liable only if the encouragement proceeded from some relatively scarce or tempting opportunity for wrongdoing that he controlled.

Suppose the person whom the defendant negligently encourages is not a free radical but a responsible citizen. In the unlikely event that Bill Gates had responded to the Weirum radio broadcast by racing over the highway to collect the prize, his intervening conduct would have almost certainly cut off the defendant's liability. That would be a case falling within Paradigm IIT (independent intervening tort).

Here is a real example of Paradigm IIT that we can compare to Paradigm EFR. In Seith v. Commonwealth Electric Co.,[50] the defendant maintained an electrical grid strung overhead in

---

[47] In Weirum, discussed supra text accompanying notes 40-42, the California Supreme Court stressed that "[t]hese tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium." Weirum, 539 P.2d at 40. In other words, the defendant's conduct provided the teens a material incitement to wrongdoing.

[48] 139 F.2d 14 (D.C. Cir. 1943).

[49] Compare Hergenrether v. East, 393 P.2d 164 (Cal. 1964) (holding the defendant, whose employee left a partially loaded two-ton truck overnight in a dangerous section of city, liable to the plaintiff struck by a thief), with Avis Rent a Car Sys., Inc. v. Superior Court, 15 Cal. Rptr. 2d 711 (1993) (holding that defendant Avis, which maintained poor security in its rental lot, was nevertheless immune from suit from someone with whom a car thief collided).

[50] 89 N.E. 425 (Ill. 1909).

Chicago. Because of the defendant's negligence in maintaining its system, a wire broke and fell down to a sidewalk. Two nine-year-old girls saw the wire just after it broke, while it was still moving on the ground. Recognizing the danger to passersby, they immediately went to a nearby saloon and told the saloon keeper that a live electrical wire had fallen to the ground. Two police officers who were in the saloon came out to investigate, and one of them walked over to where the wire was lying. At the same time, the plaintiff, who knew nothing of what had happened, came down the back stairs of his nearby apartment. The investigating police officer took his police club and flipped the wire toward the plaintiff. The plaintiff instinctively caught it and suffered a severe electrical shock. Luckily, passersby were able to take a wooden plank and knock the wire from the plaintiff's hands before he was killed. In reversing the trial court's judgment for the plaintiff, the appellate court stressed that no one would ever anticipate that a police officer would behave the way this one did. He committed an independent intervening tort.[51]

Two major differences exist between this classic Paradigm IIT case and a Paradigm EFR case like Weirum. The Seith defendant's negligence seems to have been inadvertent, whereas the Weirum defendant intentionally designed and broadcast the dangerous contest. More significantly, perhaps, the intervening parties in Weirum were true free radicals, whereas the

---

[51] Id. at 426-27. The Seith court said:

> The defendant would be liable, although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground; but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. There is no evidence tending in the slightest degree to prove that policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it, and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true, and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff.

Id. at 429.

intervening party in Seith was the epitome of a responsible citizen: a police officer. If one of the nine-year-old girls had flipped the wire at the plaintiff, the defendant's liability probably would have been preserved under either Paradigm EFR or Paradigm DCE (dependent compliance error), which is the next topic.

Before we move on to Paradigm DCE, however, let us summarize the main features of Paradigm EFR. The clearest cases of a defendant encouraging free radicals are negligent entrustment cases like Dixon v. Bell, in which the defendant intentionally entrusted his young servant with a gun. Extensions from this core involve situations in which the defendant intentionally incites irresponsible persons to behave negligently or even criminally, as in Weirum and Dorset Yacht. The probability test makes good sense in this setting, because the defendant would not be liable unless it were more or less probable ex ante that the free radicals would take the defendant's conduct as encouragement. Other factors are also critical, however. Most importantly, these include whether the last wrongdoer was in fact an irresponsible person and whether the encouragement that the defendant provided went beyond the background level of the normal incitements that exist in everyday life.[52]

---

[52] A good example of a case that did not quite make it into Paradigm EFR is Dennis ex rel. Evans v. Timmons, 437 S.E.2d 138 (S.C. Ct. App. 1993).

The defendants, the Weekses, installed underpinnings on their mobile home. When they finished, they inadvertently forgot to return a screwdriver to the toolbox that they stored inside their mobile home. The next day, eight-year-old Brock Dennis and thirteen-year-old Randy Timmons were playing at the Weeks home with Scott and Michael Weeks, who were ten and five years old. Michael Weeks retrieved the screwdriver from underneath the mobile home, and all four boys began playing games with it. After a very short time, Randy Timmons tossed the screwdriver at the plaintiff's son, Brock Dennis, who was struck in the eye. Id. at 140.

The plaintiff brought this action on behalf of his son, claiming that the defendants were liable for Brock's injuries. The South Carolina Court of Appeals affirmed a directed verdict for the defendants. Id. at 142. The court stressed that a screwdriver does not provide an incitement to violence beyond the normal background level:

Some instrumentalities are almost always, if not always, dangerous (such as dynamite) and some objects are almost always non-dangerous (such as a powder puff). Many instrumentalities are dangerous or not dangerous because of their use or potential use under the circumstances. We hold that a screwdriver is not an instrumentality which is almost always dangerous. A screwdriver is, of course, a common object which can be found in most homes. Although it is obviously possible to use a screwdriver in such a manner that it becomes a dangerous instrumentality, such an object is not inherently likely to inflict serious bodily injury on another person unless it is intentionally used for that purpose or is handled in a reckless and dangerous manner.

3. Liability Paradigm DCE (Dependent Compliance Error)

A defendant can be negligent by putting the plaintiff in harm's way. Then, someone else comes along and commits a compliance error--involving relatively innocent or inadvertent negligence--and injures the plaintiff (or injures him further). In this situation, modern courts preserve the liability of the original wrongdoer. Interestingly, this paradigm has experienced the greatest evolution. Older courts were much more likely to cut off the liability of someone who created a situation fraught with possibilities for inadvertent negligence.

In Ferroggiaro v. Bowline,[53] the defendant negligently ran her car into a power pole, which cut off the electricity to a nearby traffic light. The plaintiff's deceased was then killed in a collision at the same intersection when the car in which he was a passenger collided with another car.[54] The trial court sustained the defendant's demurrer to the complaint, and the appeals court reversed, holding that a jury would be entitled to find that proximate cause existed.[55] By cutting the power to the signal, the defendant exposed the plaintiff's deceased to negligence by other drivers-- their negligence in failing to notice that the signal was not working.

Another good example of the modern paradigm, which preserves the liability of the original wrongdoer, is Hairston v. Alexander Tank and Equipment Co.,[56] in which the defendant car dealer negligently installed a wheel on a new car purchased by the plaintiff's deceased. When the wheel subsequently fell off, the plaintiff became stranded on a busy highway. The second

---

Id. at 140 (citations omitted). Though Randy Timmons was definitely a free radical, his conduct went way beyond the encouragement that the defendants provided. The case can be seen alternatively as falling within Paradigm IIT (independent intervening tort) or as involving no breach of duty by the defendants.

[53] 315 P.2d 446 (Cal. Dist. Ct. App. 1957).

[54] Id. at 447.

[55] Id. at 450-51.

[56] 311 S.E.2d 559 (N.C. 1984).

defendant came along and inadvertently, though negligently, struck the plaintiff.[57] The jury returned a verdict against both defendants as joint (concurrent efficient) tortfeasors, and the first defendant (the car dealer) moved for judgment n.o.v. on the ground that its liability was cut off by the second defendant's negligence.[58] The trial court granted this motion, but on appeal the court held that the first defendant's negligence should have been preserved (was a proximate cause of the death).[59] The first defendant had negligently rendered the plaintiff vulnerable to a compliance error by another.

In the clearest DCE cases, the original wrongdoer's negligence is more deliberate or reckless than the relatively inadvertent negligence of the Hairston car dealer. Nevertheless, Hairston shows that even inadvertent negligence by an original wrongdoer can yield liability when it significantly increases the probability that the victim will suffer from someone else's compliance error, as when the original negligence strands someone next to a highway where negligently and nonnegligently driven cars are whizzing by. Typically in modern times, the two injurers become joint tortfeasors, as in Hairston.

Suppose the automobile defect for which the defendant is responsible puts the plaintiff not on a busy highway, but in a lawful parking place. There, someone inadvertently, though negligently, bumps into him. This case, Ventricelli v. Kinney System Rent A Car, Inc.,[60] found no liability because, as the original wrongdoer's good luck had it, the plaintiff was not rendered

[57] Id. at 564.

[58] Id.

[59] See id. at 563-64.

[60] 383 N.E.2d 1149 (N.Y. 1978).

more vulnerable to a compliance error by someone else.[61] The second act of negligence was not dependent on the first, because a defective car is just as likely as an undefective car to be struck in a lawful parking place. Ventricelli falls into Paradigm IIT (independent intervening tort) because there was no systematic relationship between the second actor's negligence and the first actor's negligence. Ventricelli is also a Paradigm MSR (minimal systematic relationship) case, under the reasonable foresight doctrine, because there is no systematic relationship between being struck in a lawful parking place and having a defective rental car. Most Paradigm IIT cases (under the direct consequences doctrine) can just as easily be seen as Paradigm MSR cases (under the reasonable foresight doctrine). Both paradigms yield no liability for the original actor.

The modern Paradigm DCE also creates liability when the defendant causes a situation in which the plaintiff's or a third party's emergency response is the most immediate cause of the plaintiff's injury.[62] When a defendant has placed the plaintiff or a third party in an emergency situation, it can deprive that party of his wits and make his negligence innocent in the same way that a compliance error is innocent. Some courts call the forgiveness of such a party's negligence the “emergency doctrine.”[63] These cases are hardly different from the cases in which it is a third party's compliance error that causes the plaintiff's harm.

Some older cases actually held the original defendant immune in DCE cases. In Stone v.

---

[61] Compare id. at 1150 (holding the defendant not liable for a defective rental car when the plaintiff was struck in a lawful parking place), with Betancourt v. Manhattan Ford Lincoln Mercury, Inc., 607 N.Y.S.2d 924 (App. Div. 1994) (holding that the defendant was liable when a defective rental car stranded him beside an interstate highway where he was struck by a negligent driver).

[62] See Tuttle v. Atlantic City R.R. Co., 49 A. 450 (N.J. 1901) (holding the plaintiff not liable for contributory negligence when the defendant's original negligence deprived her of her wits); Wagner v. Int'l Ry., 133 N.E. 437 (N.Y. 1921) (illustrating the same case as Tuttle). These cases amounted to an unglossed exception to the normally harsh contributory negligence rule. It is conventional to think of them as proximate cause cases.

[63] See 57A Am. Jur. 2d Negligence § 213 (1989). In proximate cause doctrine, an original wrongdoer preserves his liability when he creates an emergency that prompts a negligent act that is the most immediate cause of the harm to the plaintiff. Id. § 226.

Boston & Albany Railroad,[64] the defendant railroad negligently permitted its platform to become saturated with flammable oil. Then Casserly, a worker who should have known better, inadvertently threw a match down to the sodden platform, igniting it.[65] Although Casserly seems to have been inadvertently negligent, the court held that his dependent compliance error cut off the defendant's negligence.[66] Modern cases reach different results. For instance, in Robert R. Walker, Inc. v. Burgdorf,[67] the defendant's service station employees were negligently mixing gasoline with water and running it down a drain. A third party, who did not think the mixture would burn, lit it, and the defendant remained liable for the fire.[68] This modern result is inconsistent with the old Stone case.[69] Under modern doctrine, when someone negligently creates a situation that is fraught with possibilities for innocent negligence by third parties, and that subsequent negligence materializes, the defendant remains liable.[70]

Paradigm DCE also depends on events that cannot be known or foreseen before the accident. If the defendant's negligence puts the plaintiff in a situation in which he is especially vulnerable to someone else's inadvertent negligence, the original wrongdoer will usually share liability with the last wrongdoer. Nevertheless, if the original wrongdoer is lucky in some way

---

[64] 51 N.E. 1 (Mass. 1898).

[65] Id. at 1-2.

[66] See id. at 4.

[67] 244 S.W.2d 506 (Tex. 1952).

[68] See id. at 507, 510.

[69] Burgdorf is basically the same case as Philco Radio and Television Corp. v. J. Spurling, Ltd., [1949] 2 All E.R. 882 (C.A.), and reaches the same result.

[70] Compare Pacific Tel. & Tel. Co. v. Parmenter, 170 F. 140 (9th Cir. 1909) (holding the defendant liable when its rotten telephone pole fell on the plaintiff because of a more immediate compliance error by a third party), with Leeds v. N.Y. Tel. Co., 70 N.E. 219 (N.Y. 1904) (holding the defendant not liable when it negligently tied its phone line to a decrepit chimney, a third party negligently bumped the line, and the chimney fell onto the plaintiff).

that he could never predict, and no systematic relationship exists between the original negligence and the subsequent negligence, as when a defective rental car breaks down in a lawful parking spot, the original wrongdoer will escape liability. If the last wrongdoer is a responsible person, and his negligence is not a mere compliance error but is instead a willful failure to use precaution against an impending harm, the case falls within nonliability Paradigm NCP (no corrective precaution), the next one that we will consider.

4. Nonliability Paradigm NCP (No Corrective Precaution)

Paradigm NCP constitutes the basic reason for the direct consequences doctrine.[71] A defendant, through a compliance error or other inadvertent negligence, creates a dangerous situation. Then, a responsible person, not a free radical, appears on the scene and recognizes the dangerous situation. This intervening person for some reason, usually a special relationship, also has a duty to use precaution against the risk that threatens the plaintiff. Nevertheless, the third party, though she recognizes the risk, unaccountably and recklessly does nothing about it. In this paradigm, the courts cut off the original wrongdoer's liability. The last wrongdoer becomes solely liable for her failure to use "corrective precaution." Corrective precaution by a party heads off a disaster impending from another party's negligence. The common term for deliberate, as opposed to inadvertent, negligence is "willful and wanton." "Recklessness" is a synonym. In order to cut off the original wrongdoer's liability, in modern times at least, the last wrongdoer's failure to use corrective precaution must be willful and wanton or reckless. The last wrongdoer's merely inadvertent failure to use corrective precaution preserves the original wrongdoer's

[71] A liability-limiting doctrine, such as proximate cause, creates an impact only by barring liability. Only two direct consequences paradigms deny liability: NCP and IIT. Paradigm IIT, although part of the direct consequences doctrine, seems closer in its policy purpose to Paradigm MSR, with which it overlaps. Paradigms IIT and MSR both limit liability for relatively innocent compliance errors, no matter what coincidental events or coincidental negligent acts conjoin with them. Both doctrines seek to incentivize people to engage in valuable activities (the essential purpose of the reasonable foresight doctrine), not to use corrective precaution.

liability and probably makes the last wrongdoer a joint tortfeasor.

In Pittsburg Reduction Co. v. Horton,[72] the defendant inadvertently discarded live blasting caps. The Copples, parents of the child who found them, though they knew that the blasting caps could have been live, then failed to confiscate them from their child.[73] Their child then traded the caps to the plaintiff, also a child, who was injured.[74] The court held that the parents' reckless omission of corrective precaution (taking the caps away) cut off the defendant's liability.[75] A plaintiff is free to sue any of the people negligently responsible for any of the concurrent efficient causes that harmed him. Often, the most attractive defendant is a deep-pocketed corporate defendant whose conduct may have been a relatively remote cause of the plaintiff's harm. In such a world, people like the Copples, who obviously lacked deep pockets, might not otherwise possess enough incentive to use corrective precaution. Without Paradigm NCP, they might say, “Why worry if little Charlie has explosives? If he hurts a playmate with them, odds are that someone besides us will be a more attractive defendant.” But Paradigm NCP focuses all liability on people like the Copples. In effect, they cannot count on being unattractive defendants. Sinram, already discussed, is a similar case.[76]

One final example of Paradigm NCP is Lamb v. Camden London Borough Council,[77] in which the plaintiff sued her local municipal agency for negligently damaging her London house

---

[72] 113 S.W. 647 (Ark. 1908).

[73] Id. at 648-49.

[74] Id. at 648.

[75] See id. at 648-49.

[76] See supra Part I.

[77] 1981 Q.B. 625 (C.A.).

so that it became a target for squatters.[78]

While the plaintiff, Mrs. Lamb, was in New York with her house rented to a tenant, the defendant local council decided to replace the sewer in the road next to her house. Because of the council's negligence, a water main broke and undermined the plaintiff's foundation. The walls cracked, the house became unsafe to live in, and the tenant moved out.[79]

The plaintiff had to put her furniture in storage so that repairs could be made. The house, then left unoccupied and unfurnished, became a sitting target for squatters. Before the repairs were started, a group of squatters invaded and assumed control. The plaintiff and her lawyers expelled them once, and after they were out, the plaintiff's father put up a few boards at a cost of £ 10. This corrective precaution was totally inadequate to the impending risk, as subsequent events made clear. A few months later, a second group of squatters invaded. These squatters pulled off the paneling for fuel. They ripped out the central heating and other installations and stole them. Eventually the police arrested the squatters on a charge of larceny. While the squatters were at the police station, Mrs. Lamb's agents entered the house and made the premises secure with elaborate reinforced defenses, which stopped the squatting problem.[80]

The plaintiff sent all her bills to the defendant council. Over £50,000 in expense was directly due to the subsidence, but nearly £30,000 was the cost of repairing the malicious damage done by the squatters and the value of their thefts.[81]

The official referee allowed the plaintiff to recover for the harm to the structure caused by the subsidence, but not for the additional £30,000 in damages caused by the squatters. He said

---

[78] Id. at 638.

[79] Id. at 632-33.

[80] Id. at 633.

[81] Id.

that although squatting was at the time a reasonably foreseeable risk, it was not likely to occur in the locality of the plaintiff's house and was therefore too remote for the plaintiff to be able to recover damages. The plaintiff appealed on the ground that the evidence was insufficient to support the referee's verdict on the squatters' damage.[82]

In the British Court of Appeal, Lord Denning saw this case as similar to Dorset Yacht, described above. The respective defendants had each encouraged free radicals. Because Lord Denning's judgment was that the local council should not be liable for the squatter damage, even though he assumed that squatters were “very likely” once the council's negligence caused the plaintiff's tenant to move out, he openly doubted Lord Reid's test.[83] As his ground for decision, Lord Denning stressed that the plaintiff herself had willfully neglected an excellent opportunity for corrective precaution. If she had installed her ultimate security precautions immediately after her tenant vacated, the squatters never would have entered, and all the squatter damage would have been avoided.[84]

---

[82] Id. at 625.

[83] Lord Denning said:

> Now I would test the rulings of the Law Lords by asking: Suppose that, by some negligence of the staff, a Borstal boy--or an adult prisoner--escapes over the wall--or from a working party. It is not only reasonably foreseeable--it is, as we all know, very likely--that he will steal a car in the immediate vicinity. He will then drive many miles, abandon the car, break into a house and steal clothes, get a lift in a lorry, and continue his depredations. On Lord Reid's test of “very likely” to happen, the Home Office would be liable not only to the owner of the stolen car, but also to all the others who suffered damage: because it was very likely to happen.
>
> That illustration convinces me that Lord Reid's test was wrong. If it were adopted, it would extend the liability of the Home Office beyond all reason. The Home Office should not be liable for the depredations of escaped convicts. The householders should recover for the damage--not against the Home Office but on their insurance policies. The insurers should not by subrogation be able to pass it on to the Home Office.

Id. at 635.

[84] On the plaintiff's failure to use corrective precaution, Lord Denning said:

> Looking at the question as one of policy, I ask myself: whose job was it to do something to keep out the squatters? And, if they got in, to evict them? To my mind the answer is clear. It was the job of the owner of the house, Mrs. Lamb, through her agents. That is how everyone in the case regarded it. It has never been suggested in the pleadings or elsewhere that it was the job of the council. No one ever wrote to the council asking them to do it. The council were not in occupation of the house. They had no right to enter it. All they had done was to break the water main outside and cause the subsidence. After they had left the site, it was Mrs. Lamb herself who paved the way for the squatters by moving out all her furniture and leaving the house unoccupied and unfurnished. There was

Despite Lord Denning's analogy to the facts of Dorset Yacht, the Lamb case does not fit very well into liability Paradigm EFR. The local council's construction employees seem to have been inadvertently negligent in breaking the water main. In the classic EFR cases, the defendant's negligence has been intentional. In Dorset Yacht itself, the defendant's guards intentionally went to sleep and intentionally failed to post a guard.[85] In Weirum, the defendant radio station intentionally designed the dangerous contest and intentionally broadcast it.[86] Because Lamb was weak as an EFR case and because the defendant herself intentionally omitted corrective precaution, the case fell instead within nonliability Paradigm NCP.

5. Nonliability Paradigm IIT (Independent Intervening Tort)

In Paradigm IIT, the relationship between the defendant's negligence and the third party's (or second defendant's) subsequent negligence is coincidental. A good example is Central of Georgia Railway v. Price.[87] The defendant railroad took the plaintiff beyond her stop. The defendant's conductor then took the plaintiff to a hotel at the next stop so she could spend the

---

then, if not before--on the judge's findings--a reasonably foreseeable risk that squatters might enter. She ought to have taken steps to guard against it. She says that she locked the doors and pulled the shutters. That turned out to be insufficient, but it was her responsibility to do more. At any rate, when the squatters did get in on the first occasion in 1974, it was then her agents who acted on her behalf. They got the squatters out. Then, at any rate, Mrs. Lamb or her agents ought to have done something effective. But they only put up a few boards at a cost of £10. Then there was the second invasion in 1975. Then her agents did recognise her responsibility. They did what they could to get the squatters out. They eventually succeeded. But no one ever suggested throughout that it was the responsibility of the council.

In her evidence Mrs. Lamb suggested that she had not the money to do more. I do not think the judge accepted the suggestion. Her agents could well have made the house secure for a modest sum which was well within her capabilities.

Id. at 637.

[85] Lord Denning's suggestion in the passage quoted supra note 83--that Lord Reid's test would make the Home Office liable for damage done by all prisoners that its guards have negligently allowed to escape--goes beyond the facts of Dorset Yacht. If, through the inadvertent negligence of the guards, the Borstal boys escaped, it seems doubtful that the Home Office would be liable for their depredations. See, e.g., Hullinger v. Worrell, 83 Ill. 220 (1876) (holding that a sheriff who negligently allowed a criminal to escape from jail was not liable for a later assault that the escaped criminal committed on the plaintiff).

[86] See supra notes 40-42 and accompanying text.

[87] 32 S.E. 77 (Ga. 1898).

night and catch the train back to her stop the next day. Either the hotelkeeper gave the plaintiff a defective lamp or the plaintiff herself negligently managed the lamp so that it exploded.[88] The issue was whether the original wrongdoer (the railroad) was liable. The case did not fit into Paradigm EFR, because the hotelkeeper was not a free radical, and the railroad did not negligently encourage him. Also, Central of Georgia Railway v. Price does not fall into Paradigm DCE, in which the defendant has made the plaintiff specially vulnerable to a compliance error or to an emergency response. If the defendant's conductor had noticed at the last moment what he should have noticed earlier--that it was plaintiff's stop--and then had told the plaintiff to get off the train in a hurry, and she had bumped into another passenger in her rush, that would be a case of liability under Paradigm DCE.[89]

Another common Paradigm IIT case almost verges into Paradigm EFR but stops short because the free radical's conduct has gone way beyond the encouragement provided by the defendant. In Cole v. German Savings & Loan Society,[90] the defendant owned an office building with an elevator. A boy, unconnected with the defendant's business, came into the defendant's building and became fascinated with the elevator, which was at that time a relatively new invention.[91] The "strange boy," as the court called him, befriended the elevator operator, who was also a boy. By watching the regular elevator boy, the strange boy learned how to impersonate him. Perhaps the defendant was negligent in failing to keep the boy out of the lobby,

[88] See id. at 77.

[89] See Reynolds v. Tex. & Pac. Ry. Co., 37 La. Ann. 694, 697 (1885) (finding the defendant liable for instructing the plaintiff to rush down unlighted steps).

[90] 124 F. 113 (8th Cir. 1903).

[91] Id. at 114.

because it should have been obvious that he had no business there.[92]

On the day in question, the strange boy was hanging around the lobby as usual, standing next to the elevator. A woman walked up to the elevator. The boy knew the elevator was on an upper floor, but he nevertheless opened the door to the elevator shaft and beckoned the woman toward it. The woman, thinking that the strange boy was the elevator operator, walked through the open door and fell down the empty shaft, injuring herself. She sued the defendant which, as noted above, owned the building and the elevator. On appeal, the court upheld the defendant's verdict.[93] Assuming that this defendant was negligent in failing to exclude the strange boy from its lobby, the strange boy's negligence went way beyond the encouragement provided by the defendant. The Weirum teenagers behaved exactly the way one would have expected, but the strange boy did not.

As noted above, in Paradigm IIT, the relationship between the defendant's negligence and the third party's (or co-defendant's) subsequent negligence is coincidental. In both Paradigms EFR and DCE, a defendant's negligence makes the intervening tort more probable. In Paradigm EFR, the defendant encourages the irresponsible person to act; in Paradigm DCE, the defendant increases the probability that the plaintiff will be harmed by someone else's compliance error or emergency response. By contrast, in Paradigm IIT, the defendant does not increase the likelihood of a tort; the subsequent tort happens independently of the prior negligence.

Most IIT cases also fall within Paradigm MSR (minimal systematic relationship) of the reasonable foresight doctrine. This doctrine looks at the particular accident, as it is understood after the fact, and then asks whether a systematic relationship existed between this type of

---

[92] Id.

[93] See id. at 123.

accident and the defendant's untaken precaution. In Central of Georgia Railway this relationship was weak or even absent. Because the plaintiff was just as much at risk from exploding lamps in her hometown as away from it, no systematic relationship existed between the defendant's untaken precaution and the accident that she suffered.

Let us examine Paradigm IIT in relation to the other direct consequences paradigms. Suppose a case does not fit within Paradigm DCE because, ex post the accident, we can see no systematic relationship between the defendant's negligence and the type of accident that occurred. Think of Ventricelli, discussed above,[94] in which the defendant rented the plaintiff a defective car that stranded him, not on a busy highway, but in a lawful parking place. Then, the last wrongdoer negligently struck the plaintiff with his car. It is natural to call the last wrongdoer's negligence an independent intervening tort, and this is true whether the last wrongdoer's negligence is inadvertent or more deliberate (willful and wanton).

Paradigm IIT can also bear a close similarity to Paradigm NCP, but luckily we do not get tricky issues of characterization on this boundary because both paradigms yield nonliability for the original wrongdoer. In Seith, discussed above,[95] the last wrongdoer, the police officer who flipped the live electric wire toward the plaintiff, was clearly a responsible citizen. We could say that he willfully failed to use corrective precaution against the defendant's negligence in maintaining its wires. This characterization seems strained, however, because the police officer's conduct went way beyond a failure to correct the problem; he actually made the problem much worse. Again, at this margin between the two paradigms, the characterization does not really matter, because either way we get no liability for the original wrongdoer.

---

[94] Supra notes 60-61 and accompanying text.

[95] Supra notes 50-51 and accompanying text.

Finally, as illustrated by the Cole case, if a defendant has arguably encouraged free radicals, but the free radical in question has gone way beyond the encouragement that the defendant provided, it is a case of IIT. Suppose that one of the Weirum teens had shot another racing contestant to stop that competitor from getting the prize. That case would not be EFR, but IIT like Cole.

Each of the direct consequences paradigms possesses a central core of cases in which we can predict case results fairly accurately. Each also possesses a fringe in which results become more doubtful. The next part summarizes the rules for breaking the direct consequences code so that we can see which cases are hard and which easy and for what reasons.

B. Rules for Breaking Direct Consequences Code

Proximate cause cases viewed from the direct consequences perspective follow a pattern in which an original wrongdoer (the defendant) is negligent and then some other party commits a second tort that is also a cause in fact of the same harm that the plaintiff suffers. Cases in which this second tort does not exist are cases of liability falling under Paradigm NIT (no intervening tort).

Here are some rules for understanding when the second tort cuts off the defendant's liability for the first tort:

1. Courts distinguish between responsible and irresponsible people. When responsible people incite irresponsible people to commit a second tort, the responsible people are liable jointly with the irresponsible, though they will probably pay most of the damages because the irresponsible people usually are insolvent if they can even be found. To fall squarely within Paradigm EFR, the defendant must behave intentionally--not in the sense of an intentional tort, but in the sense that his negligent act or omission must be deliberate as opposed to inadvertent.

As we move toward the edge of this paradigm, the defendant's conduct becomes a serious inadvertent lapse. If someone inadvertently leaves blasting caps where schoolchildren can find them, this person remains liable to a child who is hurt by another child (without an intervening precaution opportunity by a responsible actor who owes a duty to the victim).

2. Courts create liability for people who negligently make others vulnerable to someone else's inadvertent or otherwise innocent negligence. Even though the second actor's negligence was innocent, he remains a joint tortfeasor with the first wrongdoer.

3. If someone owing a duty to a potential victim sees a risk about to materialize in that person's injury and deliberately fails to use precaution to head off the risk, this person's intervening negligence will likely cut off the original wrongdoer's liability.

4. A responsible person who has deliberately omitted a reasonable precaution or has engaged in an intentional tort or crime will cut off the liability of any prior actor who has set the stage for his wrongdoing. An irresponsible person whose wrongdoing has been encouraged by a prior actor will cut off the prior actor's liability if his conduct goes way beyond the encouragement or incitement he received.

III. Five Reasonable Foresight Paradigms

The basic purpose of the reasonable foresight doctrine is to reduce the liability of people who may have been efficiently (reasonably, in a larger scheme of things) negligent. Holding such people liable can cause them to reduce their valuable activities. If they are inefficiently negligent, liability will ultimately catch up with them.

Historically, five reasonable foresight paradigms exist, but only three (the first three discussed below) are prominent in modern times.

A. Divide et Impera

1. Nonliability Paradigm MSR (Minimal Systematic Relationship)

This paradigm represents the basic purpose of the reasonable foresight doctrine. People who have committed inadvertent negligence--a compliance error--should not be responsible for the merely coincidental harm that results. People cannot totally avoid compliance errors. Many are efficient in this sense, though many are also inefficient, which is why the law of negligence imposes a kind of strict liability upon them. However, the danger is that people committing compliance errors will be punished too often, which will cause them to abstain from valuable activities.

The basic test of the reasonable foresight doctrine is whether one can see a systematic relationship between the type of accident that the plaintiff suffered and the untaken precaution that constituted the defendant's breach of duty. Conceptualizing the harm ex post, together with its peculiar features, can one see that using the precaution would have significantly reduced the incidence of that kind of accident? If not, proximate cause bars liability under Paradigm MSR.

In Berry v. Borough of Sugar Notch,[96] the plaintiff was driving his streetcar at a speed well over the lawful limit. Just as he passed beneath the defendant's rotten tree, it fell on him. Although the defendant conceded that it was negligent in failing to cut the tree, it maintained that contributory negligence should bar recovery, because the plaintiff's excessive speed brought him to the wrong place at the wrong time.[97] The court held that the plaintiff's speed was not a proximate cause of his injury, so his contributory negligence would not count against him.[98] The

[96] 191 Pa. 345 (1899).

[97] Id. at 348.

[98] See id. at 349.

court stressed the absence of a systematic relationship between excessive speed and direct hits by trees.[99] If anything, the plaintiff's excessive speed would reduce direct hits by rotten trees, because quicker trips would place him underneath the shelter at the turnaround for a longer period.

Notice that the coincidental nature of this accident could be seen only after the fact. No one could tell before the fact that the tree would score a direct hit on the plaintiff. If the tree had fallen in front of the plaintiff, so that he could have stopped if he had been traveling at a reasonable speed, his negligence would have been a proximate cause of his injury. The test in these cases--which runs against the name of the doctrine--is ex post. Ex post the accident, given what is known about it, is there a systematic relationship between the actor's breach of duty (his untaken precaution) and the type of harm that befell him? In Berry, after the fact, no one could see a systematic relationship between going too fast and suffering direct hits by trees. Strangely, the reasonable foresight doctrine has little to do with probabilities in their normal ex ante sense.

A similar MSR case is Texas & Pacific Railway v. McCleery,[100] in which the plaintiff was injured when the truck in which he was a passenger, which was driven by Hardgrave, collided with the defendant's train. The evidence established that, at the time of the accident, the train was traveling at 25 m.p.h. in violation of the 12 m.p.h. speed limit.[101] At the crossing, the train activated a warning signal, but Hardgrave, the driver of the truck, testified that he never saw it

---

[99] Judge D. Newlin Fell wrote for the court:

> That his speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety.

Id. at 348-49.

[100] 418 S.W.2d 494 (Tex. 1967).

[101] See id. at 495-96.

and only noticed the train when his truck was 55 to 75 feet from the track. He then applied his brakes, and the truck skidded into the train. The train's engineer testified that he never saw the truck. It was undisputed that each vehicle should have been visible to the other when the truck was 90 feet from the crossing and the train 234 feet away.[102]

The jury returned a verdict for the plaintiff. The Texas Supreme Court reversed the jury's finding of liability, holding that the trial court properly entered judgment n.o.v.[103] The court stressed that the train's speed could have made no difference, given that the plaintiff's driver was so oblivious.[104]

McCleery is the same case as Berry, except that in McCleery, the proximate cause issue arose on the defendant's primary negligence, not on the plaintiff's contributory negligence. After the fact, the court could see that the defendant's reduction of speed had no systematic relationship to the type of accident that occurred. Again, foresight in its usual sense did not enter into the picture. The railroad had no way of predicting before the event whether the plaintiff's driver was or was not going to be oblivious. In effect, the plaintiff's driver scored a direct hit on the defendant's train.

In Harpster v. Hetherington,[105] the plaintiff went over to feed the defendant's dog, according to a prior arrangement. The plaintiff let the dog out of the garage into a fenced-in backyard. As she prepared the dog's food, she discovered that the dog had escaped through a broken backyard gate. In search of the missing dog, the plaintiff walked onto the defendant's front porch and slipped on ice that had accumulated during the day. The plaintiff did not maintain that the porch

---

[102] Id. at 496.

[103] Id. at 498-99.

[104] Id. at 499.

[105] 512 N.W.2d 585 (Minn. 1994).

was in a negligent condition, because the ice had accumulated during the day, before the defendant could have done anything about it.[106] Instead, she maintained that her slip was caused by the broken backyard gate that the defendants had negligently failed to fix. The trial court entered partial judgment for the plaintiff based on the jury's apportionment of fault between the plaintiff and the defendant. The Minnesota Supreme Court reversed, finding minimal systematic relationship between the defendant's breach of duty and the type of harm that the plaintiff suffered.[107] In other words, if one wants to prevent slips on icy front porches, it is not especially productive to fix backyard gates. After the fact, this type of accident can be seen as having a weak systematic link with the defendant's untaken precaution (fixing the latch). The type of accident is relevant, however. This particular accident would have been prevented by a better latch, but most accidents of this same type would not have been. Cause in fact existed, but not proximate cause.

In Palsgraf v. Long Island Railroad Co., a passenger came running up to one of the defendant's trains as it was leaving the station. The defendant's guards should have stopped him from boarding, but instead they negligently helped him aboard so that the package that he was carrying fell to the rails. The package contained fireworks, which exploded. The explosion jarred the platform and toppled scales onto Mrs. Palsgraf, who was standing some feet away.[108] The trial court entered judgment on the plaintiff's verdict, but the New York Court of Appeals

---

[106] Id. at 585.

[107] See id. The court said:

> [The] plaintiff argues that but for the broken gate the dog would not have escaped, and but for the dog's escape she would not have gone out on the front stoop and fallen. This is much like arguing that if one had not got up in the morning, the accident would not have happened. The fact that the dog escaped through the broken gate was simply the occasion for plaintiff to go out on the icy front stoop, not a cause of her fall.

Id.

[108] 162 N.E. 99, 99 (N.Y. 1928).

reversed.[109] It found that only a minimal systematic relationship existed between helping a passenger more carefully and scales toppling. If one wanted to prevent this type of accident, a better precaution would be to fix the scales.

In Mahone v. Birmingham Electric Co.,[110] the defendant's bus driver negligently let the plaintiff out in the street instead of on the sidewalk at the marked bus stop. The plaintiff slipped on a banana peel in the street.[111] The jury returned a verdict for the defendant, and the Alabama Supreme Court affirmed.[112] The court held that no proximate cause existed because it was equally likely that the plaintiff would have slipped on a banana peel if he had been let out at the proper place.[113]

In Falk v. Finkelman,[114] the defendant overparked his car on the main street of a town beyond the twenty-minute parking limit on that street. While the car was overparked, two fire engines collided with each other near it.[115] One of the fire engines careened into the defendant's parked car, pushing the car into the plaintiff, a pedestrian.[116] If the defendant's car had not been parked where it was, the plaintiff would not have been hurt. Still, the court held that the defendant was immune.[117] No systematic relationship existed between overparking a car and

---

[109] Id. at 101.

[110] 73 So. 2d 378 (Ala. 1954).

[111] Id. at 378.

[112] Id. at 382.

[113] See id. at 381-82.

[114] 168 N.E. 89 (Mass. 1929).

[115] Id. at 89.

[116] Id. at 89-90.

[117] See id. at 90.

having it bump into a pedestrian.

In Cunillera v. Randall,[118] the plaintiff, who was ten years old, somehow got into the stream of an open fire hydrant in New York City. He was propelled into the right rear of a station wagon that the defendant was driving on the street in front of the fire hydrant.[119] The plaintiff alleged that the defendant was negligent because she was speeding. The defendant moved for summary judgment, and the trial court granted it. The plaintiff appealed. The appeals court held for the defendant.[120] The court found no systematic relationship between the accident and the defendant's speed.[121] The same type of accident could have happened if the defendant had been traveling at any random speed, including zero.

2. Liability Paradigm RFH (Reasonably Foreseeable Harm)

This is the default paradigm under the reasonable foresight doctrine. In these cases, one can see after the fact that a systematic relationship did exist between the defendant's untaken precaution and the type of accident that the plaintiff sustained.

In In re Guardian Casualty Co.,[122] the plaintiff sued for the wrongful death of his wife. The defendant was a taxicab company whose insurance company had been taken over by the state because it was insolvent. The ultimate issue was whether the taxicab company was liable in negligence for the death of the plaintiff's wife. If the taxicab company was liable, the state would have to pay the damages on behalf of the taxicab company.

---

[118] 608 N.Y.S.2d 441 (App. Div. 1994).

[119] Id. at 441.

[120] Id. at 442.

[121] Id. at 441 ("The possibility of the driver's excessive speed is immaterial; if defendant had been driving just a little faster, the child would have missed the car altogether.").

[122] 16 N.E.2d 397 (N.Y. 1938) (mem.), aff'g 2 N.Y.S.2d 232 (App. Div. 1938).

After receiving a referee's report, the trial court found that two cars had collided outside a laundry that the plaintiff and his deceased wife owned and operated. One of these cars was the defendant's taxi, and the other car was driven by a private individual named Haas. As a result of the crash, the defendant's taxicab was propelled into the stone steps of the plaintiff's laundry. Indeed, because of the taxi driver's speed, the defendant's taxicab was literally embedded in these stone steps. The immediate force of the collision dislodged several stones from the building, and the taxicab remained wedged between some of the remaining stones. The police arrived, and they called the plaintiff's wife down to examine the damage. The police were concerned that the laundry building had become unsafe. Twenty minutes later, as the plaintiff's wife was still standing by the stone steps pursuant to police instructions, a tow truck came to pull the taxicab out of the steps. The plaintiff's wife seemed to be standing at a safe distance. Nevertheless, when the tow truck pulled the taxicab out of the stone steps, another stone, which had been loosened by the original impact, fell from the building onto the plaintiff's wife, killing her almost instantly. The trial court found that neither the people removing the taxicab nor the deceased had been negligent in any way.[123]

The plaintiff sued the taxicab company for the wrongful death of his wife. The referee found that (1) the defendant's taxicab driver was negligent; (2) the taxicab driver's negligence was a but-for cause of the wife's death; but (3) the taxicab driver's negligence was not the proximate cause of the wife's death. Accordingly, the referee entered judgment for the defendant taxicab company.[124]

The plaintiff appealed to the Appellate Division, which reversed, holding that the taxicab

---

[123] Guardian Casualty, 2 N.Y.S.2d at 233.

[124] Id.

driver's negligence was a proximate cause of the decedent's death.[125]

Viewing this accident ex post, a good way to prevent building stones from falling on people is to avoid car crashes that loosen these stones. Although other precautions were available, there was a systematic relationship between avoiding this accident in the first place and the falling stone that killed the plaintiff's wife. Under the direct consequences doctrine, the case fell within liability paradigm NIT (no intervening tort).

In Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Railway Co.,[126] the plaintiff sued for the loss of a broom corn shipment that was flooded when it was sitting in a Kansas City freight yard because of the defendant's negligent error. The plaintiff was able to recover.[127] A systematic relationship existed between the defendant's error and the destruction of the shipment by a flood, because the goods would have been more safe from flood damage in the plaintiff's own warehouse in Minneapolis. At that location, the plaintiff could have put out sandbags if a flood threatened.

In O'Malley v. Laurel Line Bus Co.,[128] on a dark and stormy night, the defendant's bus driver let the plaintiff out of the bus in the middle of the street, where he was immediately struck by an

---

[125] See id. at 235. Judge Joseph M. Callahan wrote for the Appellate Division:

> The present defendants, whose wrongful acts caused a vehicle to be projected across a sidewalk and against a building, with such force as to loosen parts of the structure, must have foreseen the necessity of removal of the vehicle from the sidewalk. They might reasonably have anticipated that the parts of the structure which were dislodged by the blow would fall into the highway. That a passing pedestrian might be injured when such an event took place in a city street, was also foreseeable. It would seem plain that although the injury to the pedestrian did not occur for some minutes after the application of the original force, because of the circumstances that the dislodged stones were temporarily held in place by the vehicle, this would not alter the case, when there is nothing to show the application of a new force causing the stone to fall.
>
> We think that the fact situation presented here shows that claimant's wife lost her life as the result of the original acts of negligence of both defendants.

Id. at 234.

[126] 102 N.W. 709 (Minn. 1905).

[127] See id. at 712.

[128] 166 A. 868 (Pa. 1933).

oncoming car. The driver had not told the plaintiff where he was being let out, and the plaintiff had assumed that it was at the side of the road, at the regular bus stop. The court held that the defendant was liable.[129] Letting people off in the middle of the street does have a systematic relationship with their being struck by cars, although it does not bear a systematic relationship to their stepping on banana peels, as in Mahone.

3. Nonliability Paradigm RIR (Reasonable Ignorance of the Relationship)

Although the reasonable foresight doctrine poses a question that is basically ex post, an important limitation on the doctrine is ex ante. Suppose that ex post the accident, indeed because of the accident, we can see that a systematic relationship did exist between the defendant's untaken precaution (his breach of duty) and the type of harm that resulted. Nevertheless, scientists would not have predicted this relationship ex ante. In this limited set of cases, no liability exists.

In Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (Wagon Mound I),[130] the defendant negligently allowed bunker oil to escape from its ship while it was moored in Sydney Harbor. The escape was negligent, because it would foreseeably do some damage as gunk. The plaintiffs owned a wharf where they were repairing a ship. When they saw the oil spread on the harbor and on the pilings of their wharf, they inquired as to whether it was safe for them to continue to weld. Everyone told them that bunker oil could not burn when spread on water. Nonetheless, evidently because their welding ignited an oil-soaked piece of waste, the oil caught on fire and ultimately burned down their wharf.[131] At the bench trial, the judge found that

[129] See id. at 869-70.

[130] [1961] 1 A.C. 388 (P.C.) (appeal taken from Austl.).

[131] Id. at 390-91.

the defendants could not have reasonably known that bunker oil could be flammable when spread on water.[132] Indeed, a "distinguished scientist," Professor Hunter, testified to that effect.[133] Based on this finding, the Privy Council held that although the defendants would be liable for the gunk damage, they would not be liable for the more substantial damage done by the fire.[134]

In Doughty v. Turner Manufacturing Co.,[135] the defendant maintained in its factory a large vat, which was filled with molten sodium cyanide heated to a temperature of 800 degrees centigrade. This vat had a cover made from a combination of asbestos and cement known as sindayo, which had been used in England and the United States for twenty years for this purpose. While a worker was changing the electrodes in the bath, he negligently knocked the cover into the vat. No one regarded this incident as dangerous at the time, and two men actually moved closer and looked into the bath. It was negligent for the worker to let the vat cover slip because it might have splashed the molten liquid onto someone. That did not happen, but after an interval of between one and two minutes, the molten liquid erupted from the bath, injuring the bystanders with its great heat and setting fire to objects on which it fell. The plaintiff was at that moment standing close to the bath, and suffered personal injuries as a result of the eruption.[136] Experiments later demonstrated that at temperatures over 500 degrees centigrade, the cement-asbestos compound underwent a chemical change that created water, which in turn became

---

[132] See id. at 413 ("The raison d'être of furnace oil is, of course, that it shall burn, but I find the [appellants] did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water.").

[133] Id.

[134] Id.

[135] [1964] 1 Q.B. 518 (C.A.).

[136] Id. at 519-20.

steam, and caused the eruption.[137] The plaintiff got judgment at trial, but the appeals court reversed, because the defendant was reasonably ignorant of the possibility that the vat cover could explode.[138]

Suppose because of a doctor's prior negligence, before HIV was identified as a disease, a patient must undergo a blood transfusion and contracts AIDS. In hindsight, there is a systematic relationship between the negligence and the disease, but scientists would not have known of it at the time of the negligence. Under a strict view of Paradigm RIR, if the exact contaminant was unknown at the time of the breach of duty, no proximate cause exists.[139] Under a looser conception of Paradigm RIR, if scientists knew generally about the problem of blood contamination before the accident, the defendant would be liable for all contaminants, whether specifically known or unknown.[140]

4. Nonliability Paradigm CLMH (Correlated Losses/Moral Hazard)

This paradigm appears to be mainly historical. The classic case of Paradigm CLMH is Ryan v. New York Central Railroad,[141] which created the New York fire rule. The defendant, through improper management of its locomotive, ignited its own woodshed.[142] From this building, the fire spread to the plaintiff's house. In denying liability, the court stressed how difficult it would be for the defendant to insure against a mass fire caused by its own inadvertent negligence.[143]

---

[137] See id. at 520.

[138] See id. at 520, 525.

[139] See, e.g., Quinones v. Long Island Coll. Hosp., 607 N.Y.S.2d 103 (App. Div. 1994).

[140] See, e.g., Jeanne v. Hawkes Hosp. of Mt. Carmel, 598 N.E.2d 1174 (Ohio Ct. App. 1991).

[141] 35 N.Y. 209 (1866).

[142] Id. at 210.

[143] See id. at 216.

The court said that first-party insurance by the homeowners would be more efficient.[144] The court also stressed that negligence in starting such fires could not be avoided.[145] In Hoffman v. King,[146] the court recognized that the rule had a special importance for city fires, but applied the same limitation to a country fire that had burned two miles for two days before destroying the plaintiff's timber.[147] The rule was not widely followed outside of New York.[148]

5. Nonliability Paradigm AS (Adverse Selection)

This paradigm also appears to be mainly historical. In First National Bank v. Marietta and Cincinnati Railroad,[149] the defendant's passenger train fell into a creek because of the defendant's negligence in maintaining its bridge. The plaintiff's bank messenger, who was carrying a satchel

---

[144] Judge Ward Hunt wrote for the court:

> To hold that the owner must not only meet his own loss by fire, but that he must guaranty the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offence committed.

Id. at 216-17.

[145] Judge Hunt wrote on this point:

> In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible, that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house, or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them.

Id. at 216.

[146] 55 N.E. 401 (N.Y. 1899).

[147] See id. at 403-04.

[148] See, e.g., Cox v. Pa. R.R., 71 A. 250 (N.J. 1908) (holding that the plaintiff was allowed to recover for the destruction of its building from a fire negligently started by the defendant railroad, which passed to an intervening building and then spread to the plaintiff's buildings). Even in New York, the doctrine was limited. See Webb v. Rome, Watertown & Ogdensburgh R.R. Co., 49 N.Y. 420 (1872) (holding the defendant liable for property damage from a fire caused by live coals which fell from the defendant railway's locomotive).

[149] 20 Ohio St. 259 (1870).

full of money, was killed in the crash.[150] The crashed train then caught fire, and the plaintiff's money was destroyed in the blaze.[151] The court held that the plaintiff could not recover for the destroyed money.[152] If the plaintiff had been allowed to recover, the insurance for the defendant's compliance errors created by the negligence liability rule would have provided more extensive coverage for the plaintiff than for other customers who were paying the same fare. Because of the heterogeneity of the risks, the plaintiff would have received a much better bargain than others. Recovery for this loss would have tended to unravel the market, if only a little bit, as rail services would become good bargains for bank messengers and poor bargains for normal travelers.

The prior two paradigms are mainly historical, though the policies that they serve can influence modern cases, especially when they are close to a modern paradigm margin.

We can now summarize some of the key ideas underlying the reasonable foresight doctrine of proximate.

B. Rules for Breaking Reasonable Foresight Code

The modern reasonable foresight doctrine is less complicated than the direct consequences doctrine. Recall, however, that both doctrines must be satisfied for proximate cause to

[150] Id. at 260-61.

[151] Id. at 261.

[152] Id. at 281. Judge Josiah Scott wrote for the court:

> We do not call in question the right of a passenger to carry about his person for the mere purpose of transportation, large sums of money, or small parcels of great value, without communicating the fact to the carrier, or paying anything for their transportation. But he can only do so at his own risk, in so far as the acts of third persons, or even ordinary negligence on the part of the carrier or his servants is concerned. For this secret method of transportation would be a fraud upon the carrier, if he could thereby be subjected to an unlimited liability for the value of parcels never delivered to him for transportation, and of which he has no knowledge, and has therefore no opportunity to demand compensation for the risk incurred. No one could reasonably suppose that a liability which might extend indefinitely in amount would be gratuitously assumed, even though the danger to be apprehended should arise from the inadvertent negligence of the carrier himself.

Id. at 279.

exist. The plaintiff's harm must be both directly caused by the defendant's negligence and a reasonably foreseeable result of it.

1. The basic test of reasonable foresight proximate cause is, paradoxically, ex post. Given what we know of the accident after the fact, is there a systematic relationship between its occurrence and the defendant's untaken precaution? If it appears that only a coincidental relationship exists between the defendant's breach of duty and the harm that the plaintiff suffered, no proximate cause exists.

2. Nonliability Paradigm IIT (independent intervening tort) is composed of many cases in which it appears ex post that no systematic relationship existed between the defendant's breach of duty and the plaintiff's harm. So, when a police officer flips a live power wire toward the plaintiff, the relationship between the defendant power company's failure to maintain its wires and the plaintiff's electrocution seems coincidental in a manner similar to Paradigm MSR (minimal systematic relationship) cases such as Harpster, in which the defendant's failure to fix the back gate bore only a coincidental relationship with the plaintiff's slip on the front porch. Paradigm MSR extends beyond Paradigm IIT, however, because it is possible for a nonsystematic relationship to exist between a breach of duty and an accident, even when no third-party tort intervenes between the two.

3. Even when it appears ex post that a systematic relationship exists between the accident and the defendant's untaken precaution, liability still does not exist when scientists did not know before the accident that a systematic relationship did exist.

Conclusion

Breaking the proximate cause code requires us to see that the doctrine is a dualism. The same case can be analyzed under both the direct consequences doctrine and the reasonable

foresight doctrine. For proximate cause to exist, the case must fall under a liability paradigm under each doctrine, for example, Paradigm NIT (no intervening tort) and Paradigm RFH (reasonably foreseeable harm).

Analyzing cases according to the paradigms described above yields many easy cases. Other cases are not as easy. These lie at a margin between two conflicting paradigms within one of the doctrines--for instance, at the border between Paradigm DCE (dependent compliance error) and Paradigm IIT (independent intervening tort). A good example is Bigbee v. Pacific Telephone and Telegraph Co.,[153] which many people have deemed wrongly decided. The plaintiff's complaint alleged that on the night of the accident, at approximately 12:20 a.m., the plaintiff was standing in the defendant's telephone booth located in a parking lot of a liquor store on Century Boulevard in Inglewood, California.[154] A second defendant, Roberts, was driving, intoxicated, east along Century Boulevard.[155] She lost control of her car and veered off the street into the parking lot, crashing into the telephone booth in which the plaintiff was standing.[156]

The plaintiff saw Roberts's car coming toward him and realized that it would hit the telephone booth. He attempted to escape but was unable to do so because the door had jammed. The plaintiff alleged that the defendant telephone company's failure to maintain its booth was a breach of duty and a cause in fact of his injury.[157] Had the door operated freely, he would have been able to escape and would have suffered no harm. The plaintiff also alleged, as a second untaken precaution, that the defendant negligently located its booth too close to Century

[153] 665 P.2d 947 (Cal. 1983).

[154] Id. at 948.

[155] Id.

[156] Id.

[157] Id.

Boulevard, where "traffic . . . traveling easterly, generally and habitually speeded in excess of the posted speed limit," thereby creating an unreasonable risk of harm to anyone who used the booth.[158]

The California Supreme Court held that the plaintiff's complaint stated a good cause of action,[159] a result that outraged many. Because Roberts was drunk, it seemed to many that she was the sole cause.

Under the reasonable foresight doctrine, there was certainly a highly systematic relationship between the defendant's failure to maintain its phone booth door and the plaintiff's accident. Indeed, similar cases of telephone company liability show a far more coincidental relationship.[160] Under the direct consequences doctrine, the case seems close to the margin between Paradigm DCE (dependent compliance error) and Paradigm IIT (independent intervening tort). If Roberts had been sober and had inadvertently lost control of her car in that sober state (maybe looking on the floor for a cigarette), the case would have been an obvious situation of liability for the telephone company, analogous to the Hairston case described above[161] and hundreds of others. Nevertheless, because Roberts was drunk, it was not really an innocent compliance error that she committed. It was something worse. Nevertheless, the case does not seem to fall more clearly within Paradigm IIT (independent intervening tort) because those cases typically involve responsible actors or irresponsible actors who have gone beyond a third party's incitement. Roberts was not responsible; she was a drunk driver. Moreover, she was not at all encouraged by

---

[158] Id.

[159] See id. at 953.

[160] See, e.g., Pac. Tel. & Tel. Co. v. Parmenter, 170 F. 140 (9th Cir. 1909) (holding the defendant liable when its rotten pole was toppled onto the plaintiff by a third party who, six hundred feet away, negligently cut a tree onto the wire that the pole was supporting).

[161] Supra notes 56-57 and accompanying text.

the phone company's negligence in failing to grease its telephone booth more often, so that the case also did not fall squarely within Paradigm EFR. Roberts knew nothing of the state of the phone booth as she was driving. The case is close, but the California Supreme Court's resolution in favor of liability seems reasonable from some points of view. Why should the telephone company lose incentive to maintain its booths as the number of drunk drivers increases? It would seem that the opposite incentive would be more reasonable. That result would be quite consistent with the policy underlying Paradigm EFR (encourage free radicals)[162] even though Roberts was not encouraged by any act or omission of the phone company. For all of the controversy that the case has created, it is very similar in its facts and reached the same result as a Texas case decided in the early 1960s.[163] Probably the reason Bigbee became controversial was that during the campaign against drunk driving many people wanted to see drunk drivers as totally responsible people, like the Seith police officer. People want to focus liability on them. Perhaps this is the more reasonable view. The paradigms can help us see both sides.

As a hard case like Bigbee illustrates, using the paradigms described in this Article does not make every case easy. Moreover, proximate cause doctrine continues to evolve, as Bigbee also demonstrates. The paradigms do, however, allow us to see the orderly features of this important body of law, to see cases as hard or easy, and to map further changes in the law created by the courts.

---

[162] See, e.g., O'Toole v. Carlsbad Shell Serv. Station, 247 Cal. Rptr. 663 (Ct. App. 1988) (holding that the defendant gas station that sold gasoline to an obviously drunk motorist was liable under Paradigm EFR to the motorcyclist whom she later struck). In O'Toole, the California Supreme Court denied review and depublished the Court of Appeals' opinion, thereby avoiding controversy. See id. at 663 n.*.

[163] See Byrnes v. Stephens, 349 S.W.2d 611 (Tex. Ct. App. 1961).