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UNDERSTANDING THE NEGLIGENCE QUESTION

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There is currently an unsolved problem in the legal literature regarding the role cost-benefit analysis should play in determinations of breach in negligence cases. Additionally, despite extensive writings, the relationship between duty and breach in negligence cases remains unclear. At the core of the problem lies the inadequacy of our understanding of breach, which is currently established through multiple independent constructs that lack a shared fundamental conceptual base. Further complicating matters is the limited study afforded the nature of the negligence cause of action itself, which leaves the element of duty on unsound footing. This note fills those gaps. In analyzing breach, the note provides a framework for understanding the negligence cause of action and duty. The note then asserts that an actor's given conduct is in negligent breach of a duty if (and only if) a reasonable person would have foreseen the nonattainment of the duty's demanded result and a cost-benefit analysis weighs against the actor. This note concludes with the application of this framework to the oft-maligned element of proximate cause. Proximate cause in the

negligence cause of action is fundamentally linked to breach, and this note clarifies some of the uncertainty around proximate cause using its unique duty/breach analysis.

I. INTRODUCTION

This note is a conceptual study of breaches in negligence cases. Traditionally, breach has been established by a collection of independent constructs, such as foreseeability, adherence to custom, adherence to one's purported standards, violation of statutes, risk/utility analysis, and notice and opportunity to cure. This hodgepodge of constructs is conceptually and procedurally unsatisfactory. This existing theoretical patchwork fails to provide a fundamental theory of negligent breach. The hodgepodge necessitates inelegant and inefficient argumentation of separate (yet intersecting) constructs that produce awkward conclusions.

This note offers a theoretical approach that unifies the existing, disparate theories. It argues that the various constructs of breach can be subsumed under a particular combination of foreseeability and cost/benefit analysis that results in procedural simplicity and theoretical cohesion. This synthesis precisely captures the notion of "negligent breach" as—*an act (or inaction) is in negligent breach of a duty if and only if it foreseeably results in the nonattainment of the duty's demanded outcome and a costs and benefits assessment of the act (or inaction) weighs against the actor*. Both these elements have venerable roots. Foreseeability is at the core of negligence, playing an important or decisive role in the elements of duty, breach, and proximate causation. Cost/benefit analysis is the primary focus of law and economics in negligence cases.

Two preliminary clarifications are in order. First, this note adopts the broad, ordinary meaning of "duty": "[a]ction, or an act, that is due in the way of moral or legal obligation; that which one ought or is bound to do; an obligation."[1] Any

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duty we have, such as a statutory or contractual duty, will satisfy this definition. In other words, I am separating the notion of duty from the general duty of care. However, this note exclusively considers legal duties, as opposed to moral ones.[2]

Second, my analysis focuses on the law as developed and applied by the appellate courts. I make no claims to explaining the thinking of individual jurors as they consider negligence cases. The law, of course, must still be read to the jury in jury instructions.

The body of this note proceeds as follows. Part II separates duties into two categories, results-based duties, which explicitly demand a specific result, and conduct-based duties, which do not. Courts engage in a more extensive analysis of negligence when the duty in question is conduct-based, as opposed to results-based. Part III considers intentional breaches. Unlike negligent breach, intentional breach demands that the actor desire the consequences that constitute breach or be substantially certain that the consequences will occur. Part IV analyzes negligent breaches of results-based duties in case law and argues that a results-based duty is breached negligently if a reasonable person would have foreseen the non-occurrence of the duty's result. Part V investigates negligent breaches of conduct-based duties, which are more common. Part V, which is the primary part of this note, analytically establishes that the ordinary constructs considered in cases of negligent breach are equivalent to a two-step inquiry: (1) Would a reasonable person have foreseen the non-occurrence of the underlying result of the duty, and if so, (2) did a cost-benefit analysis weigh against the actor? Results-based duties only demand the first prong of the analysis, and this note explains that the specificity of the demanded result in results-based duties obviates the cost-benefit inquiry of the second prong. It suggests, however, that a better approach is to use the general analysis in both cases, noting as a special cost in the

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[1] *Duty*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The Oxford English Dictionary recognizes this as the primary current sense of the word. *Id.*

[2] The classic moral example is of a person in a room, smoking a cigarette and watching a person in the street being beaten to death by a stranger. There is no legal duty to act.

cost-benefit inquiry of the second prong the non-attainment of a result that was explicitly demanded by the duty, without assuming *a priori* that the second prong would be met.

II. DUTIES CAN BE RESULTS-BASED OR CONDUCT-BASED

In contrast to this note's unified thesis, a review of appellate cases shows that courts treat breaches differently depending on whether the duty breached is a "results-based" duty or a "conduct-based" duty. The present Part clarifies the distinction between "results-based" and "conduct-based" duties.

A duty is results-based if and only if it demands a specific result. For example, a contractual duty to pick someone up at 4:00 p.m. on a certain day of the week is a results-based duty. A duty is conduct-based if and only if it is concerned with a person's conduct, as opposed to specific results from that conduct. The common law general duty of care with which negligence is often associated is the quintessential conduct-based duty.[3] The fiduciary duty of care for corporate officers and directors is another example.[4]

Common carriers have the conduct-based duty of exercising the utmost care and diligence.[5] A possessor of land owes licensees a conduct-based duty of reasonable care for his activities on the land,[6] and a duty to warn or to exercise reasonable care to make safe both natural and artificial

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[3] "[T]he standard of conduct to which [an actor] must conform to avoid being negligent is that of a reasonable man under like circumstances." RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965).

[4] "A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." 1-4 PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (AM. LAW INST. 2005).

[5] *E.g.*, CAL. CIV. CODE § 2100 (Deering 2020) ("A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.")

[6] RESTATEMENT (SECOND) OF TORTS § 341.

conditions on the land.[7] The duty to warn, standing independently, would have been results-based. The duty to exercise reasonable care to make the condition safe is conduct-based. A duty to make the condition safe would have been results-based. On the other hand, no duty of reasonable care is owed to undiscovered trespassers.[8]

As a borderline example, if a child's caretaker has the contractual duty to act in such a way that the child is happy, then that caretaker would have a conduct-based duty. If, on the other hand, the caretaker has the duty to keep the child happy at all times, then the caretaker would have a results-based duty.

Conduct-based and results-based duties interact. Conduct-based duties can result in other, less general, duties, or even specific results-based ones. For example, the fiduciary duty of care requires that directors and officers "keep informed about the activities of the corporation."[9] This is a conduct-based duty. It also requires that directors and officers avoid violations of positive law.[10] This would be a results-based duty. Of particular interest is when a conduct-based duty splits into or is otherwise satisfied by other duties. For example, The American Law Institute recommends that if three duties are satisfied and there is no conflict of interest, then the fiduciary duty of care is satisfied.[11]

The general duty of care with which negligence is often associated, and which is a duty to act in such a way as

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[7] *Id.* § 342. The idea is to make the land as safe as it appears or disclose that it is not. *Id.* cmt. e.

[8] *Id.* § 333. As an organizational matter, to determine the duties owed by landowners to those on the land, traditionally one generally determines the status of the entrant (trespasser, licensee, etc.) and the danger in question (natural condition, activity by landowner, etc.). *See id.* §§ 328E-350.

[9] Francis v. United Jersey Bank, 432 A.2d 814, 822 (N.J. 1981); *see generally* 1-4 PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(a)(1) (AM. LAW INST. 2005).

[10] Roth v. Robertson, 118 N.Y.S. 351, 353 (Sup. Ct. 1909); 1-4 PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(a) cmt. d ("[A] director or officer violates the duty to perform his or her functions in good faith if he or she knowingly causes the corporation to disobey the law.").

[11] 1-4 PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(c). This formulation is in line with current law. *See id.*

not to cause others an unreasonable risk of harm,[12] enjoys the most joyful group of such permutations. This often raises theoretical questions as to what is and is not related to the general duty of care. For example, the Arizona Supreme Court once stated that the duty owed by common carriers to passengers is but the general duty of care measured by the reasonable and prudent person standard, interpreting that duty to imply a heightened standard.[13] The California Supreme Court has held that landowners owe to entrants, not special duties, but the general duty of care measured by the reasonable and prudent person standard (in this case to change the substantive requirements).[14]

I shall argue in a separate paper that the general duty of care is a social contract duty that arises from and, in that regard, is limited to the conduct-based duty that we owe each other precisely because we have congregated to live together as a society.[15] Results-based duties, arising by definition from special relationships instead of individuals' membership in a society, are separate from this duty.

Motivated by this social contract duty, one can nonetheless reinterpret it and say that there is a constant duty to avoid creating unreasonable risks of harm to others, *all circumstances considered*, including in it thereby all the special relationships such as statutes, contracts, and family. The duties resulting from the special relationships may or may not completely cover the general duty; additionally, they exist independently.[16]

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[12] RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 1965). This expansion helps understand when breach of the duty occurs, because it provides the content of the duty.

[13] Nunez v. Prof'l Transit Mgmt. of Tucson, Inc., 271 P.3d 1104, 1106-09 (Ariz. 2012).

[14] Rowland v. Christian, 443 P.2d 561, 564-69 (Cal. 1968).

[15] It is also the only conduct-based duty of care, and accounts for all situations—situations that inevitably arise—for which specific protective laws do not exist.

[16] For example, the statement that a landowner owes a duty of reasonable care to discovered trespassers, to licensees, and to invitees with respect to active operations, RESTATEMENT (SECOND) OF TORTS §§ 336, 341, 341A, is nothing but a restatement of the basic general duty of care applied against landowners in favor of those entrants. On the other hand, it is misleading to say that a landowner has no duty of reasonable care to undiscovered trespassers, since the basic general duty of care still exists. However, as we shall see later in the paper, there can never be breach of this duty in

Under this interpretation, the general duty of care ceases to be a social contract duty and must be imposed by the government. Furthermore, and at least equally importantly, it ceases to be a necessary duty.[17] This note adopts the extended version of the general duty of care because it is easier to explain court opinions through it.[18]

The separation of duties into the results-based and the conduct-based that I introduced at the beginning of this section is not of particular interest in understanding duties themselves. It is, however, useful in understanding negligent breaches. Before considering negligent breaches, however, it would be useful to briefly consider intentional breaches.

III. INTENTIONAL BREACHES

Since a given act that is in breach of a given duty cannot constitute both an intentional and a negligent breach

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such a context. A company that releases asbestos into society should be concerned about the basic general duty of care. Similarly, a chemist who, in an effort to find his way back to his home after a visit to his grandmother's new dwelling, leaves behind a trail of TNT, should also be concerned about that duty. In both these latter cases, no legal relationship exists between the potential plaintiffs and defendants; hence we consider the general duty of care at its rudimentary level. Nevertheless, if one existed, an additional duty would be added because of it, and independently of membership in society. This duty would then alter the general duty of care in that context.

The general duty of care can be abrogated; for example, because no contractual principle exists preventing its curtailment, *see* RESTATEMENT (SECOND) OF CONTRACTS §§ 178-96 (AM. LAW INST. 1981), one can remove the duty by contracting out of it. *See also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. e (AM. LAW INST. 2000) (considering special cases where an overall indemnification for negligence would be unenforceable). In the ultimate analysis, though, if there is a contract abrogating the duty, the contract is simply part of "all the circumstances."

[17] Thus, a court that ignores the social contract basis for the general duty of care could well decide to remove it entirely, as the Arizona Supreme Court did in Quiroz v. Alcoa Inc., 416 P.3d 824 (Ariz. 2018).

[18] The alternative would have been to keep the social contract duty and the special relationship duties separate.

of that duty,[19] it is helpful to say a few words on intentional breaches.

A person who acts with intent "desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it."[20] As such, a breach is intentional if the actor desires to cause the consequences that constitute breach, or has substantial certainty that the consequences will occur.[21] Intent to breach, in the ordinary sense of the phrase, is not required, insofar as lack of knowledge of the law is no defense.[22] Conduct-based duties can be breached intentionally just as well as results-based ones: because conduct-based duties often come in the form "act in such a way that x," any intentional act that guarantees "not x" would be an intentional breach by this definition.[23]

It is a fundamental aspect of American jurisprudence that one needs a legal theory (a "cause of action," if the procedural aspect shall be emphasized) to bring suit.[24] Sometimes, the legal theory is essentially the statute establishing the duty;[25] at other times, as with the negligence

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[19] Ryan v. Napier, 425 P.3d 230, 235-36 (Ariz. 2018). Of course, a given act can constitute an intentional and negligent breach of *different* duties. For example, suppose a housekeeper has a contractual duty never to have any oil (spilled) on the floor. One day, frustrated at being subject to such a specific duty, the housekeeper picks an oil bottle and pours oil on the floor of the entrance hall 10 minutes before the homeowners' usual arrival time. The homeowners arrive early, slip on the oil, and are injured. The act of pouring oil on the floor is an intentional breach of the contractual duty and a negligent breach of the general duty of care.

[20] RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

[21] *Id.*

[22] *Ignorantia legis non excusat*. *E.g.*, Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Ga. Code Ann. § 1-3-6 (2020).

[23] This is not to say that the intentional breach will have any practical significance. For example, if a person walking down the street decides to and beats a stranger with a bat, that would be an intentional breach of the general duty of care. However, aside from the lack of existence of a remedy for this intentional breach, *see* RESTATEMENT (SECOND) OF TORTS Division 1, this act would be tackled under battery, *id.* §§ 13-16.

[24] Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 631-37 (2015) (providing historical background); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864-73 (1996).

[25] *See, e.g.*, Stabile, *supra* note 24, at 861 n.1.

cause of action, it runs across various duties.[26] As such, in the US, there exists a world of duties and rights, the "law" as one would ordinarily understand the word, and a different world of "causes of action."[27] "Intentional breach of duty" is not a legal cause of action and there instead exist multiple causes of action intended to account for harms caused by intentional breaches of tort duties.[28]

IV. NEGLIGENT BREACHES OF RESULTS-BASED DUTIES

A results-based duty is breached negligently if the non-attainment of its result was foreseeable. This Part clarifies that idea by analyzing appellate cases.

Since the difference between a results-based and a conduct-based duty is the difference between "x" and "act in such a way that x" (e.g., as a reasonable and prudent person), the fundamental problem is, compared to conduct-based duties, what recognition should be given to a result-based duty's outright demand of a particular result. In the case of a results-based duty, one would expect that breaches would be found more readily. Contrast this with conduct-based duties, where one would expect breaches found less readily.

With whatever greater ease negligent breaches of specific duties shall be found, that ease is not mere failure to execute. There is a fundamental difference between negligence and strict liability: negligence imputes, and by extension demands, greater fault. For example, the Supreme Court has held that violations of the Safety Appliance Act, a federal act intended to promote safety in railroad

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[26] *E.g.*, RESTATEMENT (SECOND) OF TORTS §§ 341, 388.

[27] This note does not consider, and passes no judgment on, (1) the procedural efficiency of this approach; (2) the existence, or nonexistence, of normative justifications for it; (3) the interpretation of ingenious violations of horizontal separation of powers in the creation of laws that of themselves leave out the judiciary. *See generally* Stabile, *supra* note 24, at 864 n.14 (providing sources arguing for the essential relationship between a law and its enforceability).

[28] *See* RESTATEMENT (SECOND) OF TORTS, Division 1.

operations,[29] are subject to strict liability.[30] It has explained that this liability "*is not based upon the carrier's negligence.* The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous."[31] Similarly, the Wisconsin Supreme Court has held that violations of the Pure Food Act, which guarantees the quality of food in certain specific senses,[32] result in strict liability.[33] In explaining its ruling, the court stated: "We construe that decision as holding that the liability of [D]efendant for selling unwholesome food exists *independently of any showing of actual negligence*."[34]

As explained below, results-based duties often arise from statutes and contracts.[35] This Part will, in turn, consider duties arising from statutes and contracts.

A. NEGLIGENCE PER SE

This note first considers statutes. As discussed previously,[36] in the United States, one needs a legal theory to sue. Thus, the mere existence of a statute on point does not grant the person the right to enforce it by litigation. The existence of a statute may result in one of three effects: the statute could itself provide a legal theory for a suit,[37] which could be expressly stated by the legislature or implied;[38] it

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[29] O'Donnell v. Elgin, J. & E.R. Co., 338 U.S. 384, 387-89 (1949). The Safety Appliance Act imposes a specific duty. *See id.*

[30] *E.g.*, *id.* at 390.

[31] Brady v. Terminal R. Ass'n., 303 U.S. 10, 15 (1938) (emphasis added).

[32] Doherty v. S.S. Kresge Co., 278 N.W. 437, 441 (Wis. 1938). The Pure Food Act also imposes a results-based duty. *See id.*

[33] *Id.*

[34] *Id.* (emphasis added).

[35] On the other hand, the general duty of care and associated duties are often general instead of specific.

[36] *See supra* notes 24-28 and accompanying text.

[37] *See, e.g.*, *supra* notes 29-34 and accompanying text (discussing the Safety Appliance Act and Pure Food Act).

[38] *See generally* Stabile, *supra* note 24. This includes utilizing an existing cause of action instead of creating a new one. For example, the legislature could allow for a tort cause of action. This would make the duty a "tort duty," which I shall use as shorthand for "duty for which a tort cause of action exists." In this note, we will be concerned exclusively with the negligence cause of action. Therefore, a tort duty is a duty which

could *not* provide a legal theory but be used by the courts to infer negligent breach of the general duty of care; or it could *not* provide a legal theory but serve as evidence, and no more than evidence, of negligence. We will be seeing the third category in Part V. Here, the paper considers the second category.

The Restatement (Second) of Torts ("Restatement Second") provides the common rule for when a statutory duty has per se effect:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.[39]

Thus, the grant of per se effect to a statutory duty is essentially a bench trial on the merits.[40] Of course, that this is the standard rule does not mean that it is the uniform

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negligence recognizes. Such thinking might be odd to the reader, who might find it strange that after identifying a cause of action in a context in which it seems to apply, one should nonetheless ask whether the cause of action includes the duty. This is probably exacerbated, and might even be caused, by the fact that many causes of action do not float over various duties. Regardless, it might help to analogize it to the element of actual harm. We are much more used to asking whether a given cause of action is intended to account for a certain type of harm. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 15 (AM. LAW INST. 1965) (battery); *id.* § 46 (intentional infliction of emotional distress); *id.* § 281 (negligence).

[39] *Id.* § 286.

[40] Compare the elements and implicit assumptions of the RESTATEMENT (SECOND) OF TORTS § 286 with the elements of the RESTATEMENT (SECOND) OF TORTS § 281.

rule.[41] Still, it has been reaffirmed in the draft of the Restatement (Third) of Torts ("Restatement Third")[42] and is the "strong majority rule."[43]

Negligence per se is an important doctrine[44] and has many rationales: comity between the judiciary and the legislature,[45] the superiority of the legislature's determination of reasonableness to that of a jury, the avoidance of conflicting results by different juries on recurrent questions, and observance of the implied will of the legislature.[46]

I would like to emphasize that most courts interpret negligence per se as the use of breach of a statutory duty to determine negligent breach of the general duty of care, under the interpretation that the statute is part of the circumstances; it is *not* the derivation of a tort duty.[47] This is

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[41] There have been divergences, sometimes with spectacular results. For example, one commentator has argued that negligence per se should not exist at all. Barry L. Johnson, *Why Negligence per se should be abandoned*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 247 (2017). Another has argued for a categorical bar to all federal duties. Barbara Kritchevsky, *Tort Law is State Law: Why Courts should distinguish State and Federal Law in Negligence-per-se Litigation*, 60 AM. U. L. REV. 71 (2010).

[42] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (AM. LAW INST. 2010) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

[43] *Id.* § 14 cmt. c.

[44] *Id.* § 14 cmt. d.

[45] The comity rationale might appear slightly odd, given that the legislature is the supreme lawmaker and that, accordingly, the judiciary and the legislature are not on equal footing in making laws. Perhaps this might best be interpreted as legal realism. *See generally* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005).

[46] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 cmt. c. The idea behind observance of the implied will of the legislature is thus: since negligence per se has existed for decades, the legislature knows that the judiciary could use its pronouncements to determine tort duties; where it desires a private cause of action, it may establish one; where it does not desire the judiciary to use it to determine negligence, it may say so; thus, where it does not do either, it is knowingly leaving the responsibility to the judiciary. *Id.*

[47] For example, Arizona currently is an exception, because it does not have a general duty of care but uses negligence per se. Quiroz v. Alcoa Inc., 416 P.3d 824 (Ariz. 2018). Thus, it interprets negligence per se as implying a tort duty (the court speaks of public policy "giving rise" to duty). *Id.* Since

the approach of the Restatement Third.[48] In this case, the negligence duty is conduct-based. Once negligent breaches of general duties are covered in Part V, the breach question here can be easily understood. This note adopts the interpretation that negligence per se is concerned with breach and not duty.[49]

The rest of this section shows that when a statutory duty is given per se effect, it can be breached strictly, intentionally, or negligently, although in the case of strict liability, a court must ensure to grant the duty such significance. As an example of strict breach of a duty giving rise to negligence per se, consider *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65 (Mass. 1985). There, the plaintiff suffered a stroke due to the use of contraceptive pills and brought a products liability action against the defendant company.[50] The theory was inadequate warning of the dangers.[51] Ordinarily, manufacturers are under a duty to inform consumers of the dangers of their products.[52] However, in the case of pharmaceuticals, this duty is weakened by the "learned intermediary" doctrine, which provides that pharmaceutical companies discharge their duty by informing the doctors, without informing the patients directly.[53] Relying on a Food and Drug Administration ("FDA") regulation to the contrary, as well as various other reasons, the court held that the learned intermediary doctrine did not apply to contraceptive pills, and that pharmaceutical companies manufacturing

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the court is considering public policy, the cause of action is not in the law itself, expressly or impliedly. This is negligence per se. *Id.* at 565–66.

[48] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 cmt. i and note.

[49] While there are reasons to interpret negligence per se as creating tort duties, this note adopts the alternative approach since it is more in line with court opinions. Moreover, (1) negligence per se is *negligence* per se, not *duty* per se; (2) the questions courts ask to determine whether negligence per se applies make more sense as breach questions rather than duty questions; (3) because "intentional breach of duty" is not a legal theory for suit, under the duty approach one obtains the systematic oddity of granting remedies for negligence but not for the more egregious intentional violations.

[50] MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65, 66 (Mass. 1985).

[51] *Id.* at 67.

[52] *Id.* at 68.

[53] *Id.* at 68-69.

contraceptives had a duty, given per se effect and which differed slightly from the regulation, "to provide to the consumer written warnings conveying reasonable notice of the nature, gravity, and likelihood of known or knowable side effects, and advising the consumer to seek a fuller explanation from the prescribing physician or another doctor of any such information of concern to the consumer."[54] The court then affirmed a jury's determination of breach, even though the company had complied with the FDA requirements because a trier of fact could have concluded that the warnings provided did not adequately apprise users of the inherent risks.[55] In other words, there was a breach because the warning requirement was not strictly complied with, as determined by the factfinder.[56] This is strict liability.

Meanwhile, in *Munford, Inc. v. Peterson*, 368 So. 2d 213 (Miss. 1979), the court found negligence per se due to an intentional breach of statutory duty. There, the plaintiffs brought suit against the defendant for selling beer to underage boys in violation of law.[57] One boy was 15, three were 14, and one was 13.[58] On the evening in question, the boys found vodka in the family car, bought orange juice from the defendant, and drank the mix.[59] One of the 14-year-old boys then went back to the defendant's store and bought a six-pack of 14-oz. cans of beer.[60] The operator asked the boy if he was of age, but made no effort to verify his affirmation.[61] The record showed that he looked no older than fourteen.[62] The boys then drank the beer. At that point, one member of the party was lost to the protection of his 17-year-old sister, who prevented him from continuing with the group because she knew they were drinking beer.[63] The remaining four then drove back to the market, where a different member of the party from the previous customer went in and bought another six-pack of beer without any questions being

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[54] *Id.* at 69-70.
[55] *Id.* at 70-72.
[56] *Id.*
[57] Munford, Inc. v. Peterson, 368 So. 2d 213, 215 (Miss. 1979).
[58] *Id.* at 214.
[59] *Id.*
[60] *Id.* at 215.
[61] *Id.*
[62] *Id.*
[63] *Id.* Times, evidently, change.

asked.[64] The boys then drank the beer, and another went back to the store and bought another six-pack of beer, again with no questions as to his age asked.[65] They drank the beer then continued to drive, having an accident that killed one of the boys.[66] The court found a violation of the statute preventing the sale of alcohol to underage kids, valid for purposes of a negligence action, even though the violation was intentional.[67]

On the other hand, the court in *McDermott v. McKeown Transportation Co.*, 263 Ill. App. 325 (Ill. App. Ct. 1931) declined to find negligence per se, because the breach of the underlying statute, which imposed a results-based duty, was not negligent as to the statutory duty. There, the plaintiff, a 20-year old woman, brought suit for violation of a statute requiring that cars have a rear red light on at night.[68] The plaintiff was in a car with two young men and they were heading south to a party the night in question.[69] The night was misty and rainy.[70] The fog was so thick the young party-goers could hardly see, and the path south was like a tunnel with a row of trees of heavy foliage on the west side and an embankment holding railroad tracks on the east.[71] The arc lights on the street failed to penetrate the fog,[72] and the windshield was so full of water it "all splashed up," and the passengers could not see through the windshield.[73] The young party, driving between 15 and 20 miles per hour in these conditions, rear-ended a delivery truck that had just finished its night's work.[74] The truck was traveling around 10 miles per hour.[75] It had a new kerosene lamp that was in good condition and that was lit when it had gotten dark two hours before the accident.[76] There was also evidence that it was lit five minutes before the accident, just after the truck's

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 215-17.
[68] McDermott v. McKeown Transp. Co., 263 Ill. App. 325, 326–28 (1931).
[69] *Id.*at 326.
[70] *Id.* at 327.
[71] *Id.*
[72] *Id.* at 327-28.
[73] *Id.* at 327.
[74] *Id.* at 328.
[75] *Id.*
[76] *Id.*

last delivery, throwing a red light to the rear.[77] The court refused to attach strict liability to the statute.[78] There was no "absolute legal duty" to maintain a red light at the rear of the car, and "the law [was] not so unreasonable that there might not be circumstances which would relieve one from liability in case the rear light suddenly went out."[79] The court concluded that even if the light were out at the time of the accident, a jury could find that the defendant did not breach a duty insofar as it had taken reasonable steps to achieve the law's dictate.[80]

The *McDermott* court quoted *Toledo, Wabash & Western Railway Co. v. Beggs*, 85 Ill. 80 (1877), in which the Illinois Supreme Court reversed a judgment in favor of the plaintiff in a personal injury case for the breaking of a wheel on the coach of a railroad train, because the wheel was manufactured by one of the most skillful makers in the United States, was of the kind usually employed in the industry, and had been subject to and withstood the ordinary tests, so *that the defect was not discoverable through reasonable care*.[81] In other words, the non-attainment of the statute's result was not foreseeable.

This requirement of negligence for breach of statutory duty can be found in other cases.[82] In *Brotherton*, the court reversed a judgment for the plaintiffs in an action against the defendants for having been negligent in ensuring that their rear red light was working, as required by law.[83] The court found that the vehicle had been inspected at 4 p.m. on the day of the accident and that the rear lights were shining less than half an hour before the collision.[84] The court noted that "the electric bulb [of a vehicle] may at any time cease to function, or the light for some other reason may suddenly cease to shine, without any fault on the part of the person in charge of the vehicle, and *without his becoming aware of the fact that the light has gone out*."[85] The court reversed the

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[77] *Id.*
[78] *Id.* at 329.
[79] *Id.* at 328–29.
[80] *Id.* at 329–31.
[81] *Id.* at 329.
[82] *E.g.*, Floyd v. Johnson, 100 S.W.2d 975, 978 (Ark. 1937); Brotherton v. Day & Night Fuel Co., 73 P.2d 788, 791 (Wash. 1937).
[83] *Brotherton*, 73 P.2d at 789–90.
[84] *Id.* at 794.
[85] *Id.* (emphasis added).

judgment as against the weight of the evidence, stating that "it [was] difficult to understand upon what theory appellants were held negligent," and asking: "How should appellants have known that the lights on the rear of the truck were not shining?"[86]

This gives us the notion of a negligent breach of a results-based duty: a results-based duty is breached negligently if its breach was foreseeable. In other words, the person subject to the duty has to take reasonable steps to ensure that the result of the duty is attained. The idea is incredibly simple: since the person is subject to a results-based duty, the task is to ensure that the duty is satisfied without being subject to strict liability.[87]

B. DUTIES UNDER CONTRACT

As we have seen, in the case of statutory duties, courts infer breach of the general duty of care without converting the statutory duty into a tort duty.[88] In the context of contracts, courts, as we shall see, convert the contractual duty into a tort duty. Moreover, whereas in statutory duties there is a common rule governing the analysis, no such uniformity exists in the contractual setting.[89]

As an example, this note considers the rule suggested by the Restatement Third. That rule is motivated by physical harms and promissory estoppel:

> An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

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[86] *Id.*

[87] Although the note does not consider recklessness, that breach of a results-based duty simply demands greater foreseeability.

[88] *See supra* Section IV.A.

[89] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 42 cmts. e & f and notes (AM. LAW INST. 2000).

> (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
>
> (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.[90]

The dominant element appears to be the relationship between the undertaking and the reduction of risk of physical harm, which carries the undertaking into the ambit of tort law. For example, if a person comes to install a water heater, the undertaking is not governed by this section because the installation of a new water heater is not connected to the reduction of an existing risk of physical harm.

The requirement of "reasonable care" implies that the specific tort duty cannot be breached strictly.

The Restatement Third recognizes that the distinction between (a) and (b) is unclear.[91] Further, the Restatement Third emphasizes that the rule, in speaking of undertakings, is intended to cover promises.[92] This is some version of promissory estoppel, but it is not promissory estoppel itself.

The Restatement (Second) of Contracts provides as to promissory estoppel: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[93]

In the world of undertakings that one could reasonably know to reduce the risk of physical harm to others, it can be seen that any undertaking resulting in a contractual duty through promissory estoppel will also result in a tort duty through the rule above. On the other hand, the existence of option (a) in the tort rule makes tort duties more extensive than contractual duties. Yet in the world of undertakings generally, the requirement that the undertaking relate to the reduction of physical harm to

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[90] *Id.* § 42.
[91] *Id.* § 42 cmt. f.
[92] *Id.* § 42 cmt. e.
[93] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

others makes contractual duties through promissory estoppel more extensive than tort duties through the rule above.

In terms of breaches, the same rule applies. There is negligent breach of the results-based duty if the breach was foreseeable. In *Anderson v. Kroh*, 301 N.W.2d 359 (N.D. 1980), the plaintiff brought suit against a landowner for wrongful death and destruction of property.[94] The plaintiff had rented a mobile home from the owner, who lived in a building north of the trailer.[95] One day, the plaintiff realized that the trailer was without hot water, so she sent her 12-year-old daughter to inform the landowner of the problem.[96] The landowner was a mechanic and self-trained in the functioning of heaters,[97] so he came to resolve the issue himself. After he had relit the flame, he instructed the plaintiff to keep the door to the water heater compartment open because of dampness in the compartment.[98] The flame appeared to burn strangely, to the side of and down from the water tank in a reddish-orange color.[99] The landowner did not check the flue.[100] In fact, he made no investigation, including as to the cause of the flame's initial extinguishment, other than checking a faucet on the heater for leakage.[101] That night, the plaintiff went out with friends, leaving her four children in the trailer.[102] She returned to find the trailer burning.[103] Three of her children had escaped, but one had remained in his room and perished in the fire.[104] Additionally, all the personal property in the trailer was lost.[105] At trial, evidence was introduced that the landowner, who even had special knowledge, should have known that his repair was inadequate. When relighting the flame, one should always determine why the flame had been

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[94] Anderson v. Kroh, 301 N.W.2d 359, 360 (N.D. 1980).
[95] *Id.*
[96] *Id.*
[97] *Id.* at 361, 363.
[98] *Id.* at 360.
[99] *Id.*
[100] *Id.* at 361.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

extinguished in the first place.[106] Checking the flue is a routine matter in this service call.[107] There was evidence that a blocked flue could cause a fire.[108] One should also engage in other routine tasks, such as checking the chimney.[109] All these, of course, show that because the landowner could have foreseen that he was not fixing the heater properly, the court concluded that the evidence supported a finding against the defendant for negligence and reversed a judgment notwithstanding the verdict.[110] Unlike foreseeability, the court, as the above shows, did not engage in an explicit cost-benefit analysis.

In *Mixon v. Dobbs Houses, Inc.*, 254 S.E.2d 864 (Ga. Ct. App. 1979), the plaintiff sued the defendants for failing to deliver an emergency message. The plaintiff's husband had informed his manager that his wife, the plaintiff, was pregnant and that he would have to leave at a moment's notice to take her to the hospital.[111] He worked loading food and clearing planes serviced by his employer for Delta Air Lines and had no access to a telephone.[112] His manager had agreed to inform him if his wife called.[113] This discussion had occurred twice, and twice the manager agreed.[114] A few weeks later, the plaintiff, in labor, called the employer and spoke with the timekeeper, who promised to give her husband the message and relayed it to his manager.[115] Thirty minutes later, the plaintiff again called, asking whether the message had been delivered, as she was in labor and her husband, who was only ten minutes away, had not yet arrived.[116] The timekeeper again relayed the message, this time to a supervisor.[117] The plaintiff soon called a third time, "crying and desperate," and was told that her husband was on the way home.[118] In fact, he had not been relayed the

[106] *Id.* at 361–62.
[107] *Id.*
[108] *Id.* at 361.
[109] *Id.* at 362.
[110] *Id.* at 362–63.
[111] Mixon v. Dobbs Houses, Inc., 254 S.E.2d 864, 864 (Ga. Ct. App. 1979).
[112] *Id.* at 864–65.
[113] *Id.* at 865.
[114] *Id.* at 864–65.
[115] *Id.* at 865.
[116] *Id.*
[117] *Id.*
[118] *Id.*

message at all, even though he was working in the kitchen, and could have been easily delivered a message both in person and over the intercom.[119] When the husband's shift ended and he was heading out, the timekeeper asked him whether he had received the message.[120] He returned home to find that his wife had had to give birth to their child alone, unassisted and unmedicated.[121] The court concluded that there was a duty arising from a promise,[122] and explained: "In order for a party to be liable as for negligence, . . . [i]t is sufficient, if in ordinary prudence he might have foreseen that some injury would result from his act or omission . . . The most common test of negligence is whether the consequences of the alleged wrongful act are reasonably to be foreseen as injurious to others coming within the range of such acts . . . ."[123]

In *Slogowski v. Lyness*, 927 P.2d 587 (Or. 1996), the plaintiff's father brought a negligence action against a defendant company.[124] The defendant had an easement across certain real property to erect and maintain electrical power lines, and it was alleged that the defendant "had undertaken to inspect all trees along its right-of-way, and to remove trees with hazardous defects."[125] One day, while the plaintiff's wife was driving with the couple's four children along the property subject to the easement, a large fir tree fell on the car, killing three of the children and injuring the fourth.[126] The plaintiff alleged that the tree was a hazardous condition discoverable upon inspection, presenting a foreseeable danger to passing cars.[127] "The condition of the tree, coupled with its position on the south side of the roadway, presented a significant foreseeable danger of tree failure and resulting collapse into the area of the roadway on which drivers and passengers of vehicles, such as the plaintiffs in this case, would be travelling."[128] The court

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 865-66.
[123] *Id.* at 865 (quoting Stuckey's Carriage Inn v. Phillips, 178 S.E.2d 543, 549 (1970)).
[124] Slogowski v. Lyness, 927 P.2d 587, 588 (Or. 1996).
[125] *Id.*
[126] *Id.*
[127] *Id.* at 588-89.
[128] *Id.* at 589 (quoting the complaint).

found that the plaintiff had alleged sufficient facts to show that the defendant had a tort duty based on an undertaking.[129] The plaintiff had also alleged, through the discoverability of the hazardous condition and the failure to remedy it, that the defendant was negligent.[130] The court reversed a judgment on the pleadings in favor of the defendant.[131]

C. SUMMARY

Duties can be results-based or conduct-based. Results-based duties are breached negligently when a reasonable person would have foreseen the non-attainment of the specific result. In the tort setting, there is typically physical harm associated with the duty. This note has considered two main types of results-based duties, statutory and contractual, and their relationship to the negligence cause of action. This note has taken the general duty of care to require that a person acts in such a way so as not to create unreasonable risks of harm, all circumstances considered. This note has also taken the negligence cause of action to include duties beyond the general duty of care.[132]

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[129] *Id.* at 590.

[130] *Id.*

[131] *Id.* at 591.

[132] There exists another viable interpretation. Under this interpretation, the negligence cause of action is not a floating cause of action that runs over various duties. Instead, it is limited to the general duty of care. Breach of other duties related to the cause of action can then show, as negligence per se does (albeit as a matter of law), breach of the general duty of care. For example, in the contractual setting, the Restatement Third's requirements for the derivation of a tort duty from contract are such that breach of the contractual duty would imply breach of the general duty of care, especially given that the party under contract can often admit inability to execute the duty, thereby saving the beneficiary from harm. However, judicial opinions have not developed this interpretation, and this note does not adopt it.

The rejection of this interpretation of the negligence cause of action is critical in understanding modern negligence law. To be clear, the alternative could well be preferable. If the cause of action were limited to the general duty of care, one would no longer need to ask the question: "What does it mean to be in negligent breach of a duty?" since there would

V. NEGLIGENT BREACHES OF CONDUCT-BASED DUTIES

A. LITERATURE REVIEW

This Section considers the standard constructs used in determining breach of conduct-based duties, focusing on the general duty of care. Each construct is provided with one or two examples that are used in the subsequent Section to help clarify how all the constructs are accounted for by the two-step procedure given in this note's thesis. First, however, this note reviews the common ground of the standard constructs.

1. FORESEEABILITY

Part III explained that the crux of breach of results-based duties is foreseeability. Foreseeability is also a construct used to determine breach of conduct-based duties.[133]

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no longer be a basis for that question. Instead, the analysis would be limited to the general duty of care, the breach of which would be determined as in Part V, infra. Correspondingly, one would never need ask: "Was there an intentional breach of duty?" or "Was there a reckless breach of duty?" In analyzing laws, one would only ask: "Was there a breach of duty?" And in case of negligence per se, the extra requirement imposed by courts on other duties to find negligence per se would be precisely that: Extra requirements to convince the courts that the breach of the other duties truly does show breach of the general duty of care. Under this interpretation of the negligence cause of action, there would only be four elements: breach, harm, actual cause, and proximate cause.

Nevertheless, this is not currently the law. Since the negligence cause of action floats over duties, one is forced to ask the sweeping question: "What does it mean to negligently breach a duty?" The issue of this culpability use of *mens rea* is that, in line with modern criminal law, duties are rife with elemental *mens rea* terms. The result is such awkward questions as: "What does it mean to negligently breach a duty that demands intent?" or "What does it mean to negligently do something recklessly?" Two independent formalist systems (elemental definitions and broad culpability definitions) would clash. They experience an uncomfortable coexistence. The questions can be answered, but the answers are clunky. The reader is forewarned.

[133] W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 744–47 (2005); D. E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942 § 2[c] (Westlaw, last accessed Oct. 31, 2020).

For example, in *Kubert v. Best*, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013), the plaintiffs brought suit against the *friend* of a driver who injured them in an accident, claiming negligence in texting the driver. The facts of the case are simple. The driver and this defendant were in a non-exclusive relationship.[134] They texted each other multiple times a day.[135] On the day of the accident, they had texted each other 62 times.[136] That day, while the driver was returning from work,[137] he was texting his friend.[138] Between the friends' last text preceding the accident and the driver's 911 call to help the injured, 17 seconds had elapsed.[139] The court affirmed the dismissal of the charges against the friend.[140] "We hold that the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted."[141] In other words, harm is not foreseeable simply because, in the abstract, the recipient is a driver, or even that at the time the message was sent, the recipient is driving. Particularized knowledge is needed for the foreseeability of harm in this context.[142] The court found that the plaintiffs had failed to show that the driver's friend knew he was driving or, even if she did, that he would immediately view her text.[143]

Returning to breach in general, the question at this stage of a negligence analysis is whether *some* harm was foreseeable to *some* person.[144] It also bears emphasis that foreseeability is not nugatory. Any harm has an infinitesimal probability of occurring (otherwise, it would never have occurred). That is not what is meant by foreseeability.[145]

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[134] Kubert v. Best, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).
[135] *Id.*
[136] *Id.*
[137] Of course, the driver was also a defendant in the suit. *Id.* at 1218.
[138] *Id.* at 1220.
[139] *Id.*
[140] *Id.* at 1221.
[141] *Id.* at 1219.
[142] It might help in understanding this case to recognize the court's being knowledgeable about societal norms. *Id.* at 1223.
[143] *Id.* at 1229.
[144] Cardi, *supra* note 133, at 746-47; Buckner, *supra* note 133 § 2[c].
[145] To "foresee" means to "see beforehand, have prescience of." *Foresee*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). As in psychology those who

2. COST-BENEFIT ANALYSIS

Another important construct in determining a breach in a negligence action is the use of a cost-benefit analysis.[146] Phrased in misleading simplicity, the cost-benefit construct states that conduct is negligent if the resulting disadvantages would outweigh the conduct's possible advantages.[147] The most famous theoretical formula of a cost-benefit analysis was provided by Judge Learned Hand who, in an attempt to clarify the concept, suggested a formula of weighing B, the cost to the individual of a particular action, against P, the probability of injury if the action is not taken, and L, the cost of that injury.[148] Thus, if $B < PL$, then the actor's conduct is negligent.[149] In other words, the actor is negligent in not having taken the precautionary conduct, which would have cost less to him than the probabilistic harm. A cost-benefit analysis should consider two snapshots: one with negligent (inaction), and one without, to calculate costs and benefits and engage in its absolute analysis. When the error is inaction, one must typically specify some action that was not done, which may require an exercise in creativity.[150]

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remember all, sad is the fate of the person, never reasonable, who foresees everything that has a mere infinitesimal probability of occurring. *That* we can foresee.

[146] *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (AM. LAW INST. 2010).

[147] *Id.* § 3 cmt. e.

[148] United States v. Carroll Towing Co., 159 F.2d 169, 173-74 (2d Cir. 1947). This inequality is inept in socialist states such as in Europe, since it compares a private cost B with a public cost PL. Where the economic assessments of the terms are precise, the formula fails. For example, if B is simply measurable and equals $4,999 and PL is simply measurable and equals $5,000, the imposition of liability is improper, even though the formula unequivocally implies liability.

[149] *Id.* at 173. Of course, PL is a sum over all potential injuries. Furthermore, it is more proper to speak of $P^1L - P^2L$, where P^1 is the probability of injury before the action is taken, and P^2 is the probability of injury after the action is taken. This recognizes that the action need not eliminate the probability of harm. It need merely reduce it.

[150] One should not confuse the relationship to duty of the foreseeability and cost-benefit constructs. The foreseeability construct is linked to a duty. The cost-benefit construct is not.

In *United States v. Carroll Towing Co.*, a barge, carrying goods belonging to the United States, broke loose from her moors, hitting a tanker and creating a hole in the barge's hull.[151] The hole made the barge sink and destroy the entire cargo of goods.[152] The issue before Judge Learned Hand dealt with the comparative liability of the barge owner in failing to have a bargee or another attendant on board.[153] Judge Learned Hand found, due to the surrounding circumstances of the incident, that it was foreseeable that the mooring work would not have been done with adequate care, thus necessitating the presence of a bargee on board.[154] Phrasing this in terms of the now-famous Learned Hand formula, B would be the cost of labor involved in keeping an attendant on board, P would be the probability of the resulting circumstances occurring absent having an attendant on board, and L is would be the damages that were incurred from the unattended barge breaking loose from its moors. Here, the court found there was a high probability of the resulting consequences. When this foreseeability is combined with the gravity of the damages incurred, then B<PL. Accordingly, the plaintiff's conduct was ultimately deemed to be negligent.

This note defines cost-benefit analysis expansively. Neither the costs nor the benefits need to be economic or even quantifiable. As such, the existence of a "formula" can be misleading. Judge Learned Hand himself was clear that the formula was merely illustrative.[155] For example, suppose a neighbor is tasked with picking up a young child from an after-school activity held outside the school. The neighbor delays in picking up the child, who suffers extreme fear of being left alone in an unfamiliar location. If the neighbor is sued for negligence, the jury, in addressing the cost-benefit construct, must consider the harm the neighbor would have suffered had he been on time, the foreseeability of the child's suffering from the delay, and the harm the child suffered as a result. All of which are, presumably, not economic. Or consider a woman eagerly awaiting her partner's arrival so that the two could go to a new chocolate shop a few blocks

[151] *Carroll Towing Co.*, 159 F.2d at 170-71.
[152] *Id.* at 171.
[153] *Id.*
[154] *Id.* at 173-74.
[155] *Id.* at 173.

away. Her partner, however, feeling lethargic after having lunch, decides to lie down for a while and, naturally, falls asleep. The heroine, disappointed, accuses her partner of negligent breach of fiduciary duty, specifically the duties to pander, indulge, and assure their partner's happiness. The cost-benefit analysis of this social situation is neither economic nor quantifiable.[156]

3. NOTICE AND OPPORTUNITY TO CURE

Notice and opportunity to cure are constructs used to prove landowner negligence in slip and fall cases.[157] One must show that the defendant-landowner had notice of the hazardous condition which resulted in the slip and that the notice sufficiently provided an opportunity to cure the hazardous condition.[158] The plaintiff can prove notice by showing that the defendant had actual notice of the hazardous condition or that the defendant had constructive notice.[159] For example, the plaintiff can show the defendant previously received specific complaints about the condition, approved work orders to fix it, or created the condition himself.[160] The plaintiff can also prove that a defendant had constructive notice of the hazardous condition.[161] A number of factors guide the analysis of constructive notice, such as the length of time a foreign substance has been on a premises, the nature of such substance, the substance's location within the premises, the substance's proximity to employees, and the number of entrants to the premises.[162]

One exception to the requirement of notice is the "mode of operations" rule, which states that notice of hazardous conditions is imputed and active surveillance demanded where the mode of operation of the business creates a risk of recurrent hazards.[163] The Connecticut

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[156] As this note has attempted to emphasize, negligence is a self-standing concept, a type of breach. Thus, negligent breach of duty is negligent breach of duty, be the duty legally cognizable or not.

[157] 2 NORMAN J. LANDAU & EDWARD C. MARTIN, PREMISES LIABILITY—LAW AND PRACTICE § 8A.03, Lexis (database updated 2020).

[158] *Id.* § 8A.03.

[159] *See generally id.* § 8A.03[1].

[160] *Id.*

[161] *See generally id.* § 8A.03[2].

[162] *Id.*

[163] *See id.* § 8A.03[3][f].

Supreme Court addressed this rule in *Kelly v. Stop & Shop, Inc.*, 918 A.2d 249 (Conn. 2007). There, the plaintiff visited the defendant's supermarket to purchase groceries and to make a salad.[164] The supermarket offered a self-service salad bar, where the plaintiff prepared her salad.[165] The bar had no railings, lacked adequate space to accommodate trays, and was surrounded on both sides by a narrow "floor runner."[166] The surrounding floor was made of tile or linoleum.[167] When the plaintiff left the area covered by the floor runner to pick up a lid, she slipped and fell.[168] While she was wiping her shoes during her recovery at the supermarket, she observed "a wet, slimy piece of green lettuce" on the side of her shoe.[169] The plaintiff alleged that the lettuce had caused her to fall. The question was whether the supermarket was liable for the injuries alleged.[170]

The court explained that the mode of operations rule arose from the proliferation of self-service retail stores that, allowing customers to pick up their items and move them around the store, increased the risk of drops and spillage.[171] This risk is exacerbated by retail marketing techniques which attract customers' attention towards the shelves and, consequently, away from the floors.[172] The mode of operation rule implicates the store's actions and, in a slip and fall case, imputes notice. Where there are continuous, foreseeable dangerous conditions, the plaintiff need not prove the defendant had either constructive or actual notice.[173] The use of self-service and marketing techniques are financially favorable for the operation of a store but also increase the risks of injuries on the premises. [174] These costs become part of a business's calculus of doing business.[175] The court concluded its analysis by observing that the mode of

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[164] Kelly v. Stop & Shop, Inc., 918 A.2d 249, 252 (Conn. 2007).
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.* at 252-53.
[170] *Id.*
[171] *Id.* at 256.
[172] *Id.*
[173] *Id.* at 259.
[174] *Id.* at 258, 260.
[175] *Id.* at 261.

operation rule comports best with the standard of reasonable care.[176]

The court held that a plaintiff established a prima facie case of negligence by showing that the defendant business's mode of operations carried a foreseeable risk of injury that proximately caused injury to the plaintiff.[177]

4. PRIVATE STANDARDS

A related issue in entity liability concerns the use of an entity's standards in establishing negligence. That is, to what extent does an entity's violation of its standards provide proof of the entity's negligence?

The Restatement Third suggests that the *admissibility* of the entity's standards should be governed by all the circumstances of the case, such as the extent of the plaintiff's reliance on those standards, the extent to which they demonstrate foreseeability, and the extent to which those standards provide for discretionary extra care.[178] If admitted, the standards do not create a tort duty; they are merely relevant in establishing whether the entity has exercised reasonable care.[179]

For example, in *Current v. Columbia Gas of Kentucky, Inc.*, 383 S.W.2d 139 (Ky. 1964), plaintiff homeowners brought suit against a defendant gas company.[180] The plaintiffs, a husband, wife, and their five minor children, moved into a new home in Winchester on October 28, 1960.[181] The house contained a 65,000 BTU space heater in the living room.[182] It was disputed whether this heater was vented.[183]

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[176] *Id.* at 262.
[177] *Id.* at 263.
[178] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 13 cmt. f (AM. LAW INST. 2010). It appears the Restatement is engaging in what recalls a Rule 403 balancing analysis. *See* FED. R. EVID. 403.
[179] *Id.*
[180] Current v. Columbia Gas of Kentucky, Inc., 383 S.W.2d 139, 140 (Ky. 1964).
[181] *Id.*
[182] *Id.* Very roughly speaking, this would have power sufficient to heat around 1,900 square feet, or 180 square meters. *E.g.*, Herb Kirchhoff, *How Much Space does a 1500 Watt Heater Heat Up?*, SFGATE (last updated Dec. 17, 2018), available at https://homeguides.sfgate.com/much-space-1500-watt-heater-heat-up-87133.html.
[183] *Id.* at 141.

Since the house had been vacant, the gas had been cut off before the plaintiffs' occupation and had to be reinstated.[184] The defendant inspected the premises and reinstated gas services, lighting the pilot light on the space heater.[185] An employee of the business testified that according to private standards and his knowledge, he ensured that the heater was burning normally and was not dirty.[186] Having noted the heater's power, the employee also ensured it was vented.[187]

During a night of heavy rain, the plaintiffs fell ill and called the doctor who arrived to find them vomiting, and concluded that they had suffered a mild gastric upset.[188] The next day, when the father did not report to work, a concerned coworker, apprehensive, visited the plaintiffs' house.[189] She knocked on the door and heard moans coming from within the house.[190] She entered and found the mother on the floor in the living room, the children on two couches, and the father "half on the bed," unconscious.[191] There was soot or other settlement around the mouth and nostrils of at least three of the family members.[192] They had apparently been poisoned by leaking carbon monoxide gas from the improperly vented heater.[193]

The issue before the court, for purposes of this note, pertained to the admissibility of the private standards for inspecting and venting heaters to which the defendant's employee attested.[194] The court reasoned that a jury could not assess the standard of conduct for a specialized business without direct information about the standards of conduct of such business.[195] Here, the defendant's employees knew the rules and testified that they constituted safe practice.[196] The

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[184] *Id.* at 140.
[185] *Id.* at 140-41.
[186] *Id.* at 141.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at 141-42.
[194] *Id.* at 142.
[195] *Id.* at 143 ("It may be questioned that a jury of laymen can intelligibly gauge the degree of care usually exercised by an ordinarily prudent man when that mythical actor is engaged in conduct utterly beyond the ken of the juror.")
[196] *Id.*

rules were clearly in place for safety.[197] There was no evidence that they exceeded ordinary standards of care.[198] The court admitted the evidence.[199]

In contrast, the New York high court reached a different result in *Rivera v. New York City Transit Authority*, 569 N.E.2d 432 (N.Y. 1991). Evidence, in that case, suggested that the plaintiff's husband spent ten to fifteen seconds at the edge of a platform in a train station, entirely stable, looking into the tunnel at an arriving train.[200] He then began acting erratically, staggering as though intoxicated, fell onto the tracks, and was killed by the oncoming train.[201] The plaintiff sued, alleging that the train operator was negligent in speeding into the station.[202] As concerned the admissibility of private standards in the case, the court was curt: "[W]e note that the trial court should not have admitted into evidence the defendant's entire internal rule book and manual containing irrelevant material which was not relied upon by the parties' experts or which imposed a higher standard of proof on the defendant than that imposed by law."[203] Instead, the court reversed a judgment for the plaintiff and remanded for a proper determination of foreseeability and the reasonableness of the driver's actions under the circumstances.[204]

5. CUSTOM

Another question concerning negligence arises with the violation of customs. Customs are defined as standards set by the community in question.[205] Departure from custom is often strong evidence of negligence.[206] Such custom shows that further precautions were available to the actor, that they were feasible, and that the actor should have been

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[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Rivera v. N.Y.C. Transit Auth., 569 N.E.2d 432, 433 (N.Y. 1991).
[201] *Id.*
[202] *Id.*
[203] *Id.* at 435 (citation omitted).
[204] *Id.* at 434-36.
[205] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 13 (AM. LAW INST. 2010).
[206] *E.g.*, *id.* § 13(b) & cmt. c.

aware of them.[207] The actor can counter this by attempting to question the intelligence of the custom, by showing adoption of other risk-reducing measures that were at least as good as the custom in question, or that the methods of operation belied the applicability of such custom.[208] On the other hand, *compliance* with custom is merely evidence offered to support that the actor was not negligent.[209]

A classic opinion discussing custom is that of Judge Learned Hand in *The T.J. Hooper*.[210] There, two barges carrying cargoes of coal were being transported by two tugs, the "Hooper" and the "Montrose," when they were hit by wind coming from the east and sank far at sea.[211] Plaintiffs presented evidence that the weather bureau at Arlington cast two predictions daily, and that had the tugs received the Arlington reports, they would have put in at the Delaware Breakwater on Cape Henlopen instead of weathering the unknown storm.[212] They did not receive the report because the receiving sets on board, which belonged privately to the seamen and not the business, were not in working order.[213] The tugs' business practices evinced that custom did not demand there be receiving sets on board.[214] However, Judge Learned Hand rejected the suggestion that this custom precluded a finding of comparative fault.[215] He reasoned that reliably maintained receiving sets cost little and afforded great protection.[216] As to theory, Judge Hand stated:

> [I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are

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[207] *Id.* § 13 cmt. b.
[208] *Id.* § 13 cmt. c.
[209] *E.g.*, *id.* § 13(a).
[210] The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).
[211] *Id.* at 737.
[212] *Id.* at 739.
[213] *Id.*
[214] *Id.* at 739-40.
[215] *Id.* at 740. In the case, all the vessels had been deemed unseaworthy. *Id.* at 737.
[216] *Id.* at 739.

> precautions so imperative that even their universal disregard will not excuse their omission.[217]

This reasoning echoes Holmes's famous statement: "What usually is done may be evidence of what ought to be done, but what ought to be done is set by a standard of reasonable prudence, whether it is usually complied with or not."[218]

6. STATUTES

Part III of this note states that some statutes may serve as evidence, but no more than evidence, of negligence. This situation is analogous to the treatment of evidence of custom by the courts as just discussed, and more need not be said.[219]

Section 16(b) of the Restatement Third asserts that failing to adopt a precaution cannot be used to find negligence if one taking that precaution would violate a statute.[220] This rule is difficult to understand. Even the criminal law recognizes that statutes—criminal statutes—can be broken for the greater good.[221] Perhaps the way to reconcile § 16(b) of the Restatement and § 3.02 of the Model Penal Code is to recognize a general disinclination to find liability.[222]

7. OPEN AND OBVIOUS DANGERS

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[217] *Id.* at 740.

[218] Texas & P.R. Co. v. Behymer, 189 U.S. 468, 470 (1903).

[219] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 16 (AM. LAW INST. 2010). Furthermore, nothing precludes this application of statutes to negligence even when the other applications of statutes in Part III.A are valid. That said, when a statute has already been given per se effect, its use as here would be rather blasé.

This is the default rule. *See id.* § 16 cmt. a. In other words, if a statute states that noncompliance cannot be used to establish tort liability, or that compliance precludes tort liability, then legislative intent dominates if constitutional.

[220] *Id.* § 16(b).

[221] This is the necessity defense. MODEL PENAL CODE § 3.02(1) (AM. LAW INST. 2007).

[222] *Compare* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 16(b), *with* MODEL PENAL CODE § 3.02.

The doctrine of open and obvious dangers historically functioned to insulate landowners from liability for injuries caused by dangers that were open and obvious.[223] The idea is that if a danger is so open and obvious to an entrant that using reasonable care would have avoided the danger, then the harm flowing from that danger should not be considered foreseeable by the landowner.[224] The Restatements Second and Third have moved away from this position.[225] These latter two Restatements follow the same rule,[226] except that the Restatement Third does not limit it to invitees.[227] The rule given in the Restatement Second provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them unless the possessor should anticipate the harm despite such knowledge or obviousness."[228] While courts have made much ado about this development,[229] the idea is simple: harm is not foreseeable unless it is. In other words, the recognition is that harm is sometimes foreseeable, even though the danger is open and obvious.[230]

The Iowa Supreme Court tackled the open and obvious doctrine in *Hanson v. Town & Country Shopping Center, Inc.*, 144 N.W.2d 870 (Iowa 1966). There, the plaintiff slipped and fell on ice on her way from the shopping mall to

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[223] Ernest H. Schopler, Annotation, *Modern Status of the Rule Absolving a Possessor of Land of Liability to Those Coming Thereon for Harm Caused by Dangerous Physical Conditions of Which the Injured Party Knew and Realized the Risk*, 35 A.L.R.3d 230 § 2 (2020).

[224] *Id.* § 3. The section also mentions contributory negligence and assumption of risk; however, those are affirmative defenses and do not bear on the landowner's negligence.

[225] RESTATEMENT (SECOND) OF TORTS § 343A (AM. LAW INST. 1965); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 cmt. k (AM. LAW INST. 2010).

[226] *Compare* RESTATEMENT (SECOND) OF TORTS § 343A, *with* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 cmt. k.

[227] The Restatement Third has moved away from the traditional specific rules for landowner liability that focus on the status of the entrant and the type of harm, preferring instead the general duty of care formulation. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 cmt. a. There appears to be a modern trend *in fact* in this direction. *See* Schopler, *supra* note 223 § 2.

[228] RESTATEMENT (SECOND) OF TORTS § 343A(1).

[229] *See, e.g.*, Schopler, *supra* note 227 § 2.

[230] The Restatement Third calls this "residual risk." RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 cmt. k.

her car in the mall's parking lot.[231] Snow fell on March 15th, 16th, 17th, and 20th of 1960.[232] The shopping center cleared snow from the parking lot and sidewalks but had piled snow from the sidewalk onto one particular patch of the grounds and parking lot.[233] During the two days immediately preceding the plaintiff's injury on March 22, 1960, the snow pile had become rough and jagged, converting into slick ice.[234]

In moving away from the traditional doctrine barring defendant liability, the court expressed the modern sentiment and evoked the original general duty of care:

> Defects in premises which are in no sense hidden and could only be classified objectively as open and obvious may be of such nature that the possessor should know the invitee would not anticipate or guard against them in using the premises within the scope of the invitation. To arbitrarily deny liability for open or obvious defects and apply liability only for hidden defects, traps or pitfalls is to adopt a rigid rule based on objective classification in place of the concept of the care of a reasonable and prudent man under the particular circumstances.
>
> The possessor of real estate is under a duty to use reasonable care to keep his premises safe for use by invitees. Failure to do so constitutes negligence.[235]

The court explicitly recognized the shift from the Restatement (First) of Torts, which had adopted the traditional view, to the Restatement (Second), which rejected the categorical bar.[236]

Finding it possible that the plaintiff had not discovered or appreciated the risks because of potentially bad

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[231] Hanson v. Town & Country Shopping Ctr., Inc., 144 N.W.2d 870, 873 (Iowa 1966).
[232] *Id.* at 872.
[233] *Id.*
[234] *Id.*
[235] *Id.* at 874.
[236] *Id.* at 873-75.

lighting and an obstructed view while pushing a shopping cart,[237] the court concluded that the facts presented a triable case.[238]

8. *RES IPSA LOQUITUR*

Res ipsa loquitur is one of the most beautiful and inventive notions in the law. It is a means of determining from results (1) the existence of an act that (2) constitutes negligent breach of duty.[239] So bizarre was the result, says *res ipsa*, that it must have been caused by one's negligence.[240] The traditional formulation of the doctrine, which operates against a background of harm by some cause, asks whether the instrumentality of the harm was in the exclusive control of the defendant and whether the accident is of a type that does not occur in the absence of negligence.[241] The first element guarantees that the defendant is the one responsible for the mystical action, and the second element guarantees that the mystical action was negligent. But it is precisely this second element that carries *res ipsa loquitur* outside the scope of this note, for the doctrine does not try to determine whether a given action was negligent, which is this note's purpose. Instead, it utilizes our preexisting notions of negligent actions. The element is generally found in other formulations of the doctrine as well.[242] Thus, while *res ipsa loquitur* arises in the context of breach, it is not a construct

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[237] When discussing shoppers driving a cart, the court quoted: "Where a grocery shopper must cross a supermarket parking lot heavily laden with goods purchased in order to board his automobile it is of little help to him to be aware of the presence of ice along the way. Under these circumstances the likelihood of injury is not lessened by his knowledge and the degree of care which he exercises. Many cases recognize this." *Id.* at 876 (quoting King Soopers, Inc. v. Mitchell, 342 P.2d 1006, 1009 (Colo. 1959)).

[238] *Id.* at 875-76.

[239] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 b (AM. LAW INST. 2010).

[240] Admittedly, this sounds like finding breach by saying *asa nisi masa*.

[241] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 cmt. b.

[242] *E.g.*, *id.* § 17; RESTATEMENT (SECOND) OF TORTS § 328D (AM. LAW INST. 1965).

like the preceding constructs of this section for finding it, and there is no more to say on the matter.[243]

B. ANALYSIS

Conclusion: A conduct-based duty is breached if a reasonable person would have foreseen harm[244] and, in that case, a cost-benefit analysis also weighed against the actor.

Proof[245]: This note "reduces" the determination of breach in negligence cases to the first two constructs discussed in Part V.A. The key is that the other factors are contained in this two-step analysis. They are, in essence, merely elaborations in particular contexts. To prove this, the note shall show that an action that is negligent in this general two-step analysis is also negligent in the context of each of the other constructs, and vice versa.

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[243] There are other important concepts in breach that are unrelated to this note. For example, one of the important, though not necessarily sensible, rules in negligence is that a person with above-average knowledge and skills is legally obligated to utilize them, regardless of whether in a field that demands such specialized knowledge, where the rule would have been extraneous. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 12. This changes the applicable standard of care, which is ordinarily that exercised by the objectively reasonable person, but does not otherwise alter the method used to determine breach, such as is explained in this note (in other words, for results-based duties, the question becomes whether a reasonable person with the actor's knowledge and skills would have foreseen the non-occurrence of the duty's result).

[244] More generally, a conduct-based duty is breached if a reasonable person would have foreseen the non-occurrence of the underlying result, and a cost-benefit analysis weighed against the actor. In the negligence context with which we are concerned, this is the occurrence of physical harm. The recognition in this rule is that duties are assigned in order to achieve certain results. Thus, consider the caretaker of children from Section II. Suppose the caretaker had taken an action, or failed to take an action, that ultimately made the child unhappy, and that the parents had alleged negligent breach of duty. If the caretaker were under the results-based duty that outright demanded the result, the question becomes whether a reasonable person would have foreseen that the caretaker's action or inaction would have made the child unhappy. If the caretaker were under the conduct-based duty, then presuming foreseeability weighed against the caretaker, one would also have to ask whether a cost-benefit analysis weighed against the caretaker as well. Under no circumstance can the caretaker be held negligent as to a duty under a strict liability theory applied to that duty. That would be a contradiction of terms.

[245] The proof is uninteresting. The reader may find more informative the examples at the end of each of the first three constructs that follow their technical proofs.

1. Notice and opportunity to cure: Notice and opportunity to cure applies in slip and fall cases. Suppose a landowner had notice of a defect and the opportunity to cure it. Since the landowner had (1) notice of (2) a defect, then the landowner could foresee harm. Since the landowner had an opportunity to cure, then a cost-benefit analysis weighed in favor of removing the defect. This is partly because "opportunity to cure" means not so much that the defect is curable, but that it could reasonably have been cured, and partly because the defects in these cases can ordinarily easily be cured, merely a cause of slips, so that a cost-benefit analysis necessarily weighs in favor of the cure.

Now suppose a landowner could foresee harm from some defect and that a cost-benefit analysis weighed in favor of curing the defect. Since the landowner could foresee harm from the defect then the landowner presumably had notice of the defect. This notice could be actual or constructive. Furthermore, since a cost-benefit analysis weighed in favor of curing the defect, then the defect was not only curable (for the cost of achieving the impossible, being infinite, would necessarily outweigh any benefit), but reasonably curable.

For example, consider the case of the dangerous salad bar, *Kelly v. Stop & Shop*.[246] Since the particular danger, the slimy lettuce on the ground, resulted from the store's mode of operations, the store had actual or constructive notice of danger. This is the legal facilitation of the mode of operations rule.[247] Since the store knew its own procedures, having

[246] Kelly v. Stop & Shop, Inc., 918 A.2d 249 (Conn. 2007). This case was discussed in Part V.A.3.

[247] The mode of operations rule is necessary, because of the additional requirement in the law that a landowner know not (only) the condition that creates the danger, but the direct danger that results in harm (or, equivalently, that the landowner foresee harm from the particular danger that results in harm, and not the condition that creates the danger). Theoretically, this requirement reduces the standard of care from that of the reasonable and prudent person under the circumstances. The substantive error of this requirement is easily seen. Suppose a landowner has a machine that, at fast but unknown rates, spews globs of oil in random directions. Without the mode of operations rule, the landowner would not be liable for any injury from a fall, unless the landowner knew of the particular glob of oil on the particular patch of ground where the injury occurred. This is clear error. The mode of operations rule overrides this requirement. The machine is *itself* the danger, and one asks whether there is opportunity to cure *that* danger by reducing its risk.

created them itself, then it could also foresee harm resulting from the unattended salad bar. Moreover, the problem could be resolved by regular surveillance. This is a cost-effective approach since the costs of medical injuries resulting from falls are high. By extension, the store had the opportunity to make safe the danger.

2. Private standards: Private standards concern an entity's own rules for its operations.[248] Suppose an entity's private standards imply that it was negligent in a given affair. Since the entity has adopted a precautionary standard, then it could foresee some harm the standard was meant to obviate. Furthermore, since it has adopted the standard, then a cost-benefit analysis weighed in favor of the safety measure. Recall that private standards would not have been admissible (hence suggested negligence) *unless* the factors of the extent of foreseeability of harm and discretionary extra care weighed in favor of admissibility.

Now suppose that a company was negligent because it could foresee harm, and a cost-benefit analysis weighed in favor of dealing with the danger. Then, either it has broken its private standards, or it has not. If it has broken its private standards that would have accounted for the harm, then they suggest negligence.[249] If it has not, then the private standards *themselves* are evidence of negligence for not having accounted for a danger that was foreseeable and cost-effectively managed.

For example, consider the case of the soot-poisoned family, *Current v. Columbia Gas of Kentucky*.[250] There, a company had breached its private standards regarding the lighting of a space heater. One of the reasons the standards were admissible was their clear purpose of ensuring safety. This shows foreseeability. Another reason the standards were admissible was that they did not exceed ordinary standards of care. This means they were cost-effective.

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[248] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 13 cmt. f (AM. LAW INST. 2010).

[249] The proof can account for the admissibility factors by splitting itself up into cases. However, that complication is unilluminating.

[250] Current v. Columbia Gas of Ky., Inc., 383 S.W.2d 139 (Ky. 1964). This case was discussed in Part V.A.4.

3. Custom: Custom concerns rules imposed upon an entity by the group to which the entity belongs.[251] Suppose custom weighed in favor of finding negligence. The failure of an entity to question the custom will result in favor of finding negligence.[252] The existence of a custom means that harm was foreseeable, and the failure to question means, for legal purposes, that the expectation created by an entire group having a precautionary custom that the cost-benefit analysis weighs in favor of the precaution stands.

Now suppose an entity could foresee harm and a cost-benefit analysis weighed in favor of accounting for the harm. Then, the law removes custom as a construct in determining negligence. Thus, that the construct, an artificial creation, weighs in favor of finding negligence becomes vacuously true.

For example, consider *The T.J. Hooper*.[253] There, two barges sank because the tugs carrying them did not have receiving sets on board. Since harm resulting from not receiving news from the land was foreseeable, and since the solution was highly cost-effective, Learned Hand refused to consider that having functional receiving sets was not required by custom.

4. Statutes: The context here is of a statute that does not imply negligence per se and, from the flip side, has not been prevented from use to determine negligence by the legislature. Furthermore, because this section is concerned with the general duty of care, the statute, one must assume, is intended to reduce the risk of harm.[254] The proof is similar to that of custom.

Suppose the statute weighed in favor of negligence. By construction, harm was foreseeable. Furthermore, a cost-benefit analysis weighed in favor of the precautionary step. This is because the legislature had presumably made the correct cost-benefit determination. Unlike in the case of custom, where deference is shown to the group, here deference is shown to the legislature. The deference to representatives of the people is, naturally, more powerful.

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[251] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 13.

[252] *See supra* Part V.A.5.

[253] The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932). This case was discussed in Part V.A.5.

[254] Unlike the preceding three constructs, the statute construct in fact admits of the generalized analysis discussed *supra*, note 244.

Now suppose that foreseeability and a cost-benefit analysis weighed in favor of a precautionary measure. As with custom, the law overrides statutes as a construct, so that the construct, which is an artificial creation, vacuously weighs in favor of finding negligence.

5. Open and obvious dangers: The proof here is simple and is left to the reader's enjoyment.[255]

C. INTERPRETATION

The two-step procedure of Part V.B streamlines breach arguments in negligence cases. At the same time, however, it contains a substantive statement on the nature of negligence.

At the heart of every negligence case is an action (or inaction) that could foreseeably result in harm, or more generally, in the non-attainment of the purpose of a duty. The red flag for an individual should be the foreseeability of this harm. Yet, mere foreseeability cannot suffice. The extent to which red flags are raised by our actions would impose under that system excessive restrictions. If the benefits of any given action to society exceed the costs, there is no justification to its bar. Thus arises an additional element to negligence, the substantive responsibility for which transfers to the individual. One may engage in an action despite the foreseeability of harm, provided that he assesses and is convinced that its benefits exceed its costs. The state has no purpose restricting the freedom of an individual to act on the mere basis of foreseeability of harm.[256] The assessment of the propriety of his actions properly belongs to the individual. If, however, society, through the voice of a jury, deems that assessment to have been incorrect, the individual must accept his negligence.[257]

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[255] The doctrine of open and obvious dangers is an affirmative defense. It cannot imply negligence; it only bars negligence. Consequently, the only question that should be asked is whether, in those negligence cases barred by the open and obvious dangers doctrine, the two-step procedure also implies the absence of negligence.

[256] And calling it "negligence."

[257] This should not create the false impression that negligence is without its oddities. For example, suppose an entity correctly assesses that it

With results-based duties, the second element of negligence does not, at first glance, exist. This is misleading. The imposition of a results-based duty is based on an assessment that its benefits exceed its costs; the second element is automatically satisfied. For example, when one contractually assumes a results-based duty, the parties are implicitly agreeing to the high worth of the specific result, and the law is obligated to recognize this imposition to give content to contractual results-based duties. Absent the law's recognition, the specificity of the result in the contract becomes legally vacant.[258] Similarly, negligence per se grants this same recognition to the legislative assessment inherent in the enactment of a statute. It is no surprise, then, that the "excuses" to statutory violations[259] show that the violation was not foreseeable,[260] or that a cost-benefit analysis did not weigh in favor of compliance.[261]

That said, there is no reason for the law to treat the conclusion as foregone. It is possible instead to merely prioritize the specificity of the duty in the cost-benefit analysis, which is more consistent and analytically superior.

This note liberally uses "the negligence question" to refer to the element of breach in negligence cases, despite potential confusion with "the negligence cause of action," because "the negligence question" properly recognizes that the heart and soul of negligence is the negligent breach. Furthermore, while the note has not prioritized recklessness

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would be more economically sensible for it to pay for deaths and medical costs than adopt a security measure. Then, the entity will not pay at all, for it cannot be deemed negligent. The entity will not have to take legal responsibility for its actions. (Strict liability accounts for certain such situations) Another example lies in the risk negligence poses of imposing robotic uniformity on individuals and other entities. Indeed, tort law takes as an explicit goal enforcing public standards of behavior. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 4 (2d. ed. 2011). There is a thin line between imposing standards of behavior and imposing behavior, and duties as far-reaching as those imposed by negligence hold great regulatory power. Furthermore, negligence interferes with market forces. A good example is attorney malpractice suits based on general negligence instead of breach of fiduciary duty.

[258] This is true as principle. How contract law should treat unequal bargaining power is a separate issue.

[259] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 15 (AM. LAW INST. 2000).

[260] *Id.* § 15(b)-(d).

[261] *Id.* § 15(b), (e).

in its analysis, the elements of recklessness are the same as those of negligence, the difference being one of extent. Thus, recklessness demands that the foreseeability of harm be greater, and the cost-benefit analysis be greatly skewed, towards the costs.[262]

There is a great debate in the academic literature on the proper role a cost-benefit analysis should play in determinations of negligence. On one side of the spectrum are economists, or law-and-economics adherents, who argue that negligence is action with a poor balance of costs and benefits, focusing particularly on economic aspects of the costs and benefits.[263] The pride of this approach lies in reducing the entirety of negligence to a requirement of economic efficiency.[264] On the other side are those who consider a cost-benefit analysis a construct to determine negligence and no more, if they consider it a construct at all.[265] The most significant of those theories that reject the economic model, the rights-based theories, seem united in the emphasis they place on individual integrity.[266] This note agrees with both those who accept the economic analysis and those who reject it.

In Buñuel's *That Obscure Object of Desire*, the female antagonist, to the bewilderment of viewers, is played by two

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[262] This conclusion accords with the approach of the Restatement. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2.

[263] *E.g.*, Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 189-229 (6th ed. 2011).

[264] Posner, *supra* note 263, at 32-33.

[265] *E.g.*, Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145 (2003); Heidi H. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 359-60 (2002).

[266] *See* Zipursky, *supra* note 265, at 2029-30. In other words, they prioritize the physical well-being and the property of individuals beyond a mere economic approach. They might reject, for example, a $100 physical harm to another for a $1,000 monetary benefit to the actor. There are other theories. Zipursky, for example, runs full circle and argues for a civil competence theory of negligence. *Id.* at 2033-40. This note agrees with Zipursky that the civil competence theory provides a good statement of negligence, but disagrees with him that it carries content, *id*. at 2039. In particular, it is unclear how the content that he sees to it differs from the model developed in this note.

different women, Carole Bouquet[267] and Ángela Molina,[268] engendering much confusion especially at the beginning.[269] This surrealist move, which might easily be interpreted away as directorial fancy, is misleading. Despite the complete opposition of the depictions and styles of the two actresses, they are not playing two different characters. There is a unique underlying character; Bouquet and Molina merely demonstrate two different aspects of that character consistently over the course of the movie. As such, the use of two different actresses to play the same personage — a brilliant move — is a surrealist red herring.

This note finds that, in a fashion similar to Buñuel's directorial sleight of hand, both the economic statement in the fashion of cost-benefit analysis as typically developed and its rejection merely describe different aspects of the same underlying concept. The economic statement properly recognizes that at the heart of negligence is an act (or omission) that has been poorly assessed as to its costs and benefits. Its rejection properly recognizes that mere economic considerations are incomplete, even when extended to matters like psychological well-being. The key lies in adopting a proper assessment of costs and benefits, also keeping in mind the first element of negligent breach: foreseeability of breach of duty. It might do well to consider negligence as a question of justice; explication is still needed. This note's chief contention is that the justice of negligence lies in the system herein developed.

It does not appear that a justice-based model of negligence differs from or adds to this note's system, whatever its relationship to the economic system as commonly understood. For example, the rights-based theorist's search for respecting individual integrity is interpreted as an additional cost in the cost-benefit analysis to its violation. Zipursky points out that jury instructions phrase breach in terms of the actions of the reasonable

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[267] Well-known as the Bond girl of *For Your Eyes Only*, starring opposite Roger Moore. FOR YOUR EYES ONLY (Eon Productions 1981).
[268] *E.g.*, Pedro Almodovar's LIVE FLESH (Goldwyn films, El Deseo S.A. 1997).
[269] THAT OBSCURE OBJECT OF DESIRE (Greenwich Film Productions, Les Films Galaxie & InCine 1977).

person, not in the terms of this note's system.[270] But it is precisely that standard this note attempts to explicate. Zipursky complains that Learned Hand's formula does not account for inadvertence, such as a waiter spilling soup on a patron.[271] Perhaps; but to say the same of the cost-benefit analysis of this note is to adopt an incomplete view. He complains that the Hand formula does not account for variable standards of care.[272] The resolution there lies in the correct understanding of costs and benefits. For example, a common carrier has a duty to use the utmost care.[273] This means that injury to a passenger on public transportation is to be weighed heavily. One could say the fact that a passenger was injured on public transportation is in itself a harm. Zipursky raises the same issue of special relationships,[274] which is resolved similarly. And he argues that a cost-benefit analysis does not respect negligence's relationship to duty.[275] This note, hopefully, has demonstrated the relationship between duty and breach.

As another example, Wright argues that the law does not require that one take affirmative actions to the benefit of others, which presumably under a cost-benefit analysis would often arise, such as where costs to the actor are low and the benefits to the recipient high.[276] This is tackled by the first element of breach, foreseeability, and its relationship to duty. There could be no negligence because there is no duty. He also argues that rescuers who place themselves at risk are not deemed contributorily negligent even if a cost-benefit analysis weighed against their rescue.[277] Even assuming this to be true, it is irrelevant, as it does not relate to a cost-benefit analysis to start with: contributory negligence relates to apportionment of liability

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[270] Zipursky, *supra* note 265, at 2013-17. Zipursky, of course, is concerned with cost-benefit analysis in his note.
[271] *Id.* at 2017-18.
[272] *Id.* at 2019-21.
[273] *See* CAL. CIV. CODE § 2100 (Deering 2020).
[274] Zipursky, *supra* note 265, at 2021.
[275] *Id.* at 2021-22.
[276] Wright, *supra* note 269, at 147.
[277] *Id.*

and the technical right of an individual to recover for damages.[278]

In the thickets lie complications. Keating has complained that the economic model utilizes a "rationality" standard rather than a "reasonableness" standard,[279] deriving from it his issue that the economic model utilizes a subjective, rather than objective, assessment of costs and benefits.[280] In other words, the jury's assessment of costs and benefits follows those of the individuals involved, rather than that of the law.[281] Abraham has complained that negligence involves the setting of norms, finding it undesirable because illegitimate and inconsistent.[282] Entering the various thickets will carry this note off course.

The tort structure developed in this note differs from the criminal law. In criminal law, which is heavily concerned with assessing moral wrongdoing, recklessness demands consciousness of high unjustified risk, reading like an attenuated form of intent rather than an aggravated form of negligence.[283] There are many other differences. Intent in tort law holds a special place. It is a high form of culpability that makes an individual liable for many injuries, including those covered by other intentional torts.[284] Tort law, put

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[278] Of course, contributory negligence is also defunct. The correct starting point today for apportionment of liability is comparative fault. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. a (AM. LAW INST. 2020).

[279] In this conception, an individual is "rational" if he seeks his self-interest and "reasonable" if he also considers others' interests. *See* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 311-12 (1996). The distinction of these terms makes no sense in the English lexicon, but makes more sense in European languages. The reader may wonder why one would consider the economic model as using a "rationality" standard. This relates to a particular interpretation of the rationality standard, which this note shall not assess, for which the reader is referred to Keating's article.

[280] *Id.* at 328-40.

[281] Not so in the conception of this note. The law assigns whichever values it wishes to the "costs" and "benefits" involved.

[282] Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001). Of course, the system of this article cannot be described as "norm creation."

[283] *See, e.g.*, MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2007). *But see* Commonwealth v. Pierce, 138 Mass. 165, 177-78 (1884) (Holmes, J.) (applying an objective standard to criminal recklessness).

[284] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 33 (AM. LAW INST. 2000)

differently, recognizes transferred intent.[285] The criminal law's doctrine of transferred intent is weak.[286] Tort law, as already seen, does not recognize transferred negligence. The criminal law does.[287] Tort law, with its emphasis on the objective, is willing to impute knowledge.[288] The criminal law, with its emphasis on the subjective, is not.[289] In short, the facial similarities between tort law and criminal law could well prove irksome instead of beneficial.

The criminal law also poses some of the more challenging duty analyses, using as it does duties filled with elemental *mens rea* terms. Suppose a criminal statute read: "A person shall not fly a balloon with the intent of awakening in viewers the desire to fly." Assume a person violated this duty, in other words, flew a balloon with the intent of awakening in viewers the desire to fly. Is he also in negligent breach of the duty? First, specify the act. Presumably, the act is the flying of a balloon with a particular intent. Could the person foresee flying a balloon with that intent? The answer immediately appears to be "yes." However, there is a complication, for he must know of the intent to awaken the desire to fly, not merely have the intent. This may or may not exist, although with the standard of an objective person may be imputed. Did a cost-benefit analysis weigh against the act? Perhaps. Perhaps the criminalization of the act implies a legislative determination that the desire to fly is not a legally cognizable benefit, so the act, being harmful as a breach of a criminal statute, is automatically negligent. Regardless, formally, the question must still be posed. Therein lies the difference between a mere breach and a negligent breach of this duty.[290]

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[285] RESTATEMENT (SECOND) OF TORTS §§ 16, 870 (AM. LAW INST. 1981). For example, a person who intends to assault and causes a battery will be guilty of battery.

[286] MODEL PENAL CODE § 2.03(2).

[287] *E.g.*, *id.* § 2.03(3).

[288] *E.g.*, RESTATEMENT (SECOND) OF TORTS § 12.

[289] *See, e.g.*, MODEL PENAL CODE § 2.02(2)(b).

[290] To relieve the reader, it may be worth emphasizing that when a statute contains elemental *mens rea* terms, it generally does not also require broad culpability in its breach. The point here is that precision in language is key. "Was the breach negligent?" and "Was the person negligent as to the viewers' desire to fly?" are two entirely different questions. The criminal law can be quite careless about the difference.

D. PROXIMATE CAUSE

To further clarify its system, this note considers the relationship of the system to proximate cause. What follows are two approaches to proximate causation.[291]

1. THE FORESEEABILITY TEST

Preliminarily, it is worth noting that the nature of the foreseeability test is unclear. Indeed, despite elaborated claims of the superiority of the risk test,[292] the Restatement ultimately asserts that the foreseeability test is "congruent" with the risk test.[293] This note interprets the two tests differently.

The definition of the foreseeability test is relatively uniform: an individual is liable for harm caused only if the harm is of the general kind foreseen by his conduct.[294] This

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[291] There is a third approach that the Restatement calls the "direct consequences" approach. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. e (AM. LAW INST. 2000). It appears the criminal law uses this approach. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 6.4(c)-(g) (6th ed. 2017). This note agrees with the Restatement that the "direct consequences" test is vague and amorphous, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. e, and finds it devoid of content. Unlike proximate causation in this note, which operates in a negligence background and has a clear conceptual base, the criminal law proximate causation deals generally with causes and consequences and lacks such a base, functioning instead as an umbrella term. *See* LAFAVE, CRIMINAL LAW § 6.4(c)-(g). As such, the causation question in criminal law is more akin to the philosophical question of causation, RESTATEMENT (SECOND) OF TORTS § 431 cmt. a, rather than the proximate cause question of negligence, which, recognizing the extensive liability otherwise imposed by negligence and its oddity in not requiring intent or subjective knowledge, properly limits the negligent person's responsibility of making the other person whole to select cases, *see, e.g.*, DOBBS, HAYDEN & BUBLICK, *supra* note 257, § 199. Indeed, to a nontrivial extent, it appears that proximate causation in the criminal law is a question of genuine fault, whereas in tort law it is merely a question of whether to make somebody pay for harm caused.

[292] *See supra* Part V.D.2 (discussing the risk test).

[293] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. e. *But see id.* § 29 Reporters' Note cmt. d (stating that the two tests are only "quite compatible").

[294] *E.g.*, DOBBS, HAYDEN & BUBLICK, *supra* note 257, § 198. These definitions also often ask whether the injured person belongs to the class of persons put at risk by the conduct. *Id.* Since this note has taken

definition, under its plain reading adopted here, raises three points. First, which is shared by the risk test, the reason for which harm is proximately caused by an action is intimately linked to the reason for which the action was negligent. Both tests, indeed proximate cause itself, are concerned with whether the consequences of the negligent action match the fears held of that negligent action.[295] Second, the foreseeability test is concerned with *harms*. "Harm" is a term of art in negligence law.[296] As such, the references to "harms" are references to that concept.[297] This means that as long as there is a match between the harm foreseen and the harm experienced, the foreseeability test is satisfied. To further clarify this point, third, the test makes clear in its emphasis of "general kinds of harm" that the *manner* in which the harm occurred does not matter. This is commonly held true in proximate cause.[298]

In terms, then, of the cost-benefit formula of B, P, and L, where the B represents the private burden, the L represents the various harms, each caused by a number of possible occurrences defining the Ps, and the P represents the probabilities of the occurrence of the Ls, the foreseeability test is concerned with the Ls, the harms that were foreseen.

For example, suppose that a father, to teach his son to swim, throws him off a cliff into the sea. The son drowns. Since the father was in breach of duty owed his son because of the foreseeability of his son's death, a harm recognized by negligence law,[299] and because the son died, the father proximately caused his death. On the other hand, suppose Bill, returning from a hunting trip, decides to drop by the house of his friend, David.[300] In the yard, he greets David's nine-year-old daughter, Amy, and hands her his small, light,

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negligence duties to run to specific individuals and negligent breaches to be of such duties, then the harm foreseen is already specific to the individual harmed; this extra requirement is extraneous.

[295] Again, it bears emphasis that one cannot properly pose this question to abstract actions and causes lacking any characteristic.

[296] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 4.

[297] At least, this shall be the interpretation here.

[298] DOBBS, HAYDEN & BUBLICK, *supra* note 257, § 207.

[299] *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 4 (AM. LAW INST. 2000).

[300] This is essentially the third illustration of the RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29.

but loaded shotgun, telling her to put it in the barn. He then turns to David, who is standing on the porch. Amy drops the shotgun and hurts her toe. While Bill is in negligent breach for giving Amy the shotgun, since she might accidentally have shot it, he has not proximately caused Amy's injury to her toe, since that harm was not foreseeable. As still another example, consider the case presented in Dobbs's treatise.[301] Post Office workers left uncovered a manhole surrounded by kerosene lanterns. Two boys went down the manhole, came back up, and hit a lantern that fell, causing gas to escape that subsequently exploded. One of the boys fell and was burned. Since the boy suffered from the type of harm otherwise foreseen, there was proximate causation, even though the harm, occurring by explosion rather than mischievous ignition of the kerosene, came about in an unforeseen fashion.

This definition must be carried to its appropriate conclusion. Suppose the infuriated Fando beats Lis to a state of indeterminate life, but, before killing her, remembers his broken drum and leaves to cry over it. Lis, convinced that Fando does not love her, kills herself. Has Fando proximately caused Lis's death? Fando's attack could foreseeably have resulted in Lis's death, and Lis died. Under the definition of the foreseeability test, *without more*,[302] Fando has proximately caused Lis's death.[303]

2. THE RISK TEST

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[301] DOBBS, HAYDEN & BUBLICK, *supra* note 257, § 207.

[302] "Most often courts can rightly ignore the details about the manner of injury, because the defendant's negligence is broad enough to cover a variety of sequences, motives and events. However, the problem is not resolvable by a rule of law. If the facts of a particular case show that the risk of harm was limited to a very specific kind of accident, the manner in which harm was inflicted will be relevant." *Id.*; *see also id.* §§ 209–215 (discussing intervening acts and superseding causes); MODEL PENAL CODE PART I COMMENTARIES 255 (AM. LAW INST. 2007) (redefining harms with a specificity that includes causes). *But see infra*, note 309 (remarking that the complications of the foreseeability test merely carry it towards the risk test). The risk test, as this note shall show, does not need "more." *Accord* Barry v. Quality Steel Prods, Inc., 820 A.2d 258 (Conn. 2003); Control Techniques, Inc. v. Johnson, 762 N.E.2d 103 (Ind. 2002).

[303] For an example of when the foreseeability test would not imply proximate causation when one would expect legal causation to exist, see the example of the falling chandelier, *supra* Part V.D.2.

The definition of the risk test is concise: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[304]

According to the Restatement, "risk" consists of "harm occurring with some probability." Understood this way, the risk test states: "An actor's liability is limited to those harms that result from the harms that made the actor's conduct tortious." This statement is semantically void, or at the very least does not mean anything it could have been intended to mean. This note accepts the definition of proximate causation given in the risk test as sound but reinterprets "risk" as a harm-producing event. For example, drunk driving bears the "risk" of car accidents, but not the "risk" of a crushed foot, which is a "harm."[305]

In terms of B, P, and L, the risk test is concerned with the P's, the situations that give rise to the harms. For proximate causation, what matters is whether the situations of which the objectively reasonable person feared in considering the action that constituted negligent breach occurred. What harm occurred is insignificant. Liability is constrained "to the reasons for holding the actor liable in the first place."[306] The jury in assessing proximate causation should be told to return to those reasons that made it find the actor negligent.[307] That what harm occurred is insignificant appears to conflict with the Restatement, which seems to insist that the harm be foreseeable.[308]

For example, suppose a drunk politician entered his car and started driving. This act is negligent because it risks the politician driving into a person or an object. While he is driving, the politician is subject to an *attentat*. His car is blown up, causing injuries to his surroundings. The politician cannot be deemed liable for those injuries because they did not occur from a foreseeable risk. Ordinarily, the politician's action would not be deemed negligent because of

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[304] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29. The Restatement calls this test the "risk standard." *Id.* cmt. d.

[305] The Restatement itself is inconsistent on this point. *See, e.g.*, *id.* § 29 ills. 3-5 (treating quite clearly "risk" as this note defines it, not as "harm").

[306] *Id.* § 29 cmt. d.

[307] *Id.*

[308] *Id.* § 29 cmt. h. While one could insist that to find proximate cause the risks also cause foreseeable harms, the requirement would conflict with the observation that the *risks* were what made the act negligent, not the specific harms that the risks would cause.

the risk that he would fail to realize his car had been rigged. In Buñuel's *That Obscure Object of Desire*, where politicians are constantly being assassinated, he might be.[309]

Reconsider the case of the hunter and his shotgun. Suppose the hunter Bill gave his shotgun to Amy who, this time, dropped it onto a crystal, shattering the crystal and making the gun go off and strike David. Because the risk was that Amy would accidentally shoot the gun, and because Amy did not accidentally shoot the gun, Bill cannot be held liable for either David's injury or the property damage. It would be incongruous to hold Bill not liable for the crystal but liable for David's physical injuries, which occurred through an even greater stretch of fate. The Restatement disagrees, finding Bill not liable for the crystal but liable for David's physical injuries because the gun went off.[310]

To further clarify the difference between the two tests, consider the following two examples. In each example, solely one test implies proximate causation. Suppose there exists a large vat of very hot liquid in a room that had a big lid. The liquid is used for work. A person negligently drops the lid into the vat. The liquid, unexpectedly, splashes very high, melting the chain of the room's chandelier, which falls, crushing the victim, who dies. The risk test recognizes that the risk of negligently dropping the lid into the vat is the occurrence of a splash. A splash occurred. Harm resulted from the splash. There is proximate cause. Meanwhile, the foreseeability test recognizes the possibility of burns. Death (by being crushed by a chandelier) is not a foreseeable harm of a person negligently dropping a lid into a vat of hot liquid. There can be no proximate cause here.

Now consider a chemist who is very bored and decides to make some trinitrotoluene. A few days later, to motivate himself during a bout of existential angst, he takes the TNT from its safe position from a high shelf and looks at it for a while, lounging in his chair and considering its power. He is called downstairs. He places the TNT on a table and leaves

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[309] *See also id.* § 29 ills. 7-8 (liability for harm caused by a fall in a parking lot due to the dark, but no liability without more for the same harm caused by a thief tripping the victim).

[310] *Id.* § 29 cmt. h. Under this approach, it appears that if an uncommonly strong wind suddenly hit right after Bill gave Amy the shotgun that made the shotgun go off, injuring David, then Bill would be liable for David's injuries, because the shotgun had gone off.

his lab. Soon, kids arrive for a party. The chemist decides to show his lab to the kids. They enter the lab, and he negligently keeps the TNT on the table. An earthquake occurs, the TNT falls and explodes, causing injury. The foreseeability test recognizes that the chemist's act was negligent because of the possibility that the TNT would explode, causing injury. The TNT exploded, causing such injury. There is proximate causation. The risk test recognizes the chemist's act is negligent because it creates a risk that a child would take the TNT and cause it to explode, not that an earthquake would occur, causing the TNT to fall and as a result explode. It does not matter that the resulting harms were the same. There can be no proximate causation.[311]

As a final example, consider the following hypothetical drawn from Gaspar Noé's film, *Climax*,[312] which won the Directors' Fortnight at the Cannes Film Festival.[313] (Readers who do not wish to consider a violent example are advised to skip this paragraph). Suppose in an isolated school in a forest miles from the city, during a panic of a dance troupe induced by the consumption of LSD through a spiked sangria, a pregnant woman is punched and kicked in the stomach, placing her life at risk. The originally pregnant woman accosts her assailant with a knife, but instead of killing her, starts to cut herself. She bleeds to death over the next few hours while crawling in the snowstorm outside. Has her assailant negligently caused her death? Negligence is intricately linked to our conceptions of society and humanity, as the social experiment in the movie can indicate: Is the person who secretly spiked the sangria that caused the panic liable in negligence for the harms that ensued (which, in a

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[311] The foreseeability test can claim that there is proximate causation in the first example by calling the lid's fall into the vat a "force likely to cause unpredictable and diverse harms." DOBBS, HAYDEN & BUBLICK, *supra* note 257, § 207. It can claim that there is no proximate causation in the second example by calling the earthquake a "superseding cause." RESTATEMENT (SECOND) OF TORTS § 440 (AM. LAW INST. 1981). To the extent that the complications of the foreseeability test carry one unique, clear definition towards another unique, clear definition, the correct test to adopt is the one using the second definition.

[312] CLIMAX (Rectangle Prods. & Wild Bunch 2018).

[313] Zack Sharf, *Gaspar Noé Wins Biggest Directors' Fortnight Prize with 'Climax,' One of the Best-Reviewed Films at Cannes*, INDIEWIRE (May 17, 2018, 1:50 PM), https://www.indiewire.com/2018/05/gaspar-noe-wins-directors-fortnight-prize-climax-1201965827.

complete breakdown of the group, include a child's electrocution, incest, and murder)?

3. PALSGRAF

This note concludes with an analysis of *Palsgraf v. Long Island Railroad Co*.[314] While the application to *Palsgraf* primarily clarifies the duty and breach framework of the note, I have included it here because Justice Andrews's dissent discusses proximate cause.[315]

This note recognizes that *Palsgraf* is an old and theoretical case, which is a difficult combination.[316] As a case nevertheless from the 20th century, it is manageable.

The facts of *Palsgraf* are short.[317] Two men[318] attempted to board a train that was departing.[319] The first got on safely; the second had difficulty.[320] One guard on the train and another on the platform tried to help the second man get onto the train.[321] In the commotion, the second man dropped a nondescript package that, it turned out, contained

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[314] Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

[315] Indeed, it has been suggested that Justice Andrews's dissent is about proximate cause. Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1761-62 (2012). This is not strictly true. The key disagreement between the majority and the dissent lies in the nature of duty and, by extension, breach. *See Palsgraf*, 162 N.E. at 99. But since it was uncontested that under Andrews's view, there was a duty that was breached, Andrews discussed the remaining element, proximate cause, which he emphasized to be the chief limitation under his more expansive negligence theory, in order to affirm the decision below. *See id.* at 101-05 (Andrews, J., dissenting); STUART M. SPEISER ET AL., 3 AMERICAN LAW OF TORTS § 11.7, Westlaw (database updated March 2020). Justice Andrews's rhetoric attempting to justify his approach by emphasizing the existence of a limitation on it does not make his dissent of proximate cause instead of duty, no more than a garden of apple trees ceases to be a garden of apple trees and becomes an orange grove, because it has been circumscribed from a larger forest of apple trees. The fence merely better describes the apple garden.

[316] *See, e.g.*, Zipursky, *supra* note 315, at 1758, 1760–62 (discussing interpretational complexities of the case).

[317] For a discussion of the real-life facts, see William H. Manz, *Palsgraf: Cardozo's Urban Legend?*, 107 DICK. L. REV. 785 (2003).

[318] Technically, the "men" were boys. Joseph W. Little, *Palsgraf Revisited (Again)*, 6 PIERCE L. REV. 75, 75 (2007).

[319] *Palsgraf*, 162 N.E. at 99.

[320] *Id.*

[321] *Id.*

fireworks.[322] The fireworks exploded, causing scales at the other end of the platform many feet away to fall, injuring the plaintiff.[323] The plaintiff sued the railroad company for negligence under a vicarious liability theory.[324]

The question in *Palsgraf*, then, is whether the plaintiff has a cause of action under negligence against the two workers who help the second man board the train.

Justice Cardozo, who wrote for a majority of four in a court of seven, held that she did not. Justice Cardozo's primary argument was that the plaintiff was suing for negligent breach of the general duty of care, and that duty ran to her specifically.[325] Therefore, for the workers' actions to constitute breach, the harm must have been foreseeable as to *her*.[326] In the case, it was uncontested that harm to the plaintiff was not foreseeable through the workers' actions.[327] Thus, there was no breach and no negligence; the case had to be dismissed.[328]

There have been arguments that Cardozo held the workers owed no duty to the plaintiff.[329] While this may be a correct exercise in divination,[330] it finds almost no support in

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[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.* at 99, 102. On the other hand, there was negligence as to the holder of the package. *E.g.*, *id.* at 99. As such, Cardozo says: "The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus, to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself." *Id.* at 101 (citations omitted). This statement, which apparently has caused confusion among scholars, *see* Zipursky, *supra* note 315, at 1768, is easily explained—if it needs explanation—as a response to the dissent, which, Cardozo finds, in practice states the opposite. Unsurprisingly, then, one finds in the dissent the following almost indignant response: "[W]e do not have a plaintiff suing by 'derivation or succession.' Her action is original and primary." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).
[328] *Palsgraf*, 162 N.E. at 101.
[329] *E.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 cmt. f (AM. LAW INST. 2000); Little, *supra* note 318, at 78. It has even been said, as a basic setup to the *Palsgaf* issue, that for the defendant to be absolved of liability, the court had to find either that there was no duty or that there was no proximate cause. SPEISER ET AL., *supra* note 315, § 11.7. This is rather frustrating.
[330] *But see* Zipursky, *supra* note 315, at 1758, 1762 (arguing that it is not).

the opinion.[331] It relates to the old idea of using foreseeability to find duty,[332] wherein the general duty of care is constantly disappearing and reappearing like a quite inconsistent phoenix.[333] The sole support this interpretation finds lies in the following quotation: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[334] But absent any other support, "duty" here is more properly interpreted as the duty to commit a specific act, not as the general duty of care. This is similar to how a defense attorney would argue that any act (for the plaintiff must have specified an act or particular inaction) is not negligent, because there was no "duty" to perform it, converting the jury question of breach to a question of law for the judge, except that Cardozo, who held under the circumstances that there was no breach as a matter of law, had no reason to be attentive to the difference.

Andrews, writing in dissent, rejected Cardozo's interpretation of the general duty of care, arguing that there is a solitary general duty of care that runs to society at large, instead of multiple duties running to individuals.[335] It is that

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[331] Indeed, quite the opposite is true. *See Palsgraf*, 162 N.E. at 99-100 ("The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. *She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue.* These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor [i.e., strict liability]. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to some one else. 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, *the observance of which would have averted or avoided the injury*.'" (emphasis in both cases added) (citations omitted)). Parenthetically, the historical statement on the development of strict liability has been questioned. *See generally* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

[332] *See, e.g.*, Little, *supra* note 318, at 82–88.

[333] *See, e.g.*, Quiroz v. Alcoa Inc., 416 P.3d 824, 828-29, 833-35 (Ariz. 2018) (agreeing with the Restatement Third in rejecting foreseeability as a factor in determining duty).

[334] *Palsgraf*, 162 N.E. at 100.

[335] *Id.* at 103 (Andrews, J., dissenting).

single duty that must be violated for there to be breach. As such, Andrews appears to suggest that there is breach whenever there is, in Cardozo's language and the language of this note, breach as to one person. Indeed, Andrews agrees that there can be no breach in the air.[336] Thus, for example, if a person speeds in an empty city, there is no breach. Therefore, breach as to at least one person, as defined in this note, is necessary.[337] The key focus of Andrews's argument is that it is also sufficient. Hence, if there is breach in the language of this note as to one person, there is breach in Andrews's language as to "society at large," and thus breach as to every person in the language of this note.

It bears emphasis that in both the Andrews conception and the Cardozo conception, there must be a duty that is being breached.[338] The breach and duty elements of negligence are, in that sense, united.[339] There is no evidence that, given a duty, Andrews and Cardozo contest the nature of breach.[340] Their difference lies in the (relational) nature of the general duty of care. This note's approach to the general duty of care matches that of Cardozo.[341] While Andrews's approach is more sophisticated, it is not the law.[342] Perhaps one day it will be, but it is not at that point yet.

The rest of Andrews's dissent concerns proximate cause, which he emphasizes remains a part of the negligence cause of action.[343] Since by construction, Andrews lacks a

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[336] *Id.* at 102.

[337] Technically, this is not true. Suppose that a person is walking down an empty street in an otherwise occupied city, swinging a bat. He loses control, the bat flies into an adjacent street, striking a pedestrian. In the conception of this note, there is no breach, because harm to the pedestrian was not foreseeable. In Andrews's version, the actor, in swinging a bat in an occupied city, engaged in an act that unreasonably threatened the safety of others, hence was in breach of the general duty of care. In both conceptions, there would have been breach had a pedestrian suddenly appeared in the street and gotten hit by the swinging bat still in the actor's hand.

[338] *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting).

[339] *Id.*

[340] *See id.* at 101-05; *id.* at 99-101 (majority opinion).

[341] This was an interpretational rather than a normative choice. In other words, it describes the status of the law, but makes no statement on what the law should be. It does not follow necessarily from considering the general duty of care part of the social contract.

[342] *See* Little, *supra* note 318, at 81-82 (Wisconsin being the only exception).

[343] *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

breach framework to guide his proximate cause analysis, his approach to proximate cause differs from that in this note. He appears to define proximate cause in the manner of the criminal law.[344] To clarify his approach to proximate cause, Andrews offers the following example: Suppose a chauffeur negligently collides into another car.[345] Suppose that car contained dynamite, unforeseeably to the reasonable man, and that the dynamite exploded, cutting by flying glass a person sitting at a window a block away.[346] Andrews argues in this case, where his conception would find duty and breach, that it was conceivable there was no proximate cause.[347] He emphasizes foreseeability as a factor in the proximate cause analysis of the hypothetical.[348] Agreeing with the foreseeability analysis, this note would find that there was no breach of the duty of care running to the person at the window. One wonders, however, what distinguishes for Andrews this case from *Palsgraf*, and Andrews admits that his conception of proximate cause is amorphous.[349] "What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many

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[344] *Id.* at 104 (asking, for example, whether there was "a natural and continuous sequence between cause and effect," whether there was a "direct connection . . . without too many intervening causes," whether the cause and result were close in space and time, etc.). In the approach of this note, prolonged causation and the existence of intervening causes may be relevant to breach through foreseeability of harm to a particular plaintiff, but are not ipso facto relevant to proximate causation. As long as the harm occurred through the risks that made the actor's conduct tortious, there would be proximate causation. Of course, prolonged causation and intervening causes might even imply that the actor's conduct was not tortious at all.

In contrast, Andrews attaches significance to prolonged causation in and of itself. *See id.* at 103 (an overturned lantern that burns all of Chicago is not the proximate cause of the burning of the last house).

The following question on the risk test poses itself, clarifying its nature and demonstrating the extent to which proximate causation has little to do with causation as one would ordinarily understand the term. Suppose Actor A committed an act negligent with respect to V_1 and V_2 through risks R_1 and R_2 respectively. Suppose, unexpectedly, V_1 was injured through risk R_2. Is A liable in negligence to V_1? The answer, it appears, should be "No": Proximate cause is linked to the breach of duty, which, under current law, is linked to a specific individual.

[345] *Id.* at 104.

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *See id.*

considerations . . . ."[350] Perhaps in the hypothetical, it is the increased distance between the location of the accident and the location of the harm.

VI. CONCLUSION

In the negligence cause of action, the element of duty goes beyond the general duty of care to act reasonably under the circumstances. Any duty could potentially satisfy this element, although the duty must be considered a "tort" duty, i.e., one over which the negligence cause of action can run. It is therefore misleading to speak of duty as a separate element of the negligence cause of action, which is always met by some duty, such as by a non-derogable statutory duty. What matters is the combination of a duty and the breach of the duty.

For the negligence cause of action, the breach must be "negligent." Negligent breach of a duty is a concept that otherwise stands independently of its role in the negligence cause of action. It is a type of broad culpability *mens rea*, as opposed to elemental *mens rea*. Where the duty in question is a tort duty, negligent breach satisfies the traditional second element of the cause of action.

An actor negligently breaches a duty through an act or through inaction if (and only if) a reasonable person in the actor's position could foresee the nonoccurrence of the result of the duty, and a cost-benefit analysis weighs against the actor.

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[350] *Id.* at 103. Of course, actual cause is not subsumed under proximate cause. For example, suppose a bored babysitter takes a box and starts counting the matches inside, throwing each onto the floor after counting it. The kitchen contains a bottle of compressed butane gas and a vat of oil in which a cast iron pot is being cleaned. Having counted all the matches, the babysitter then goes to the vat, takes out the pot, and examines it for a while, dripping oil over the ground. Meanwhile, the baby, himself bored, goes into the shed, where he plays with the lantern and lights up the shed. The fire spreads and consumes the house, lighting in the process the matches and the oil, and causing the bottle of butane gas to explode. The babysitter's spoliation of the kitchen is not an actual cause of the house burning, neither under the but-for test nor under the substantial factor test, but it is a proximate cause, as it contributed to the fire through the risks that made the babysitter's conduct negligent.

The first prong of the test, the foreseeability of harm, carries an actor's conduct within the ambit of negligence. It recognizes that we must be vigilant, as reasonable people, to whether our conduct could result in harm. The mere foreseeability of harm, however, cannot suffice. Since actions could often result in harm, the fear of being deemed negligent would shackle an actor, discouraging actions that could well be preferred. As a result, the law allows the actor the possibility of engaging in the conduct, requiring that the actor assess the benefits and costs—properly understood—of the conduct, to ensure that the benefits exceed the costs. Only if the costs exceed the benefits can the conduct be deemed negligent. In this fashion, the law ensures both individual liberty and the well-being of others.

The two elements of the negligence test, the nonoccurrence of the result of a duty and the cost-benefit analysis, clarify the relationship between duty and breach, and unify the approach of law and economics with the other approaches to breach, such as the rights-based approach, which emphasize different aspects of the same underlying solution to the problem.

In those cases where an actor's conduct negligently breaches a duty, one can raise the last of the difficult issues of the negligence cause of action, the proximate cause question: Did the harms result from the risks that made the actor's conduct negligent? This is the risk test, which is both normatively superior to the foreseeability test and concludes its historical development. Proximate causation here substantially differs from that of the criminal law, which uses a free-form factor test still in its infancy.

At this point, there are two potential developments of the negligence cause of action that could be beneficial. First is the reinterpretation of the general duty of care to run to society at large, rather than to individuals, as suggested by Andrews in *Palsgraf*. As we move toward a greater appreciation of the relationship between the individual and society, a phenomenon I shall describe and analyze in my forthcoming book, this approach might gain traction. Second is the reinterpretation of the negligence cause of action itself to apply only to the general duty of care. This approach—encompassing great change—would simplify the negligence cause of action, removing the first element as well as the use of a broad culpability *mens rea* in negligence cases. Instead

of differentiating between strict and negligent breaches of entire duties, one would only speak of breaches of duties. This would comport with developments in the criminal law, which as a field is moving away from the use of broad culpability *mens rea* towards elemental rea.