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At the Intersection of
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BY JIM GASH

INTRODUCTION

This Article analyzes two key provisions of the proposed proximate
cause chapter of Restatement (Third) of Torts: Liability for
Physical Harm ("Restatement Third"), using the potential liability of the
airlines involved in the September 11th tragedy as a vehicle for illustrating
how these provisions would operate and whether they are advisable.

September 11th changed everything. The events of a single morning
created a world immeasurably more complicated and uncertain. The people
of the United States will not fully realize the social, psychological,
philosophical, and political implications of that day for several gener-

* Associate Professor, Pepperdine University School of Law. I want to give
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this Article through a summer research grant.

1 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Basic
Principles) (Tentative Draft No. 2, Mar. 25, 2002). At this point in time, the
proximate cause chapter to the Restatement Third is still in draft form. The
American Law Institute has not yet considered as a body, much less voted on, the
specific language the Reporters propose. Formal discussion on this chapter will
likely begin at the ALI's annual meeting in May of 2003. The ALI will probably
not vote on this chapter until May of 2004. Discussions with the Advisors and the
Members Consultative Group for this project are currently ongoing. Interview with
Rick Cupp, Professor of Law, Pepperdine University School of Law, Member of
Members Consultative Group, Los Angeles, Cal. (Sept. 1, 2002).
Already, fears of subsequent attacks, together with the reduced convenience, efficiency, and privacy resulting from tightened airport security, have severely impacted air travel. Many airlines and other segments of the air travel industry have found it difficult, if not impossible, to attain previous levels of profitability. Potentially even more devastating for certain members of this industry, however, is the possibility of civil liability for the catastrophic events of September 11th.

In the wake of September 11th, early calls succeeded in establishing national solidarity. Responsibility for the attack was laid upon the Taliban and the Al-Qaeda terrorist network. The overwhelming interest in preserving the nation’s focus and morale even motivated the National Association of American Trial Lawyers to request a moratorium on civil lawsuits arising out of the events of September 11th. Additionally, Congress quickly passed legislation providing a fund for the immediate financial relief for victims and their families for losses resulting from the attacks. The establishment of this fund had important implications for those who opted to receive compensation. First, by only requiring victims to demonstrate injury, rather than establish legal liability, the legislation made recovery far easier and more efficient than it would be through the judicial system. Second, Congress expressly precluded individuals opting...

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2 See, e.g., Sharon Begley et al., Will We Ever Be Safe Again, NEWSWEEK, Sept. 24, 2001, at 58 (suggesting several ways to make airports safer); Dana Hawkins, Guarding Liberties as Well as Lives, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 56 (discussing technological tools and their effect on civil liberties); Tom Kenworthy, Struggling to Create a Homeland Defense, USA TODAY, Oct. 9, 2001, at 1A (detailing changes in public perception since September 11th and what precautionary steps communities are taking).


7 U.S. Lawyers’ Group Urges Members to Postpone Suits, THE OTTAWA CITIZEN, Sept. 15, 2001, at A2. This was the first request for such a moratorium in the history of ATLA. Id.


9 Id. § 405(b)(2).
to receive compensation through the fund from pursuing a separate legal claim for damages against any other party for the harm caused by the attack. In effect, Congress created very strong incentives for those injured by the attack to keep the blame focused on the terrorists, rather than turning toward more readily identifiable entities with deeper pockets, such as the airlines whose planes were hijacked.

The amazing demonstration of unity immediately following September 11th has, however, begun to splinter. While the military and intelligence communities endeavor to locate Osama Bin Ladin and Al-Qaeda terrorists abroad, some members of the political and legal communities have sought to hold domestic entities responsible, at least to some degree, for the attacks at home. For example, some members of Congress have demanded inquiries into whether the President acted appropriately before September 11th in light of the information available. Furthermore, having opted not to seek compensation from the September 11th Victims Compensation Fund, the first plaintiffs have come forward to file wrongful death lawsuits against United and American Airlines for their roles in the September 11th tragedy. Assuming the plaintiffs can sufficiently demonstrate that the airlines breached a duty of care, and that this breach was a factual cause of the damages, the issue of proximate cause still places a significant obstacle in the plaintiffs’ road to recovery. The outcome of these suits may turn on the legal question of how to treat intervening culpable acts in the proximate

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10 Id. § 405(c)(3)(B)(i).
14 Mariani v. United Air Lines, Inc., No. 01 Civ. 11628 (AKH), 2002 WL 1685382 (S.D.N.Y. July 24, 2002); Gail Appleson, American Airlines Sued for $50 Million in WTC Attack (Apr. 9, 2002), at http://www.freerepublic.com/focus/news/662229/posts. While the lawsuit against United was actually brought by the survivors of one of the passengers on United Flight 175, the lawsuit against American was brought by the survivors of someone killed while working in the World Trade Center. This article focuses on this latter category of plaintiffs. In addition, a group of plaintiffs recently filed a one trillion dollar lawsuit against foreign governments and private entities alleged to have participated in the funding of terrorism. See Nicholas M. Horrock, Trillion-Dollar Lawsuit May Reveal More (Aug. 18, 2002), at http://www.washtimes.com/upi-breaking/20020818-082901-8164r.htm.
cause analysis. More specifically, courts will have to decide whether the intervening terrorist acts responsible for the tragedy are properly viewed as superseding causes, thus relieving the airlines of liability regardless of whether the plaintiffs can prove the airlines breached a duty of due care.

Less than a week before September 11th, the Restatement Third Reporters\(^5\) distributed a draft of the proposed chapter on proximate cause.\(^6\) Proximate cause has rightfully earned its reputation as one of the most difficult and complicated topics in modern law. While the events of the following weeks would make the world immeasurably more complicated, the purpose of this draft was to make the tort world immeasurably less complicated—at least for first year law students, torts professors, trial judges, and trial lawyers.\(^7\)

Chapter 6 of the Restatement Third lays out proximate cause\(^8\) in six sections.\(^9\) This Article analyzes the treatment of intervening culpable acts


\(^{16}\) RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Tentative Draft No. 2, Mar. 25, 2002).

\(^{17}\) See Fowler V. Harper et al., The Law of Torts § 20.1, at 86 (2d ed. 1986) (“The result has been a widely recognized confusion, and as luxuriant a crop of legal literature as is to be had in any branch of tort law.”). See also W. Page Keeton et al., Prosser and Keeton on Torts § 41, at 263 (5th ed. 1984) (“There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion.”); Stuart M. Speiser et al., The American Law of Torts § 11:1, at 380 (1986) (“‘The concept of legal causation has given the courts and commentators consummate difficulty and has in truth defied precise definition.’” (quoting Justice Tobriner’s opinion in State Compensation Ins. Fund v. Industrial Acci. Com., 176 Cal. App. 2d 10, 20 (Cal. Ct. App. 1959))). My colleagues who teach first year Property may persuasively argue that the Rule Against Perpetuities is equally difficult and complex. See Lucas v. Hamm, 364 P.2d 685, 690-91 (Cal. 1961) (finding Rule Against Perpetuities so difficult that lawyer’s failure to apply it correctly was not grounds for malpractice).

\(^{18}\) Interestingly, one of the most notable changes in proximate cause proposed by the Reporters is the elimination of that term. “Although the term ‘proximate cause’ has been in widespread use in judicial opinions, treatises, casebooks, and scholarship, the term is not generally employed in this Chapter because it is an especially poor one to describe the idea to which it is connected.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26, special note on proximate cause (Tentative Draft No. 2, Mar. 25, 2002).

\(^{19}\) See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 29-34 (Tentative Draft No. 2, Mar. 25, 2002). Section 29 states the general rule for
in proximate cause analysis under Section 33 of the *Restatement Third*. Because Section 33 incorporates the general proximate cause analysis urged in Section 29, Part I of this Article analyzes Section 29 to provide the necessary foundation for the analysis of Section 33.\(^\text{20}\) A series of charts and graphs illustrates the fundamental concepts underlying proximate cause. Part II traces the historical evolution of courts’ analyses of proximate cause when intervening acts combine with an actor’s tortious conduct to cause harm.\(^\text{21}\) Over time, three approaches to intervening cause cases have emerged; the latest (and best) is the approach urged by the *Restatement Third*. Finally, Part III analyzes the September 11th fact pattern under each of the three approaches to intervening cause analysis to ascertain whether the likely outcome will depend upon whether or not the courts trying these cases adopt the *Restatement Third* approach.\(^\text{22}\)

I. THE *RESTATEMENT THIRD*’S DEFINITION OF AND APPROACH TO PROXIMATE CAUSE

While this Article’s primary purpose is to evaluate the *Restatement Third*’s treatment of intervening culpable acts under Section 33, a secondary purpose is to conceptualize and graphically illustrate the general approach to proximate cause outlined in Section 29. This foundation is essential because Section 33 rejects the traditional application of special rules when an intervening act occurs, preferring instead a straightforward application of Section 29’s general approach to proximate cause.\(^\text{23}\) Consequen-

\(^{20}\) See infra notes 23-152 and accompanying text.
\(^{21}\) See infra notes 153-257 and accompanying text.
\(^{22}\) See infra notes 258-302 and accompanying text.
\(^{23}\) See infra notes 243-47 and accompanying text.
sequently, this Article analyzes Section 29 in some detail before turning to Section 33’s treatment of intervening acts.

A. Background of Proximate Cause

No one, it seems, likes the term “proximate cause.” Like the Reporters for the Restatement of the Law of Torts (“Restatement First”) and Restatement (Second) of Torts (“Restatement Second”), the Restatement Third Reporters are no exception—“There may be no legal term in as widespread usage as proximate cause that has been excoriated as it has.” Lord Chancellor Baron first coined the term in 1630, and has since received much scorn as a consequence.

Despite its nearly uniform use by courts, the Restatement First avoided using the term “proximate cause,” preferring instead the term “legal cause.” Notably, instead of clearly breaking the issue of causation into separate determinations of factual cause and proximate cause, the


26 Restatement (Second) of the Law of Torts (1965).

27 See Restatement (Third) of Torts: Liability for Physical Harm § 29 Reporters’ Note cmt. b (Tentative Draft No. 2, Mar. 25, 2002).

28 See “‘Injure non remota causa, sed proxima, spectatur.’ (‘In law look to the proximate, not remote cause.’)” Stasia Mosesso, Note, Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War, 76 Notre Dame L. Rev. 257, 284 n.177 (2000) (quoting Francis Bacon, Maxims of the Law, in The Works of Francis Bacon 327 (J. Spedding et al. eds., 1879)).

29 See, e.g., William L. Prosser, Law of Torts § 42, at 244 (4th ed. 1971) (categorizing Bacon’s coining of proximate cause as “sin[ ]”).

30 See Restatement (Third) of Torts: Liability for Physical Harm § 26, special note on proximate cause (Tentative Draft No. 2, Mar. 25, 2002).

31 See Restatement of the Law of Torts § 9 (1934) (“The words ‘legal cause’ are used throughout the Restatement of this Subject to denote the fact that the manner in which the actor’s tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law regards it just to hold the actor responsible for such harm.”). The comments to Section 9 then direct the reader to later specific provisions further illuminating the legal cause analysis. Id. § 9 cmt. b (directing the reader to Sections 279 and 280 and Sections 430-53). Section 431 describes what constitutes legal cause in the negligence context. Id.

32 The term “factual cause” is the one used by the Restatement Third to describe what has been variously referred to in the past as “but-for cause” and “cause in fact.” See Restatement (Third) of Torts: Liability for Physical Harm § 26
Restatement First used the term "legal cause" to encompass both factual cause and proximate cause.\(^{33}\)

The Restatement Second, initially published in 1965, likewise avoided using "proximate cause," opting instead to retain the "legal cause" terminology from the Restatement First with only minor semantic modifications.\(^{34}\) Once again, rather than separating the analytically distinct fact-bound factual cause inquiry from the policy-driven proximate cause inquiry, the Restatement Second perpetuated the confusing conflation of these concepts utilized by the Restatement First.\(^{35}\)

Finally, in 1977, in conjunction with a new Chapter addressing misrepresentation, Restatement Second Reporter Dean John Wade endeavored to sever factual cause from what we know as proximate cause.\(^{36}\) Wade nevertheless eschewed the more popular "proximate cause" terminology in favor of retaining "legal cause,"\(^{37}\) though now that term purported to refer only to the proximate cause aspect of causation.\(^{38}\)

For a variety of reasons, the Restatement term "legal cause" never gained much traction with courts or commentators.\(^{39}\) Likewise, the concepts

cmt. b (Tentative Draft No. 2, Mar. 25, 2002) ("The standard for factual causation in this section is familiarly referred to as the 'but-for' test, as well as the sine qua non test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.").

\(^{33}\) See Restatement of the Law of Torts § 9 (1934).

\(^{34}\) See Restatement (Second) of the Law of Torts § 9 (1965). See also Restatement (Third) of Torts: Liability for Physical Harm § 26 cmt. a (Tentative Draft No. 2, Mar. 25, 2002) ("The definition provided for 'legal cause' in the Second Restatement differed modestly from the first Restatement by adding that it addressed the 'causal sequence' between an actor's tortious conduct and the invasion of a legally protected interest.").

\(^{35}\) The section describing what constitutes legal cause in the negligence context was not changed at all. Compare Restatement of the Law of Torts § 431 (1934) with Restatement (Second) of the Law of Torts § 431 (1965).

\(^{36}\) Compare Restatement (Second) of the Law of Torts § 546 (1965) (entitled "Causation in Fact") with id. § 548A (entitled "Legal Causation of Pecuniary Loss"). Dean Wade's reference to the substantial factor test in the context of factual, rather than proximate, cause lends credence to the view that the earlier Restatements intended for that test to be part of the factual cause inquiry. See id. § 546.

\(^{37}\) See id. § 548A.

\(^{38}\) See Restatement (Third) of Torts: Liability for Physical Harm § 26 cmt. a (Tentative Draft No. 2, Mar. 25, 2002).

\(^{39}\) See, e.g., id. ("Despite the venerability of the 'legal cause' term in Restatement history, it has not been widely adopted in judicial and legal discourse nor is it helpful in explicating the ground that it covers."). See also id., Special Note On
advocated by *Restatement First* and *Restatement Second* fared equally poorly with the judicial system. For example, the *Restatement Second* asserted that an actor’s conduct was not to be considered to be a legal cause of harm when “after the event and looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.” This “highly-extraordinary-in-hindsight” test never gained significant support.

**B. The Restatement Third Approach to Proximate Cause**

The *Restatement Third* attempts to break from earlier tradition with respect to the causation aspect of torts restatements by actually attempting to restate the law as it is applied by courts. It is only partially successful. While the *Restatement Third* successfully completes the transition from a unitary concept of “legal cause” advocated by earlier Restatements to the bifurcated factual and proximate cause approach utilized today, it stubbornly refuses to adopt the prevailing “proximate cause” terminology.

Proximate Cause (“[D]espite 70 years of Torts Restatement commitment to legal cause, its acceptance in the vocabulary of tort law is quite minimal.”).

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40 See Richard L. Cupp, Jr., *Proximate Cause, the Proposed Basic Principles Restatement, and Products Liability*, 53 S.C. L. REV. 1085, 1086-87 (2002) (“Neither the first nor the second Restatements faithfully reflected the language or, in some respects, the approaches utilized by the courts, and the Restatements’ efforts to steer the courts to new language and approaches met with failure.”).

41 *Re*STATEMENT (SECOND) OF THE LAW OF TORTS § 435(2) (1965).


43 Much controversy has centered on whether a restatement should encourage legal reform, or should merely restate the present state of the law. See, e.g., Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, Thomas E. Fairchild Lecture, University of Wisconsin Law School (Oct. 28, 1994), *in* 1995 Wis. L. REV. 1, 20-24 (1995) (discussing whether restatements of black-letter law should focus on the “‘is’” or “‘ought’”).

44 Indeed, the *Restatement Third* goes so far as to place factual cause and legal cause into separate chapters. Compare *Re*STATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 (entitled “Factual Cause”) (Tentative Draft No. 2, Mar. 25, 2002) with id. § 32 (entitled “Scope of Liability (Proximate Cause)”).

45 See *Re*STATEMENT (THIRD) OF TORTS ch. 6, Special Note On Proximate Cause (Tentative Draft No. 2, Mar. 25, 2002) (“Although the term ‘proximate cause’ has been in widespread use in judicial opinions, treatises, casebooks, and scholarship, the term is not generally employed in this Chapter because it is an especially poor one to describe the idea to which it is connected . . . . Nevertheless, to communicate clearly with judges, lawyers, and academics who understand limitations on liability under the proximate-cause rubric, the term is included in a parenthetical following the Chapter’s title.”).
Moreover, while the substance of the Restatement Third might accurately reflect the prevailing analytical approach to proximate cause, the terminology utilized is outside the mainstream.\textsuperscript{46}

Under the Restatement Third, both factual cause and proximate cause are simply defined:

\section{Factual Cause}

An actor's tortious conduct must be a factual cause of another's physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under §27.\textsuperscript{47}

\section{Limitations on Liability for Tortious Conduct}\textsuperscript{48}

An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious.\textsuperscript{49}

Although the Restatement Third approach refuses to employ the "proximate cause" terminology and avoids the prevailing "foreseeability" language, it does have the virtue of being succinct and simple.\textsuperscript{50} It is also

\textsuperscript{46} See Cupp, supra note 40, at 1087, 1090 ("[I]f a restatement embraces too much linguistic or doctrinal creativity ... it risks irrelevance. ... [C]oncern over irrelevance could be eliminated by switching the black-letter rule to reasonable foreseeability, and emphasizing result-within-the-risk language heavily in the comments.").

\textsuperscript{47} RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26 (Tentative Draft No. 2, Mar. 25, 2002). The caveat at the end of Section 26 referencing Section 27 clarifies that tortious conduct that one may not think is a factual cause under Section 26 simply because another competing causal sequence would have also caused the harm is still to be treated as a factual cause. This harkens back to the classic case where two fires of separate origin combine to burn a single structure; both fires are considered factual causes of the harm even though either alone would have been sufficient to cause the harm, even though technically speaking neither are a factual cause of the harm. See Anderson v. Minneapolis, 179 N.W. 45, 49 (Minn. 1920); see also Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 861 (Mo. 1993), aff'd, 901 S.W.2d 270 (Mo. App. 1995); Hughey v. Candoli, 323 P.2d 779, 784 (Cal. Ct. App. 1958).

\textsuperscript{48} Though not apparent from its title, this is the section that addresses proximate cause.

\textsuperscript{49} RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 (Tentative Draft No. 2, Mar. 25, 2002).

\textsuperscript{50} In principle, I agree that the proximate cause terminology is unhelpful and even confusing to juries. But since that terminology is in such widespread use, the advances made by the Restatement Third in the justification for and simplification
more precise than the generalized "foreseeability" language often used by courts, and is appealing for that reason. To be dutifully applied, one need only engage in a straightforward three-step inquiry.51 The first question is: What types of harm did an actor's conduct reasonably risk at the time of the allegedly tortious conduct?52 The second question is: Was the type of harm actually caused to another one of the types of harm identified in question one? If the answer to the second question is affirmative, then the third and final question is: Was the harm actually suffered sufficiently probable to occur, and sufficiently grave if it did occur, so as to render the actor's conduct tortious? If so, proximate cause exists and liability is imposed; if not, proximate cause does not exist and no liability is imposed. What follows is a conceptual illustration of why the Restatement Third approach is that simple and an explanation of how it works when applied to the facts of a case.

1. The Roots of Modern Proximate Cause Analysis

Any worthwhile discussion of proximate cause necessarily addresses the seminal case of Palsgraf v. Long Island Railroad Co.53 Justice Cardozo's majority opinion in that case forms the foundation of legitimate proximate cause analysis. In contrast to some other scholars,54 I believe that the Restatement Third approach essentially vindicates the correctness of Justice Cardozo's analysis in Palsgraf, albeit with an important modification of its nomenclature. While the terminology used by the Restatement Third differs from that used in Palsgraf, the two approaches (in the final analysis) are functionally quite similar. The facts of Palsgraf will serve as the backdrop to illustrate the Restatement Third's approach to proximate cause and to demonstrate that it does not materially differ in substance from the analysis employed in that case.

of the concept it represents risk being ignored because of the refusal to use that terminology.

51 This, of course, presupposes a prior finding of tortious conduct (i.e., breach of some legally prescribed duty).

52 While "reasonably" is not expressly written into the black-letter, that concept is implicit in the requirement that that the conduct be tortious. See generally infra at Part I.B.1.b.


54 See, e.g., Ernest J. Weinrib, The Passing of Palsgraf?, 54 VAND. L. REV. 803, 803 (2001) (suggesting that the Restatement Third, if adopted, will have killed the Palsgraf analysis).
a. Justice Cardozo’s Analysis in Palsgraf

In *Palsgraf*, two men ran toward a moving train, attempting to board.\(^{55}\) While one safely climbed onto the train, the other lost his balance and dropped a small package wrapped in newspaper. As it turned out, the package contained fireworks, which exploded when they landed on the tracks. The concussion from the explosion caused a scale to strike Mrs. Palsgraf while she was standing on the far end of the train station platform. The trial court found that the negligence of the train employees in assisting the man aboard actually caused the package to fall onto the tracks.\(^{56}\)

Writing for the majority, Justice Cardozo resolved the case on grounds other than proximate cause, insisting that causation (let alone proximate cause) had nothing to do with this case. He stated that "'[t]he law of causation, remote or proximate, is thus foreign to the case before us.'"\(^{57}\) Instead, Justice Cardozo opted to analyze the case in the context of whether or not the train employee breached a duty to Mrs. Palsgraf.\(^{58}\) The scope of the duty owed, according to Justice Cardozo, was a function of the risk presented by the allegedly tortious conduct: "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."\(^{59}\) The reasonably perceived risks in this situation were fairly limited. Included among those perceived risks, for example, was the risk that the man trying to board the train could fall and suffer personal injury or that the contents of the package could fall from his grasp and break upon impact with the track. It might even be reasonably foreseeable that what was in the package could damage the track.

To Justice Cardozo, this risk inquiry could be illustrated spatially by imagining spheres of danger within which liability could be imposed, and outside of which liability could not be imposed.\(^{60}\) Accordingly, the critical inquiry to Justice Cardozo was whether a scale being knocked down and

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\(^{55}\) *Palsgraf*, 162 N.E. at 99.

\(^{56}\) *Id.* at 101.

\(^{57}\) *Id.*

\(^{58}\) Justice Cardozo even openly questioned whether the train employee actually breached a duty of care to the man he was helping onto the train. *See id.* at 100 ("If there was a wrong to [the man carrying the package] at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package.").

\(^{59}\) *Id.* (citation omitted).

\(^{60}\) *See id.* (referring to what he called the "orbit of danger" and "orbit of duty" as defining the scope of responsibility); *see also id.* at 102 (Andrews, J., dissenting) (characterizing Justice Cardozo's approach as creating a "radius of danger").
onto someone standing on the platform was among the risks reasonably posed by helping a passenger carrying a package wrapped in newspaper board a moving train, even if doing so could be abstractly characterized as wrongful. As found by Justice Cardozo, the answer was clearly “no.”

Under Justice Cardozo’s approach, the analysis mandates that the action be immediately frozen at the point of the allegedly tortious conduct—something akin to taking a legal snapshot. At that point, the “orbit of danger” can be constructed by ascertaining what risks are reasonably posed by that conduct. The risks reasonably posed by the conduct, thus falling within the “orbit of danger,” then define the “orbit of duty.” Consequently, if harm of the type reasonably risked by the allegedly tortious conduct is caused to one within the “orbit of danger,” then a duty has been breached and liability can be imposed. If, however, the harm caused does not fall within the “orbit of danger,” then no duty has been breached and liability cannot be imposed.

Under the facts of Palsgraf, the legal snapshot taken at the precise moment of the conduct alleged to be tortious would depict a train employee pulling a man into a moving train while a newspaper-wrapped package hangs in suspended animation just above the tracks below. Since the risks reasonably posed by the train employee’s conduct (the “orbit of danger”) did not include causing a scale to fall onto someone on the platform, Mrs. Palsgraf did not fall within the “orbit of duty” owed by the train employee. Accordingly, there was no liability.

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61 Id. at 99 (“Relatively to [plaintiff] it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.”).
62 Id. at 100.
63 Id.
64 To be precise, Justice Cardozo focused on whether the plaintiff was within the sphere of danger, rather than whether the type of harm ultimately caused was within that sphere. As recognized in the Restatement Third, however, there is little, if any, practical distinction between determining whether the plaintiff was within the scope of risk and whether the type of harm suffered by that plaintiff was within the scope of risk:

[M]ost often the scope-of-liability issue does not involve the problem posed in Palsgraf, that is, where the plaintiff was outside the scope of harm. Rather, most cases involve persons within the foreseeable scope of some harm but who have suffered other harm. . . . In short, an unforeseeable-plaintiff rule is not terribly helpful in addressing most scope-of-liability issues.

Justice Cardozo’s majority opinion characterizes the ultimate legal question as one of duty, and not proximate cause. Consequently, Justice Cardozo uses duty-based terminology throughout his opinion. In his dissent, Justice Andrews argues that one owes a duty of care to all, and not only to foreseeable plaintiffs, as Justice Cardozo argued. It seems that with all the dust settled, Andrews won the battle, but Cardozo won the war.

Modern courts routinely hold, and the Restatement Third urges, that actors owe a generalized duty of due care with regard to physical harm that is not tied to a specific foreseeable person or group of people. Accordingly, Andrews won that battle—Cardozo’s limited view of the scope of duty owed has been rejected. However, more importantly, Cardozo’s approach to what he deemed the “orbit of duty” has re-emerged with a new name, the “scope of risk,” which is urged by the Restatement Third as the preferred test for proximate cause. This is the more important “war” because Cardozo’s approach ultimately determines the outcome of the case. This is true because a finding of a breach of a generalized duty of due care (Andrews) is utterly worthless to a plaintiff without an additional finding that such a breach caused an injury that was within the “scope of risk” (Cardozo) created by that breach of duty.

While Justice Cardozo’s analysis is ultimately substantively correct, it still lacks a certain depth of foundation. In particular, Justice Cardozo fails to explain how one determines what risks are “reasonably to be perceived.” His analysis thus fails to provide the tools with which to ascertain the borders of the so-called “orbit of duty.” This is where the Restatement Third succeeds, at least partially. It takes Justice Cardozo’s visual image and distills it to its legal core—it provides the rationale for the result by illuminating the foundation for the argument. It shows why Justice

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65 Palsgraf, 162 N.E. at 99-100.
66 Id. at 102 (Andrews, J. dissenting).
67 Id. at 100.
68 See generally Restatement (Third) of Torts: Liability for Physical Harm § 7 (Tentative Draft No. 2, Mar. 25, 2002).
69 As discussed earlier, Justice Cardozo focused more on the foreseeability of the plaintiff than on the foreseeability of the harm caused. See supra note 64. This fine distinction, however, is without significance in the vast majority of cases. Accord Restatement (Third) of Torts: Liability for Physical Harm § 29, cmt. n (Tentative Draft No. 2, Mar. 25, 2002) (“Ordinarily, the risk standard contained in this section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to such plaintiffs.”); id. (“Generally, application of the risk standard should avoid much of the need for consideration of unforeseeable plaintiffs.”).
Cardozo’s approach is right. The *Restatement Third* takes Justice Cardozo’s imagery and separates it into its component parts so that it is more easily understood and is legally legitimized. This Article further expounds upon the *Restatement Third*’s language by graphically illustrating the principles that animate the proximate cause inquiry, further demystifying proximate cause.

**b. The Core of Proximate Cause: B<PL**

A few years after *Palsgraf*, Judge Learned Hand taught us that an actor fails to act as an average reasonable person when the probability of harm risked by certain conduct multiplied by the gravity of the harm risked by that conduct outweighs the burden of not engaging in that conduct.\(^70\) This is the familiar B<PL formula.\(^71\) This formula is used to ascertain whether an actor has breached a duty of due care (i.e., whether the actor’s conduct fell below the standard of care of a reasonably prudent person).\(^72\) To fully understand the *Restatement Third*’s approach to proximate cause, one first must fully understand and appreciate why the B<PL formula is used to determine breach. Only then can one take the additional step toward understanding when and why liability is not imposed, even when a breach of the duty of care factually causes damages.

In ascertaining whether an actor’s conduct is tortious, the conduct is compared to that of the hypothetical reasonably prudent person. The law assumes that this reasonably prudent person, prior to engaging in any particular conduct, evaluates the risks posed by that conduct and balances those risks against the utility to be gained by engaging in such con-

\(^70\) See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

\(^71\) Under Hand’s formula, B represents the burden to the actor of taking adequate precautions, P represents the probability of harm resulting from the actor’s conduct, and L represents the gravity of harm risked by the actor’s conduct. Id.

\(^72\) I am not contending that Judge Learned Hand’s formula is always overtly used by juries in deciding the dispositive question of whether the defendant fell below the standard of care of the average reasonable person. That is actually usually not the case. See, e.g., McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987) (stating that “[o]rdinarily . . . the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance.”). Nevertheless, as Judge Posner points out in *McCarty*, there is no substantive difference between the reasonable person standard and the Hand formula. See id.
duct. If the risks of harm posed by the conduct outweigh the utility of engaging in that conduct, then the reasonably prudent person will necessarily not engage in the conduct. Consequently, if an actor does engage in such conduct and causes harm, the law declares the conduct to be negligent and the actor to be liable for the harm. As discussed above, the mechanism used to compare the risk to the utility is the B<PL formula. Generally speaking, the PL represents the risk and the B represents the utility. Therefore, if the PL (risk) is greater than the B (utility), then the actor fails the test and is found to have breached a duty of care because the actor has not acted as a reasonably prudent person.

This formula and the reasonably prudent person standard it animates are necessary evaluative tools because all conduct engaged in by people carries with it some risk of harm to others and/or their interests. If merely engaging in conduct that posed some risk of harm sufficed to support a finding of liability, then ours would be a system of strict liability. But because we want to encourage conduct that maximizes efficiency, a certain amount of risk is tolerable and even encouraged. The task of the B<PL formula is, then, to draw the line between acceptable risk and unacceptable risk. A simple hypothetical will serve to illustrate how and where that line gets drawn.

c. A Simple Illustration of the Breach of Duty Inquiry

Assume a traveling salesman purchases a new car, and assume he only drives that car over a set route between Los Angeles, California, and Waco, Texas, which is roughly 3000 miles round-trip of desert highway. When the salesman takes his first trip from Los Angeles to Waco, there is a very small risk that one of the tires will fail from excess wear, thus causing a deadly accident on the highway. When the salesman takes his second trip,

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73 The Restatement Second actually preferred what is called the risk-utility test to evaluate whether particular conduct amounted to a breach of a duty of due care. See Restatement (Second) of the Law of Torts §§ 292-93 (1965). In contrast, the Restatement Third falls into line with the vast majority of case law and scholarly commentary and adopts the B<PL test. See Restatement (Third) of Torts: Liability for Physical Harm § 3 (Tentative Draft No. 2, Mar. 25, 2002). Both tests are designed to yield the same results.

74 This is subject, of course, to the proximate cause limitations discussed below.

75 More accurately, B represents the burden of sacrificing the utility of engaging in the particular conduct.

the tires now have 3000 miles on them and the risk of tire failure increases slightly. In B<PL terms, the P (probability of harm) has increased incrementally. With each subsequent trip, the probability increases that one of the tires will wear out and fail, thus causing a deadly accident on the highway. At some point in time, a reasonably prudent person in the same situation would no longer tolerate the risk of tire failure and would replace the tires. Prior to that moment in time, the salesman will not be breaching a duty of care by driving on the tires that came with the car. However, at the precise moment that a reasonably prudent person would change the tires (and from that point forward), any additional driving will be a breach of the duty of care. This can be illustrated in the table below, and in the accompanying graph.

### TABLE 1:

<table>
<thead>
<tr>
<th>Trip #</th>
<th>Miles Already Driven on Tires</th>
<th>Burden of Buying New Tires</th>
<th>Probability of Tire Failure (in percent)</th>
<th>Gravity of Potential Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
<td>$100</td>
<td>.0009</td>
<td>Death/serious injury</td>
</tr>
<tr>
<td>2</td>
<td>3,000</td>
<td>$100</td>
<td>.0019</td>
<td>Death/serious injury</td>
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<td>.0045</td>
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</tr>
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<td>$100</td>
<td>.0061</td>
<td>Death/serious injury</td>
</tr>
<tr>
<td>6</td>
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<td>18,000</td>
<td>$100</td>
<td>.0099</td>
<td>Death/serious injury</td>
</tr>
</tbody>
</table>

77 See Table 1.  
78 See Graph 1.  
79 For the sake of simplifying the illustration, I am assuming that four new tires will cost $100, which is probably a slight underestimation. I also understand that part of the burden calculus includes the amount of time and energy the salesman would have to expend in having the tires changed. For the sake of simplicity, that burden is not monetarily quantified.  
80 These probability numbers are strictly estimates on my part based upon my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, former mechanic, in Malibu, Cal. (Sept. 4, 2002). They are illustrative only and do not purport to be scientifically calculated.  
81 The gravity of harm will ultimately have to be reduced to a dollar figure, as is done below. See Table 2. For purposes of illustrating how the B<PL test works, however, I am postponing adding this additional layer of complexity.
In this hypothetical, P is the only variable in the equation that changes as the probability (in percentages) that a tire will wear out and fail increases; B and L are being held constant. B is constant because the price of replacing the tires represents the burden on the salesman, and precisely when those tires are purchased will not materially affect the price.\(^2\) L is constant because the gravity of harm risked (deadly accident) is the same regardless of when the tire failure occurs. In contrast, the probability of tire failure rises as the number of miles driven increases. Therefore, to determine at what point a breach of the duty of care occurs in this hypothetical, one must ascertain the point at which the risk of harm changes from acceptable to unacceptable. At that point, the burden will exactly equal the probability of harm multiplied by the gravity of harm (B=PL).

For purposes of this illustration, assume that a reasonably prudent person would tolerate a .02 percent level of risk (1 in 5000 chance) of causing a serious or deadly accident, but no higher. Accordingly, after taking ten trips and traveling 30,000 miles, the reasonably prudent person would purchase new tires. This means that the salesman would not be breaching a duty of care with respect to the tires on any of the first ten trips (when B>PL), but would be breaching such a duty of care if he proceeded with Trip 11 without replacing the tires (when B<PL).

If one of his tires fails due to excess wear during one of his first ten trips, then he would not be liable because he had not breached a duty. If,

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\(^2\) One could factor inflation into the equation for more precision, but that would likely be very minimal.
however, one of the tires fails during his eleventh Trip (or during any of the subsequent trips), he would have breached a duty of care.

This can be graphically illustrated in two ways. First, a simple line graph with the mileage driven as the X-axis and the magnitude of risk as the Y-axis can show how the risk increases over time.\footnote{See Graph 1.}

As depicted in the graph, as the number of trips taken and miles driven increases, the magnitude of risk rises. At some point in time, the magnitude of risk changes from an acceptable level to an unacceptable level. This change occurs when the tire failure risk curve crosses the point at which $B=PL$. This is illustrated in Graph 2.\footnote{See Graph 2.}
While the line graphs serve to illustrate the changing levels of risk over time, the question of whether an actor has breached a duty of care is typically answered by considering a particular moment in time. This illustrates what has been referred to earlier as a "legal snapshot." In other words, the actor's conduct must be judged at the point in time that the allegedly tortious conduct occurs. When the allegedly tortious conduct is considered over time, then a legal snapshot can be taken at any point along the risk curve to ascertain whether, at that particular moment, the actor is breaching a duty of care.

To illustrate, assume that one of the tires fails during Trip 8 and causes serious injury to another person who sues the salesman alleging negligent failure to maintain his tires. A legal snapshot can be taken just before Trip

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85 See supra text accompanying notes 62-65.
86 In some cases, the time at which to take the legal snapshot is perfectly clear, such as in Palsgraf when the train employee reached down to help the passenger onto the train. In other situations, such as the one serving as the illustration here, the time at which to take the legal snapshot is not so clear because the allegedly tortious act involves a pattern of conduct (or lack of conduct), rather than a certain moment.
8, when the salesman has driven 21,000 miles. At this point, the burden of purchasing new tires is higher than the magnitude of risk (probability of harm multiplied by gravity of harm) associated with driving on the same tires. Accordingly, the salesman has not breached a duty of care and should prevail on the claim brought by the injured party. This can be graphically illustrated on the line graph used previously.

While examining the legal snapshot on a line graph can be helpful, a bar graph can even more effectively illustrate the proper analysis.

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87 While the legal snapshot can be taken at any point during any given trip, for ease of illustration, I will use the beginning of each trip as the point at which to take this snapshot.

88 See Graph 3.

89 See Graph 4.
This bar graph illustrates that at the particular point in time, prior to leaving on Trip 8, the level of risk posed by not changing the tires is less than the burden of changing the tires. This explains why the risk block\textsuperscript{90} does not rise to the level of the B=PL line.

\textsuperscript{90} The term "risk block" rather than "risk bar" is used because later in this Article, I use the imagery of stacking and unstacking blocks to illustrate the difference between the breach of duty and proximate cause inquiries. See infra notes 137-52 and accompanying text.
Now assume instead that the tire failure and serious accident occurs during Trip 12. A legal snapshot taken just before Trip 12, when the salesman has driven 33,000 miles, would reveal that at this point, the burden of purchasing new tires is less than the magnitude of risk associated with driving on the same tires. Accordingly, the salesman has breached a duty of care and should lose in a claim brought by the injured party. Once again, this can be more effectively illustrated on a bar graph.

\[ \text{See Graph 5.} \]

\[ \text{See Graph 6.} \]
As shown, the level of risk posed by not changing the tires is now greater than the burden of changing the tires. This explains why the risk block rises above the level of the B=PL line. The chart and these graphs illustrate how one determines whether an actor has breached a duty of care to another. Nonetheless, as discussed and illustrated below, not all breaches that factually cause harm warrant the imposition of liability. Discerning between breaches that give rise to liability and those that do not is the function of proximate cause, or "scope of liability" as preferred by the Restatement Third. While proximate cause seems to most people to be

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93 I understand and appreciate that in the vast majority of cases the breach inquiry is multi-factored and more complicated than in this illustration. In fact, the next section of this Article increases the level of complexity. Nevertheless, the core components of the breach inquiry remain the same.

94 The general proximate cause analysis will serve, in turn, as the foundation for the analysis in Restatement Third Section 33, which discusses how intervening causes affect the general proximate cause analysis. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 33 (Tentative Draft No. 2, Mar. 25, 2002).
much more complicated than the breach analysis embodied in the B<PL test, when distilled, proximate cause is little more than a deconstruction of the individual risks that are the building blocks with which the B<PL test is constructed. Once again, the hypothetical traveling salesman will serve to illustrate this argument.

\[d. \textit{A Simple Illustration of the Proximate Cause Inquiry}\]

As before, assume our traveling salesman purchases a new car and that he only drives that car over a set route between Los Angeles and Waco, which is roughly 3000 miles round-trip of desert highway. Also, assume that the car comes with a maintenance agreement that covers any and all necessary repairs for the first 60,000 miles of driving, with the only cost being a $100 flat fee for each visit to the dealership. In other words, whenever the owner brings the car in and pays $100 for the car to be serviced, all maintenance, repair, and replacement costs are covered by the maintenance agreement. Assume that this servicing includes, but is not limited to, the following activities by the dealership:

1. Inspect tires and rotate, balance, and replace as necessary;
2. Check engine coolant levels, adding coolant as necessary, and inspect for leaks in coolant system;
3. Check battery acid levels and fill as necessary;
4. Change oil and inspect for leaks in oil lines; and
5. Check brakes and adjust and replace as necessary.

Common sense (and an honest mechanic) tell us that the various parts and systems in cars need differing levels of attention over time and tend to wear out and/or fail at different intervals. For instance, tires will typically last for about 30,000 miles and require little or no care during that time period.\(^5\) In contrast, one should probably change the engine oil every 3000 miles to prolong the life of the engine and to prevent sudden engine failure.\(^6\)

More importantly, failure to maintain a car presents a variety of risks to others from the various parts and systems in the car. For example, brake failure presents the risk that the driver will rear-end another vehicle, while

\(^5\) Interview with Caleb Frigerio, \textit{supra} note 80.

\(^6\) Jiffy Lube recommends that car owners change their oil every 3000 miles. \textit{See Jiffy Lube Signature Service, at} http://jiffylube.com/Services/SignServOilChg.asp (last visited Feb. 11, 2003).
failure to maintain a battery could result in minor property damage if the acid were to leak out onto the driveway of another. The point is that failure to have one's car regularly serviced presents a variety of risks of harm to others, some of which are highly probable, others of which are highly improbable. Furthermore, failure to have one's car regularly serviced presents a risk of a variety of types of harm, some of which are grave, others of which are relatively minor.

What follows is an analysis of five particular risks that the salesman’s failure to have his car serviced every 3000 miles would present. Each risk has a different level of probability associated with that risk that increases over time. Each risk is also associated with a different type of harm whose gravity remains constant over time. Finally, the burden associated with preventing each risk is the $100 that the salesman would have to pay to have his car serviced and repaired as necessary. Accordingly, each of the risks can be analyzed using the B<PL formula to ascertain whether the probability of harm multiplied by the gravity of the harm risked outweighs the burden of spending the $100 to have the car serviced and repaired. Each of the risks can then be plotted on a line graph to ascertain when the risk of each type of harm outweighs the burden and thus when the salesman will have breached a duty of care with respect to that particular risk.

The five risks of harm to be analyzed and plotted on a graph are:

1. Tire failure caused by excess wear, which causes death or serious bodily injury to another;
2. Car overheating on highway due to insufficient levels of coolant, which causes a passerby who stops to help to be scalded when removing the radiator cap;
3. Battery acid leakage due to failure to maintain battery, causing part of another's driveway to dissolve;
4. Engine seizing up due to a lack of oil in the engine, causing the salesman’s car to be rear-ended while on the highway; and
5. Brake failure due to excess wear on the brake shoes, causing the salesman to rear-end another car on the highway.

For purposes of this illustration, assume that the salesman never takes his car into the dealership to be serviced. Assume also that the above five risks

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97 This is a fairly uncontroversial assumption that simplifies the analysis for illustrative purposes.

98 Once again, the types of harm identified are simplified to facilitate the conceptualization of the role B<PL plays in proximate cause analysis.
could have been individually and collectively eliminated by simply taking the car in to be regularly serviced. Accordingly, the salesman never incurs the $100 cost per visit, which is the burden (B) of eliminating the various risks of harm posed by not servicing his car.

i. tire failure risk

The first type of harm risked by the salesman's failure to have his car serviced is that during one of his trips to Waco, one of his tires will fail due to excess wear that would have been detected and remedied had the salesman taken his car in to get serviced immediately prior to that trip. Therefore, the burden (B) of eliminating this risk is $100—the amount the salesman would have had to pay to have his tires inspected and replaced when necessary. As discussed above, the probability (P) of such tire failure increases with each trip taken because the amount of wear on the tires increases with the number of miles driven. The gravity of harm risked (L) remains constant because the type of harm caused by tire blowout on a highway remains the same regardless of whether that blowout occurs during the first trip or the twentieth. For purposes of this illustration, assume that the type of harm risked by tire failure is that another driver on the highway will die when a tire blowout on the salesman's car causes it to collide with the car of another. Assume also that a reasonable jury would conclude that the value of that death is $500,000. The following chart illustrates the relative risks associated with each trip.99

<table>
<thead>
<tr>
<th>Trip #</th>
<th>Miles Already Driven on Tires</th>
<th>Burden of Taking Car in To Be Serviced</th>
<th>Probability of Tire Failure (in percent)</th>
<th>Gravity of Potential Harm</th>
<th>Total Magnitude of Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
<td>$100</td>
<td>.0006</td>
<td>$500,000</td>
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<td>$8</td>
</tr>
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</table>

99 See Table 2.
100 These probability numbers are strictly estimates on my part based on my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, supra note 80. They are illustrative only and do not purport to be scientifically calculated.
101 This Total Magnitude of Risk number represents the product of The Probability of Tire Failure (P) multiplied by the Gravity of Potential Harm (L).
<table>
<thead>
<tr>
<th></th>
<th>Miles</th>
<th>Rate</th>
<th>Total Risk Magnitude</th>
<th>Total Cost</th>
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<td>$100</td>
<td>.0542</td>
<td>$271</td>
</tr>
</tbody>
</table>

The data from this table can then be plotted on the same type of line graph depicted earlier, where the X-axis represents miles traveled and trips taken and the Y-axis represents the total magnitude of risk.

102 See Graph 1.
103 See Graph 7.
As shown in the graph, as the number of miles driven without the salesman having his car serviced increases, the magnitude of risk of tire failure also increases. At some point in time, the magnitude of risk exceeds the amount of burden that would be placed upon the salesman of having the car serviced.\textsuperscript{104}

\textsuperscript{104} See Graph 8.
As before, when the curve is below the B=PL line\textsuperscript{105} the salesman is not breaching a duty of care with respect to the risk of the type of harm created by failing to have his tires inspected. However, when the curve is above the B=PL line the salesman is breaching a duty of care with respect to the tires. With respect to the tires, immediately before Trip 11 B=PL.

\textit{ii. overheating risk}

A second type of harm the salesman risks by failing to have his car serviced is the risk that the engine coolant level will drop low enough that his engine will overheat while he is driving on the desert highway to Waco. Assume that when his car overheats, he is forced to pull to side of the road, and that a passerby who stops to help suffers burns when he is scalded after removing the radiator cap. Finally, assume that the low coolant level could

\textsuperscript{105} This B=PL line is drawn at the specific point at which the Burden of Taking the Car in To Be Serviced equals the Total Magnitude of Risk (i.e., Gravity of Potential Harm multiplied by the Probability of Tire Failure).
have been detected and remedied before the overheating occurred if the salesman had taken his car in for servicing prior to the trip.

The burden (B) of eliminating this harm is $100—the cost of having the car serviced. The probability of harm (P) increases over time as the fluid level drops. However, the gravity of harm remains constant over time because when the overheating happens will not affect the harm it could cause. Assume that a reasonable jury would conclude that the value of the burns is $10,000. The following table illustrates the relative risks from overheating associated with each trip.106

**TABLE 3:**
Risks Posed by Failure to Have Car Serviced—COOLANT LEAK

<table>
<thead>
<tr>
<th>Trip#</th>
<th>Miles Already Driven of Tires</th>
<th>Burden of Taking Car in to be Serviced</th>
<th>Probability of Car Overheating and Causing Burns (in percent)107</th>
<th>Gravity of Potential Harm</th>
<th>Total Magnitude of Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
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<td>$10,000</td>
<td>$75.00</td>
</tr>
<tr>
<td>15</td>
<td>42,000</td>
<td>$100</td>
<td>1.0000</td>
<td>$10,000</td>
<td>$100.00</td>
</tr>
</tbody>
</table>

106 See Table 3.

107 These probability numbers are strictly estimates on my part based upon my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, supra note 80. They are illustrative only and do not purport to be scientifically calculated.
The data from this table can then be overlaid on the prior line graph\textsuperscript{108} so it depicts both the tire and the coolant risk curves.\textsuperscript{109}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
Trip & Miles & Cost & Rate & Risk & Burden \\
\hline
16 & 45,000 & $100 & 1.3000 & $10,000 & $130.00 \\
17 & 48,000 & $100 & 1.7000 & $10,000 & $170.00 \\
18 & 51,000 & $100 & 2.2000 & $10,000 & $220.00 \\
19 & 54,000 & $100 & 2.8000 & $10,000 & $280.00 \\
20 & 57,000 & $100 & 3.5000 & $10,000 & $350.00 \\
\hline
\end{tabular}
\end{table}

As shown in the graph, as the number of miles driven without the salesman having his car serviced increases, the magnitude of risk of overheating and of a passerby getting burned also increases. At some point in time, the magnitude of risk exceeds the amount of burden to the salesman in having his car serviced. With respect to the coolant, this occurs immediately prior to Trip 15.

\textsuperscript{108} See Graph 8.
\textsuperscript{109} See Graph 9.
A third type of harm the salesman risks by failing to have his car serviced is the risk that the battery will leak and cause property damage to another when the battery acid dissolves the concrete on the other's property. Assume that the battery problem could have been detected and remedied before the leakage occurred if the salesman had taken his car in for servicing prior to the trip.

The burden (B) of eliminating this harm is $100—the cost of having the car serviced. The probability of harm (P) increases over time as the battery ages, while the gravity of harm remains constant over time because when the leakage happens will not affect the harm it could cause. Assume that a reasonable jury would conclude that the value of the property damage is $1,000. The following chart illustrates the relative risks associated with each trip.

<table>
<thead>
<tr>
<th>Trip #</th>
<th>Miles Already Driven on Tires</th>
<th>Burden of Taking Car in to be Serviced</th>
<th>Probability of Battery Leakage (in percent)</th>
<th>Gravity of Potential Harm</th>
<th>Total Magnitude of Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
<td>$100</td>
<td>.1</td>
<td>$1,000</td>
<td>$1.00</td>
</tr>
<tr>
<td>2</td>
<td>3,000</td>
<td>$100</td>
<td>.2</td>
<td>$1,000</td>
<td>$2.00</td>
</tr>
<tr>
<td>3</td>
<td>6,000</td>
<td>$100</td>
<td>.3</td>
<td>$1,000</td>
<td>$3.00</td>
</tr>
<tr>
<td>4</td>
<td>9,000</td>
<td>$100</td>
<td>.4</td>
<td>$1,000</td>
<td>$4.00</td>
</tr>
<tr>
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<td>12,000</td>
<td>$100</td>
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<td>$1,000</td>
<td>$5.00</td>
</tr>
<tr>
<td>6</td>
<td>15,000</td>
<td>$100</td>
<td>.6</td>
<td>$1,000</td>
<td>$6.00</td>
</tr>
<tr>
<td>7</td>
<td>18,000</td>
<td>$100</td>
<td>.7</td>
<td>$1,000</td>
<td>$7.00</td>
</tr>
<tr>
<td>8</td>
<td>21,000</td>
<td>$100</td>
<td>.8</td>
<td>$1,000</td>
<td>$8.00</td>
</tr>
<tr>
<td>9</td>
<td>24,000</td>
<td>$100</td>
<td>.9</td>
<td>$1,000</td>
<td>$9.00</td>
</tr>
<tr>
<td>10</td>
<td>27,000</td>
<td>$100</td>
<td>.10</td>
<td>$1,000</td>
<td>$10.00</td>
</tr>
</tbody>
</table>

Once again, for purposes of this illustration, I have assumed this to be true. See Table 4.

These probability numbers are strictly estimates on my part based upon my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, supra note 80. They are illustrative only and do not purport to be scientifically calculated.
<table>
<thead>
<tr>
<th>Trip</th>
<th>Miles</th>
<th>Dollars</th>
<th>Probability</th>
<th>Total Risk</th>
<th>Magnitude</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>30,000</td>
<td>$100</td>
<td>.11</td>
<td>$1,000</td>
<td>$11.00</td>
</tr>
<tr>
<td>12</td>
<td>33,000</td>
<td>$100</td>
<td>.12</td>
<td>$1,000</td>
<td>$12.00</td>
</tr>
<tr>
<td>13</td>
<td>36,000</td>
<td>$100</td>
<td>.13</td>
<td>$1,000</td>
<td>$13.00</td>
</tr>
<tr>
<td>14</td>
<td>39,000</td>
<td>$100</td>
<td>.14</td>
<td>$1,000</td>
<td>$14.00</td>
</tr>
<tr>
<td>15</td>
<td>42,000</td>
<td>$100</td>
<td>.15</td>
<td>$1,000</td>
<td>$15.00</td>
</tr>
<tr>
<td>16</td>
<td>45,000</td>
<td>$100</td>
<td>.16</td>
<td>$1,000</td>
<td>$16.00</td>
</tr>
<tr>
<td>17</td>
<td>48,000</td>
<td>$100</td>
<td>.17</td>
<td>$1,000</td>
<td>$17.00</td>
</tr>
<tr>
<td>18</td>
<td>51,000</td>
<td>$100</td>
<td>.18</td>
<td>$1,000</td>
<td>$18.00</td>
</tr>
<tr>
<td>19</td>
<td>54,000</td>
<td>$100</td>
<td>.19</td>
<td>$1,000</td>
<td>$19.00</td>
</tr>
<tr>
<td>20</td>
<td>57,000</td>
<td>$100</td>
<td>.20</td>
<td>$1,000</td>
<td>$20.00</td>
</tr>
</tbody>
</table>

The data from this table can then be overlaid on the prior line graph to depict the tire, coolant, and battery risk curves.\textsuperscript{113}

\textbf{GRAPH 10:}
Risks Posed by Failure to Service Vehicle

As shown in the graph, as the number of miles driven without the salesman having his car serviced increases, the magnitude of risk of the

\textsuperscript{113} See Graph 10.
battery acid leaking and causing property damage also increases. Unlike the tire and coolant risk curves, the battery curve never crosses the B=PL line. This is because the relatively minor amount of harm risked when multiplied by the relatively small likelihood of this leak occurring never exceeds the burden of having the battery checked.\textsuperscript{114}

\textit{iv. oil risk}

A fourth type of harm the salesman risks by failing to have his car serviced is the risk that oil will leak, causing the salesman’s engine to seize up on the highway which will consequently cause his car to be rear-ended by another car on the highway. Assume that the oil leak problem could have been detected and remedied before the leakage occurred if the salesman had taken his car in for servicing prior to the trip.

The burden (B) of eliminating this harm is $100—the cost of having the car serviced. The probability of harm (P) increases over time as the oil and filter ages, while the gravity of harm remains constant over time because \textit{when} the leakage happens will not affect the harm it could cause. Assume that a reasonable jury would conclude that the value of the injuries caused to the driver of the car that rear-ends the salesman’s car is $100,000. The following chart illustrates the relative risks associated with each trip.\textsuperscript{115}

\begin{table}[h]
\centering
\caption{Risks Posed by Failure to Have Car Serviced—OIL LEAK}
\begin{tabular}{|c|c|c|c|c|c|}
\hline
Trip # & Miles Already Driven on Tires & Burden of Taking Car in to be Serviced & Probability of Oil Leakage (in percent)\textsuperscript{116} & Gravity of Potential Harm & Total Magnitude of Risk \\
\hline
1 & 0 & $100$ & .0060 & $100,000$ & $6.00$ \\
2 & 3,000 & $100$ & .0080 & $100,000$ & $8.00$ \\
3 & 6,000 & $100$ & .0110 & $100,000$ & $11.00$ \\
4 & 9,000 & $100$ & .0150 & $100,000$ & $15.00$ \\
\hline
\end{tabular}
\end{table}

\textsuperscript{114} More precisely, the magnitude of risk does not exceed the B=PL line during any of the first twenty trips. If the battery risk curve were extrapolated out further, it would eventually intersect the B=PL line at the beginning of the 100th trip.

\textsuperscript{115} See Table 5.

\textsuperscript{116} These probability numbers are strictly estimates on my part based upon my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, \textit{supra} note 80. They are illustrative only and do not purport to be scientifically calculated.
The data from this table can then be overlaid on the prior line graph so it depicts the tire, coolant, battery, and oil risk curves.\textsuperscript{117}

\begin{tabular}{|c|c|c|c|c|}
\hline
Row & Quantity & Price & Quantity & Price \\
\hline
5 & 12,000 & $100 & .0220 & $100,000 & $22.00 \\
6 & 15,000 & $100 & .0360 & $100,000 & $36.00 \\
7 & 18,000 & $100 & .0600 & $100,000 & $60.00 \\
8 & 21,000 & $100 & .0990 & $100,000 & $99.00 \\
9 & 24,000 & $100 & .1900 & $100,000 & $190.00 \\
10 & 27,000 & $100 & .3000 & $100,000 & $300.00 \\
11 & 30,000 & $100 & .4200 & $100,000 & $420.00 \\
12 & 33,000 & $100 & .5500 & $100,000 & $550.00 \\
13 & 36,000 & $100 & .6900 & $100,000 & $690.00 \\
14 & 39,000 & $100 & .8400 & $100,000 & $840.00 \\
15 & 42,000 & $100 & 1.0000 & $100,000 & $1,000.00 \\
16 & 45,000 & $100 & 1.1700 & $100,000 & $1,170.00 \\
17 & 48,000 & $100 & 1.3500 & $100,000 & $1,350.00 \\
18 & 51,000 & $100 & 1.5400 & $100,000 & $1,540.00 \\
19 & 54,000 & $100 & 1.7400 & $100,000 & $1,740.00 \\
20 & 57,000 & $100 & 1.9500 & $100,000 & $1,950.00 \\
\hline
\end{tabular}

\textsuperscript{117}See Graph 11.
As shown in the graph, as the number of miles driven without the salesman having his car serviced increases, the magnitude of risk of the oil leaking and causing a rear-end accident also increases. At some point in time, the magnitude of risk exceeds the amount of burden that would be placed upon the salesman in having his car serviced. With respect to the oil, this occurs immediately prior to Trip 8.

**v. brake failure risk**

A fifth type of harm the salesman risks by failing to have his car serviced is the risk that the brakes will wear out or fail, causing the salesman to rear-end another car while on the highway. Assume that the brake problem could have been discovered and remedied before the failure occurred if the salesman had taken his car in for servicing prior to the trip.

The burden (B) of eliminating this harm is $100—the cost of having the car serviced. The probability of harm (P) increases over time as the braking system ages, while the gravity of harm remains constant over time because when the leakage happens will not affect the harm it could cause. Assume that a reasonable jury would conclude that the value of the injuries
caused to the driver of the car that is rear-ended by the salesman’s car is $250,000. The following chart illustrates the relative risks associated with each trip.\textsuperscript{118}

\begin{table}[h]
\centering
\caption{Risks Posed by Failure to Have Car Serviced—BRAKE FAILURE}
\begin{tabular}{|c|c|c|c|c|}
\hline
Trip # & Miles Already Driven on Tires & Burden—Taking Car in to be Serviced & Probability of Brake Failure (in percent)\textsuperscript{119} & Gravity of Potential Harm & Total Magnitude of Risk \\
\hline
1 & 0 & $100 & .00320 & $250,000 & $8.00 \\
2 & 3,000 & $100 & .00328 & $250,000 & $8.20 \\
3 & 6,000 & $100 & .00344 & $250,000 & $8.60 \\
4 & 9,000 & $100 & .00368 & $250,000 & $9.20 \\
5 & 12,000 & $100 & .00400 & $250,000 & $10.00 \\
6 & 15,000 & $100 & .00440 & $250,000 & $11.00 \\
7 & 18,000 & $100 & .00500 & $250,000 & $12.50 \\
8 & 21,000 & $100 & .00580 & $250,000 & $14.50 \\
9 & 24,000 & $100 & .00670 & $250,000 & $16.75 \\
10 & 27,000 & $100 & .00790 & $250,000 & $19.75 \\
11 & 30,000 & $100 & .00930 & $250,000 & $23.25 \\
12 & 33,000 & $100 & .01100 & $250,000 & $27.50 \\
13 & 36,000 & $100 & .01320 & $250,000 & $33.00 \\
14 & 39,000 & $100 & .01650 & $250,000 & $41.25 \\
15 & 42,000 & $100 & .02020 & $250,000 & $50.50 \\
16 & 45,000 & $100 & .02430 & $250,000 & $60.75 \\
17 & 48,000 & $100 & .02880 & $250,000 & $72.00 \\
18 & 51,000 & $100 & .03390 & $250,000 & $84.75 \\
19 & 54,000 & $100 & .03900 & $250,000 & $97.50 \\
20 & 57,000 & $100 & .04520 & $250,000 & $113.00 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{118} See Table 6.
\textsuperscript{119} These probability numbers are strictly estimates on my part based upon my discussion with a student named Caleb Frigerio who used to be a mechanic. Interview with Caleb Frigerio, supra note 80. They are illustrative only and do not purport to be scientifically calculated.
The data from this table can then be overlaid on the prior line graph so it depicts the tire, coolant, battery, oil, and brakes risk curves.

As shown in the graph, as the number of miles driven without the salesman having his car serviced increases, the magnitude of risk of the brakes failing and causing a rear-end accident also increases. At some point in time, the magnitude of risk exceeds the amount of burden that would be placed upon the salesman. With respect to the brakes, this occurs immediately prior to Trip 20.

The line graph depicting each of the types of risks, thus, can be used to ascertain at which point in time the risk of causing that type of harm is sufficiently high so as to render the salesman's failure to have his car serviced a breach of a duty of care with respect to each type of harm. It is at this point that the difference between determining whether there has been a breach of a duty and determining whether that particular breach of a duty was a proximate cause of the injury can be starkly illustrated. Recall that earlier I argued that Justice Andrews won the battle, but Justice Cardozo

\[120\] See Graph 12.
won the war.\textsuperscript{121} Justice Andrews' view that a breach of a duty of care to one person is a breach of a duty to all has ultimately carried the day.\textsuperscript{122} Accordingly, in order to determine whether there has been a breach of a duty of due care, one must cumulate all of the risks posed by an actor's conduct in order to ascertain whether, once cumulated, the risks outweigh the utility of the conduct at issue. In other words, \textit{an actor has breached a duty of due care when the sum of all risks posed by the conduct at issue exceeds the utility of that conduct}. In B<PL parlance, one breaches a duty of care when the probability of each type of harm multiplied by the gravity of each type of harm risked added together exceeds the burden placed upon the actor of not engaging in the conduct at issue.

Once again, the hypothetical traveling salesman will illustrate this process. A legal snapshot taken just before Trip 5 shows that none of the individual risks exceeds the point at which B=PL. Accordingly, with respect to each of the particular risks, the salesman is not breaching a duty of care. This can be graphically illustrated in a bar graph.\textsuperscript{123}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Graph13.png}
\caption{Risk of Harms Before Trip #5}
\end{figure}

\begin{enumerate}
\item See discussion \textit{supra} at Part I.B.1.a.
\item See \textit{supra} note 68.
\item See \textit{supra} note 68.
\end{enumerate}
This graph depicts how Justice Cardozo envisioned the breach of duty analysis. Because none of the types of harm risked is sufficiently high to warrant a determination that the salesman has breached a duty of care with respect to that particular risk, Justice Cardozo would argue that the salesman has not breached a duty of care in the first instance. None of the risks falls within Cardozo’s “orbit of danger,” and hence would not be risks reasonably to be perceived by the salesman’s conduct of driving. As stated earlier, Justice Cardozo lost on this point.

Accordingly, when determining whether there has been a breach, the individual blocks need to be stacked upon one another to show the cumulative risk posed by the conduct at issue.

---

124 Justice Cardozo focused on the foreseeability of the plaintiff rather than on the foreseeability of the harm caused to the plaintiff, but that is a distinction without much functional difference. This presupposes that the different types of harm risked are to different potential plaintiffs. See supra note 64.


126 See supra note 68.

127 See Graph 14.
This graph depicts how Justice Andrews arguably envisioned the breach of duty analysis. Because the sum of the types of harm risked still does not exceed the point at which \( B = PL \), the salesman has not breached a duty of care and is not liable even if his failure to take his car in to be serviced causes one of the five types of harm. Therefore, measuring liability for harm caused during Trip 5 yields the same result under either Justice Cardozo's approach or that of Justice Andrews. Practically speaking, this means that the salesman would have neither breached a duty of care nor proximately caused the harm alleged. The same is not true for Trip 6.

Cumulating the risks posed before Trip 6 means that the salesman has breached a duty of care by failing to take his car in to be serviced.\(^{128}\)

\( \text{GRAPH 15:} \)

**Cumulative Risk of Harms Before Trip #6**

![Graph showing the cumulative risk of harms before Trip #6 with categories for Brake Failure, Oil Leak, Battery Leak, Coolant Leak, and Tire Blowout, with values for $109.75, $36.00, $6.00, $17.25, and $39.50 respectively, leading to $11.00 when summed, indicating } B = PL. \)

\(^{128}\) See Graph 15.
As depicted in Graph 15, the sum of the harms risked prior to Trip 6 are greater than the salesman's burden of having his car serviced before that trip. Therefore, according to Justice Andrews and the prevailing view of courts, the salesman has breached a duty of care. This finding of breach, of course, does not equate to a finding of liability even when this breach is found to be a factual cause of the plaintiff's harm. One must also ascertain whether such breach was a proximate cause. This is where Cardozo has won the war.

The proximate cause inquiry, plainly and simply, involves an unstacking of the building blocks that determine the breach question. This unstacking of the particular risks posed graphically illustrates Justice Cardozo's approach to ascertaining whether there has been a breach of a duty. This analysis, rejected as the test for determining breach of duty, accurately describes how I believe the Restatement Third correctly analyzes proximate cause. When applied to Trip 6, this approach demonstrates that while the salesman may have breached a duty of care, he has not proximately caused any of the five types of harm analyzed because none of the risk blocks reaches the B=PL line.  

129 See id.  
130 See Graph 16.
This graph, thus, depicts the approach to the breach of duty determination advocated by Justice Cardozo, ultimately adopted as the approach to proximate cause as described by the Restatement Third. Therefore, while Justice Cardozo lost the battle over the role and nomenclature of this determination, he won the war over whether this scope of risk, or proximate cause, inquiry would ultimately determine liability.\textsuperscript{131}

Determining the scope of liability for the particular types of harm risked is easily ascertained by using the graphs. A series of bar graphs can illustrate at which point in time each of the particular types of risks, if suffered, would give rise to liability. As shown in the previous graph, none of the risk blocks for the particular types of harm evaluated exceeds the B=PL line at Trip 6.\textsuperscript{132} Consequently, the salesman would not be a proximate cause if any of those types of harm occurred. At Trip 9, however, the risk block for an oil leak first exceeds the B=PL line.\textsuperscript{133}


\textsuperscript{132} \textit{See} Graph 16.

\textsuperscript{133} \textit{See} Graph 17.
Accordingly, if this particular type of harm occurred during Trip 9 (or during any subsequent trip), the salesman would be a proximate cause of the harm. However, since no risk blocks for other types of harm exceed the B=PL line, the salesman would not be a proximate cause of those types of harm if they occurred during Trip 9 (or during any previous trip).

At Trip 12, the risk block for a tire blowout first exceeds the B=PL line, which means that the salesman would be a proximate cause of this type of harm if it occurred during Trip 12 (or during any subsequent trip). \[134^4 \text{ See Graph 18.} \]
At Trip 16, the risk block for a coolant leak first exceeds the B=PL line, which means that the salesman would be a proximate cause of this type of harm should it occur during Trip 16 (or any subsequent trip).135

135 See Graph 19.
At Trip 20, the risk block for brake failure first exceeds the B=PL line, which means that the salesman would be a proximate cause of this type of harm should it occur during Trip 20 (or any subsequent trip).\footnote{See Graph 20.}
e. Determining the Level of Generality

The relative simplicity with which the breach of duty and proximate cause inquiries have been illustrated in conjunction with the traveling salesman hypothetical dissipates when the assumptions that accompany this academic exercise are removed. To clarify, the simplicity of the concepts does not dissipate, but instead the simplicity of application is lost in real life applications. Complexity arises chiefly because one must determine the level of generality at which one classifies the type of harm to be analyzed. What is meant by “level of generality” is the number of individual risk blocks that, when stacked, make up the unitary risk block that forms the basis for the breach of duty inquiry. The more individual risk blocks into which the unitary risk block can be divided and then unstacked for the proximate cause inquiry, the less chance any individual risk block (type of harm risked) actually at issue will exceed the burden to the actor.

---

137 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. f (Tentative Draft No. 2, Mar. 25, 2002).
138 See infra notes 141-52 and accompanying text.
being analyzed. Unfortunately, there is no definitive way to determine the appropriate level of generality.\footnote{Accord Restatement (Third) of Torts: Liability for Physical Harm § 29 cmt. i (Tentative Draft No. 2, Mar. 25, 2002) ("No specific rule can be provided about the appropriate level of generality or specificity to employ in characterizing the harm for purposes of this section.").}

The Restatement Third wrestles with this question in the Reporters' Comments and in the Illustrations. For example, Illustration 2 to Section 29 uses the following hypothetical:

Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. Greeted by Kim, his friend's nine-year-old daughter, Richard hands his loaded shotgun to Kim and enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard was negligent for leaving Kim with his shotgun, the risk that made Richard negligent was that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Richard is not liable to Kim for her broken toe, even though Richard's tortious conduct was a factual cause of Kim's harm.\footnote{See id., § 29 cmt. f, illus. 2.}

In stating that Richard is "negligent" for leaving Kim with his shotgun, the Reporters are merely saying that Richard breached a duty of care. This, of course, means that when one cumulates all of the risks associated with giving a child a shotgun, those risks outweigh the burden of Richard carrying the shotgun into the house and safely putting it away himself. Stated differently, this analysis assumes that the unitary risk block (used to ascertain breach) formed by stacking the individual risk blocks exceeds the B=PL line. It also assumes that a broken foot is necessarily a different type of harm than a gunshot wound and, thus, is a separate risk block. Once again, this can be illustrated graphically.\footnote{See Graph 21.}
Richard is not a proximate cause of the injury to Kim, however, because the probability of Kim dropping the gun onto her foot, when multiplied by the gravity of harm a broken foot represents, is less than the burden to Richard of taking care of the gun himself. Accordingly, when the risk block for a broken foot is unstacked for the proximate cause inquiry, it does not rise to the level of the B=PL line.\footnote{See Graph 22.}
But what if instead one characterizes the type of harm risked as bodily injury to a child handed a loaded gun? This broad statement of the level of generality at which to analyze the facts would lead to a different result. At that broad level of generality, there is only one risk block, which by itself would exceed the B=PL line, thus establishing proximate cause.¹⁴³

Returning to the traveling salesman hypothetical will allow for a graphic illustration of the effects of assuming differing levels of generality. In the hypothetical, I have utilized a fairly narrow level of generality in dividing the types of harm risked into five distinct categories. Once again, these five categories of types of harm are:

1. Tire failure caused by excess wear, which causes death or serious bodily injury;
2. Car overheating on highway due to insufficient levels of coolant, which causes a passerby who stops to help to be scalded when removing the radiator cap;

¹⁴³ See Graph 21.
(3) Battery acid leakage due to failure to maintain battery, causing part of another's driveway to dissolve;
(4) Engine seizing up due to a lack of oil in the engine, causing the salesman's car to be rear-ended while on the highway; and
(5) Brake failure due to excess wear on the brake shoes, causing the salesman to rear-end another car on the highway.

At the beginning of Trip 8, these narrowly-defined types of risks can be plotted on a bar graph.\textsuperscript{144}

\textbf{GRAPH 23:}
\textit{Risk of Harms Before Trip 8}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{graph23.png}
\caption{Risk of Harms Before Trip 8}
\end{figure}

\textsuperscript{144} See Graph 23.
As the graph shows, none of the narrowly defined risk blocks exceeds the B=PL line, so the traveling salesman would not be a proximate cause of any of the particular types of harm should any one of them occur during Trip 8. Suppose, however, that one divides the particular types of harm into fewer than five categories. One could persuasively argue that the risk of a rear-end collision generally should be one type of harm rather than the two types of harm. In other words, the risk that the brakes will fail and cause the salesman to rear-end another car should be in the same category as the risk that the oil will leak and ultimately cause the salesman to be rear-ended. Consequently, the risk blocks for the brakes and oil would be stacked upon one another, becoming one block, when utilizing this level of generality.\(^{145}\)

\(^{145}\) See Graph 24.
As the graph depicts, the risk block formed by stacking the individual brake and oil blocks now exceeds the B=PL line. Therefore, viewing the types of harm risked at a slightly broader level of generality changes the outcome of the proximate cause inquiry and, ultimately, the case. At this level of generality, the salesman would properly be deemed to be the proximate cause of a rear-end collision caused by either brake failure or oil leakage. At this level of generality, the salesman would not be a proximate cause of a rear-end collision that occurred during Trip 7.146

GRAPH 25:
Risk of Harms Before Trip 7
(Oil Leak & Brake Failure Combined)

As this graph depicts, even when the brakes and oil risk blocks are stacked, they do not reach the level of the B=PL line. If, however, one adopts an even broader view of the appropriate level of generality, then the salesman’s potential liability proportionately expands. For example, if the type of harm risked by the salesman’s failure to service his car is characterized as the risk that a car accident will happen, then the salesman will be properly deemed to be the proximate cause of a car accident resulting from

146 See Graph 25.
brake failure, oil leakage, or a tire blowout during Trip 7. This is true because at that level of generality each of the individual risk blocks representing these types of harm would be stacked upon one another becoming one risk block.147

As this graph depicts, the risk block now formed exceeds the B=PL line. Therefore, viewing the types of harm risked at this level of generality changes the outcome of the case because the salesman would now be properly deemed the proximate cause of the car accident. Even at this broader level of generality, the salesman would not be a proximate cause of a car accident caused by brake failure, oil leakage, or a tire blowout that occurred during Trip 6.148

147 See Graph 26.
148 See Graph 27.
As this graph depicts, even when the brakes, oil, and tire blocks are stacked, they do not reach the level of the B=PL line. If, however, one adopts an extremely broad view of the appropriate level of generality, then the salesman’s potential liability expands even further. As a final example, if the type of harm risked by the salesman’s failure to service his car is characterized as the risk of personal injury to another, then the salesman will be properly deemed the proximate cause of injuries factually caused by brake failure, oil leakage, a tire blowout, or coolant leakage during Trip 6. This is true because at this level of generality each of the individual risk blocks representing these types of harm would be stacked upon one another becoming one block.\textsuperscript{149}

\textsuperscript{149} See Graph 28.
As this graph depicts, the risk block now formed exceeds the B=PL line. Therefore, viewing the types of harm risked at this level of generality changes the outcome of the case because the salesman would now be properly deemed the proximate cause of the personal injury caused by any one of these risks.

While the above illustrates the effect of utilizing broad versus narrow levels of generality in determining the types of harm risked (i.e., the number and size of the individual risk blocks), it does not dictate which level of generality is the correct one. This is because there is no one right answer. As recognized by Dobbs, "[i]t is not usually possible to say that only one description of the risk is the right one, so the question calls for judgment."\(^{150}\)

Accordingly, unless reasonable minds cannot differ, the appropriate level of generality is a jury question.\(^{151}\) This, of course, means that the


\(^{151}\) See 1 id. ("Although that judgment is ordinarily left to the jury, sometimes judges feel that the matter is too clear for debate."). The Restatement Third Reporters agree:
persuasiveness of the lawyers in convincing the jurors to view the risks narrowly or broadly will likely determine the outcome of the case. Counsel for plaintiffs will argue for a broad view of the risks, while counsel for defendants will argue for a narrow view of the risks.\footnote{152}

II. INTERVENING ACTS AND SUPERSEDING CAUSES

As discussed earlier, the events of September 11th resulted in the loss of billions of dollars and thousands of lives.\footnote{153} Certainly the hijackers are to blame, but almost as certainly, their estates are not capable of responding in damages to any material degree.\footnote{154} Recently, plaintiffs filed lawsuits against United and American Airlines seeking to recover large sums of money for deaths and injuries allegedly caused by the negligence of the airlines in allowing the hijackers to board the planes while carrying box cutters with two-inch blades.\footnote{155} While the airlines will not likely dispute that they had a duty to exercise reasonable care in screening passengers and their carry-on items,\footnote{156} they will undoubtedly argue that they did not breach

\footnote{152} Accord I DOBBS, supra note 150, § 189, at 468 ("As a matter of argumentation, it always serves the defendant to describe the risk as precisely as possible and the plaintiff to describe it as abstractly as possible."). \textit{But see} \textsc{Restatement (Third) of Torts: Liability for Physical Harm} § 29, Reporters' Note cmt. i (Tentative Draft No. 2, Mar. 25, 2002) ("Professor Morris explained the point that efforts by advocates to push the specificity or generality of the description envelope too far are generally counter-productive, as the artificiality of such efforts is often apparent.").

\footnote{153} For example, insurance companies are now embroiled in a dispute with the leaseholder for the World Trade Center Towers and will ultimately have to pay between 3.55 and 7.1 billion dollars to the insured. \textit{See} Steven Brill, \textit{Building Castles in the Clouds}, \textsc{Newsweek}, July 29, 2002, at 44.

\footnote{154} The likelihood of recovering from a foreign government or a terrorist organization seems equally remote. \textit{But see} Horrock, supra note 14.

\footnote{155} \textit{See supra} note 14.

\footnote{156} Prior to September 11th, airlines were responsible for providing their own pre-boarding security. In the wake of September 11th, airport security has been federalized. \textit{See} Aviation and Transportation Security Act, Pub. L. No. 107-71, 115
their duty of reasonable care.\textsuperscript{157} As discussed earlier, this breach determination will be made by cumulating all of the risks presented by the airline's conduct and plugging them in to the B<PL formula.\textsuperscript{158} This analysis is performed in Part III.\textsuperscript{159} For now, I will assume for the sake of argument that a jury could and would find that the airlines breached a duty of due care.\textsuperscript{160}

Assuming there was such a breach, then the question of whether the airlines were a proximate cause of the injuries suffered by those in the World Trade Center Towers is squarely presented. In other words, someone must then decide whether or not the intentional, criminal acts of the hijackers relieve the airlines of the liability to pay for the extraordinary damages factually caused by their presumed breach of a duty.\textsuperscript{161} As is often the case in the law, where one begins analysis frequently dictates where one ultimately ends. Whether a court adopts the proposed \textit{Restatement Third} approach to this inquiry as outlined in Section 33 or chooses instead to apply the majority rule now in place could very well determine the extent, if any, of the airlines' liability.

\textbf{A. Background and Definitions}

At the outset, it is important to define the relevant terms that have traditionally governed this type of proximate cause analysis. When, after an actor breaches a duty of care, a new cause or force combines with the original actor's negligence to factually cause an injury, that new cause or

\textsuperscript{157} Among other arguments, United Airlines will likely point out that a federal directive issued in 1972 and in effect on September 11th permitted the carrying of blades up to four-inches long on airplanes. Ricardo Alonso-Zaldivar, \textit{America Attacked Travel}, L.A. TIMES, Sept. 15, 2001, at A20.

\textsuperscript{158} \textit{See supra} notes 121-27 and accompanying text.

\textsuperscript{159} \textit{See infra} notes 258-302 and accompanying text.

\textsuperscript{160} When I speak of a breach of a duty, I am referring to the jury finding that the probability of some type of harm multiplied by the gravity of that harm was greater than the burden of not allowing two-inch blades onto the plane. \textit{See supra} notes 121-27 and accompanying text. I am not saying that the probability of an airplane hitting and knocking down a building multiplied by the gravity of that harm is greater than the burden of not allowing such blades onto the plane—that question is one of proximate cause, or scope of risk as characterized by the \textit{Restatement Third}. \textit{See supra} notes 129-31 and accompanying text.

\textsuperscript{161} There is no doubt that allowing the hijackers on the planes with box cutters was the factual cause of the damages suffered by those in the buildings.
force is called an "intervening act." A "superseding cause" is an intervening act that operates to relieve the original actor of liability for the ultimate harm even though the original actor was a factual cause of that harm. In other words, intervening acts are retrospectively labeled superseding causes when there is a compelling reason for relieving the original breaching party of liability. Determining precisely which types of intervening acts are properly treated as superseding causes (or whether an entirely different approach to this inquiry should be taken) has occupied, and continues to occupy, courts and commentators. Such a determination will influence, if not dictate, the answer to the question of whether the September 11th hijackers are merely intervening actors or are, instead, properly denominated superseding causes, thus relieving the airlines of any liability for the resultant harm.

B. The Evolution of Intervening Act/Superseding Cause Analysis

Over the years, courts have utilized essentially three approaches to ascertain whether intervening acts are properly deemed superseding causes. The first approach, which I will call the "historical" approach, starts from the premise that foreseeable intervening acts are not superseding.
ing causes, but *unforeseeable* intervening acts are superseding causes. It then declares that intervening culpable acts (intentional or criminal) are *unforeseeable as a matter of law* and are thus necessarily deemed superseding causes. 168 The second approach, which I will call the "traditional" approach, simply jettisons the historical approach's automatic determination that intervening criminal or intentional acts are *ipso facto* unforeseeable and thus superseding causes, leaving a straightforward question of the foreseeability of the intervening act as the dispositive question. 169 The third approach, which I will call the "Restatement Third" approach, disclaims any interest in determining whether or not the intervening act is foreseeable, and instead simply applies the proximate cause test set forth in Section 29. 170 This means that the focus is on whether the ultimate harm caused by the intervening act (not the act itself) was within the scope of risk created by the original actor's negligence. 171 As discussed below, the practical import of this approach is to shift the foreseeability spotlight away from the intervening act and toward the ultimate harm caused. 172

1. The Historical Approach

The intervening act/superseding cause analysis "developed at a time when the prevailing jurisprudence was that law was scientifically based and correct legal principles could be deduced through logical and objective inquiry." 173 Consequently, courts and commentators believed that there was a single and identifiable cause of every event that "could be determined through a neutral, scientific inquiry." 174 Out of this thinking grew an approach to causation that was characterized by intricate and extensive rules about precisely which intervening acts qualified as superseding

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168 See infra notes 173-95 and accompanying text.
169 See infra notes 196-201 and accompanying text.
170 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 33 cmt. a (Tentative Draft No. 2, Mar. 25, 2002) ("This section adopts a rule on scope of liability that is functionally the same as § 29").
171 See infra notes 243-57 and accompanying text.
172 In other words, the question is no longer whether the intervening act was foreseeable, but is now whether the ultimate harm that resulted was foreseeable from the standpoint of the original negligent actor.
174 Id.
causes, and which did not.\textsuperscript{175} One of these rules stated that unforeseeable intervening acts were deemed to be superseding causes.\textsuperscript{176} The rule then clarified that if the intervening act was a criminal or intentionally tortious act, it was deemed to be unforeseeable, thus a superseding cause, as a matter of law.\textsuperscript{177} Apparently, the rationale was that if there was a single, identifiable proximate cause, then the intervening culpable act (rather than the original breach of a duty) had to be it.\textsuperscript{178} The fiction that had to be indulged to reach this result was that one can never foresee the criminal conduct of another.\textsuperscript{179} The case of \textit{Watson v. Kentucky & Indiana Bridge &

\textsuperscript{175} Id. (citing RESTATEMENT OF THE LAW OF TORTS §§ 439-52 (1934)). The Restatement Second contained only modest changes to this approach. See RESTATEMENT (SECOND) OF THE LAW OF TORTS §§ 439-52 (1965).

\textsuperscript{176} As discussed infra, this statement of the general rule represents what I refer to as the traditional approach.

\textsuperscript{177} See generally 1 DOBBS, supra note 150, § 190, at 471 ("In an earlier era, courts tended to hold that intervening criminal acts were unforeseeable as a matter of law."); see also Andrews v. Kinsel, 40 S.E. 300, 300 (Ga. 1901) ("It is also a well-recognized principle that where there has intervened between the defendant's negligent act and the injury an independent illegal act of a third person, producing the injury, and without which it would not have happened, the latter is properly held the proximate cause of the injury, and the defendant is excused."); Laurence H. Eldredge, Culpable Intervention as Superseding Cause, 86 U. PA. L. REV. 121, 124 (1937) ("[T]he [historical] rule was that if after the defendant's wrongful conduct there intervened the wrongful (culpable) act of a third person, the latter relieved the defendant from liability, and 'the last human wrongdoer' was solely responsible for the plaintiff's harm."); Michael D. Green, The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond, 53 S.C. L. REV. 1103, 1113 (2002) ("Particularly when the intervening act was the product of intentionally tortious or criminal behavior, superseding cause doctrine prevented a negligent individual from bearing the entirety (or any) of the liability in which considerably more culpable conduct played a role.").

\textsuperscript{178} See, e.g., Crandall v. Consol. Tel., Tel., & Elec. Co., 127 P. 994, 997 (Ariz. 1912) ("The criminal act of a third party can never be the natural sequence in the link of circumstances leading up to an injury, but, when such act is present, it must be considered as the efficient proximate cause of the subsequent injury, and the law will not go beyond it for a proximate cause.").

\textsuperscript{179} See, e.g., Henderson v. Dade Coal Co., 28 S.E. 251, 252 (1897) (holding that sexual assault by escaped prisoner relieved negligent custodian of prisoner of liability because such conduct was unforeseeable as a matter of law even though same prisoner had previously escaped five times and was "prone to a desire for sexual intercourse"); Shugart v. Egan, 83 Ill. 56, 56 (1876) (In action by plaintiff's deceased wife against defendant who negligently served decedent intoxicating liquor followed by decedent being killed by a third party, court finds that intervening violent assault "is no more to be anticipated than any other criminal act of a third party."). See also D'Ambra v. Peak Building Corp., 680 A.2d 939, 941
Railroad Co., illustrates the operation of this "historical" approach to the treatment of intervening culpable acts.

In Watson, the defendant railroad company negligently spilled a large quantity of gasoline into the street. The plaintiff was injured when a third party lit a match near the gasoline causing it to ignite. The parties disputed whether the individual who lit the match did so intending merely to light a cigar, or did so with the intent to set the gasoline ablaze. The appellate court found the answer to that question to be dispositive. If the fire was started accidentally, then it would merely be an intervening act, and not a superseding cause, thus the defendant would be liable for plaintiff's injuries. If instead, the third party acted maliciously for the purpose of starting a fire, then the railroad would not be responsible because it "could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion." Therefore, the outcome of the case depended entirely upon whether the intervening act was criminal or intentional on the one hand, or unintentional on the other hand.

Several illustrations contained in Section 442B of the Restatement Second perpetuate this rule, one of which recites and applies the facts of (R.I. 1996) (explaining that defendant "was not bound to anticipate mischievous or wrongful acts on the part of others, and hence was not bound to guard against them") (quoting Mahogany v. Ward, 17 A. 860, 862 (R.I. 1889)); 1 DOBBS, supra note 150, § 190, at 472 ("The earlier cases were prone to declare, contrary to human experience, that criminal acts could not be anticipated or at least that the defendant was under no obligation to anticipate them. Some contemporary cases come close to saying the same thing.").


Id. at 147.

Id. at 147-48.

Id. at 149.

Id. at 150-51.

Id. at 151. The court further explained that:

The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted. . . .

Id.

The Watson court remanded the case to the trial court to make this determination. Id.

RESTATEMENT (SECOND) OF THE LAW OF TORTS § 442B cmt. c, illus. 7-10 (1965).
Watson. Another of the illustrations involves an actor who negligently leaves a hole on a public sidewalk. The Reporters declare that if a traveler negligently bumps another into that hole, then the original actor is liable, but if the traveler deliberately pushes another into the hole, then the original actor is not liable.

In the mid-twentieth century, courts began to expand common law duties to impose the obligation to take precautions against subsequent negligent or intentional conduct on the part of others. This change prompted a widespread re-evaluation of the historical approach to intervening acts; if the law deems actors negligent for failing to guard against culpable conduct by others, then it cannot be the case that such conduct by others is unforeseeable as a matter of law. Courts and commentators thereafter explicitly rejected the historical approach. In fact, the Watson case was expressly overruled and characterized as representing an "archaic doctrine [that] has been rejected everywhere."

2. The Traditional Approach

As courts abandoned the pretense that culpable acts of others were categorically unforeseeable, the general rule emerged that foreseeable intervening acts are not superseding causes, even if the acts are criminal or

\[\text{References}\]

\[188\] Id. illus. 8.
\[189\] Id. illus. 7.
\[190\] Id. illus. 5.
\[191\] Id. illus. 7.
\[192\] See generally Green, supra note 177, at 1122 ("When the sole source of the risk consisted of third-party conduct and tort law expanded the obligation of merchants, landlords, employers, and other enterprise actors capable of preventing harm caused by the criminal acts of others, superseding law necessarily conformed."); see also RESTATEMENT (SECOND) OF TORTS § 442B cmt. c, illus. 7 (1965).
\[193\] See, e.g., d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 894 (9th Cir. 1977) (recognizing that while it once followed the historical approach, Arizona now applies traditional approach); Largo Corp. v. Crespin, 727 P.2d 1098, 1103 (Colo. 1986) (rejecting historical approach as "outdated and ill-reasoned" in favor of traditional rule that "[a]n intentionally tortious or criminal act of a third party does not break the causal chain if it is reasonably foreseeable"); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 993, at 383 (9th ed. 1988) ("The view... that an intervening criminal act is by its very nature a superseding cause... is rejected by many courts and writers as an illogical and undesirable formula.").
\[194\] See supra notes 181-86 and accompanying text.
\[195\] Britton v. Wooten, 817 S.W.2d 443, 449 (Ky. 1991).
intentional. "In general, the courts have moved away from rule-of-law decisions about broad categories of cases like these and have examined the facts of particular cases to determine whether intervening criminal acts are foreseeable." In cases where the intervening criminal acts were foreseeable, they were not deemed to be superseding causes and liability was imposed upon the original actor. Alternately, when the intervening criminal act was unforeseeable, courts found the intervening act to be a superseding cause. Whether the intervening act is foreseeable is a question of fact for the jury to determine, as is true with proximate cause

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196 1 Dobbs, supra note 150, § 190 at 473.
197 See, e.g., Cusenbary v. Mortensen, 987 P.2d 351, 358 (Mont. 1999) (finding that driving drunk was a foreseeable intervening act which did not supersede original negligence of serving alcohol to visibly intoxicated individual); Washa v. Oregon Dep't of Corrections, 979 P.2d 273, 283 (Or. Ct. App. 1999) (finding that the intervening acts of rape and murder were foreseeable in light of parolee's criminal history, preserving causal link with negligent defendant). See also Restatement (Third) of Torts: Liability for Physical Harm § 33, Reporters' Note to cmt. d (Tentative Draft No. 2, Mar. 25, 2002) (collecting cases "affirming a foreseeability standard for intervening acts").
198 See, e.g., Camp v. Loughran, 285 A.2d 483, 484 (N.Y. App. Div. 2001) (finding a sexual assault of a "ski weekend" participant by other participants was an unforeseeable act, severing any causal connection); Medcalf v. Washington Heights Condo. Ass'n, Inc., 747 A.2d 532, 536 (Conn. App. Ct. 2000) (finding that assault of a person outside a building was an unforeseeable act arising from the failure to maintain the building's intercom system, relieving the negligent defendant of liability); Cope v. Enter. Rent-A-Car, 551 S.E.2d 841 (Ga. Ct. App. 2001) (finding assault upon truck renter whose truck broke down to be an unforeseeable act, breaking the causal connection). See also 1 Dobbs, supra note 150, § 180, at 444 ("if a second person or a new force unforeseeably intervenes to trigger the plaintiff's injury after the defendant's act is complete, responsibility for the injury falls solely upon the second actor"); 1 id. at 470-71 ("If an intervening and unforeseeable intentional harm or criminal act triggers the injury to the plaintiff, the criminal act is ordinarily called a superseding cause, with the result that the defendant who negligently creates the opportunity for such acts escapes liability.").
determinations outside the intervening act context. The traditional approach now represents the strong majority rule.

3. The Restatement Third Approach

Just as changes in the underlying substantive law in the middle of the twentieth century gave rise to a rejection of the historical approach in favor of the traditional approach, further changes in substantive law in the latter part of the twentieth century have prompted courts, commentators, and the Restatement Third Reporters to revisit the question of what the proper analysis should be when intervening acts combine with an actor’s negligence to factually cause indivisible harm.

a. Changes That Warrant Further Change

The substantive law developments that served as catalysts for this re-examination are: (i) the widespread abrogation or modification of joint and several liability, and (ii) the emergence of principles of comparative fault. While these changes in substantive law are, in and of themselves, sufficient to warrant a re-examination of the traditional approach in favor of the Restatement Third approach, they are not the only reasons. As discussed below, the Restatement Third approach has the additional advantage of being analytically faithful to the underlying foundations of proximate cause analysis and is thus the superior approach.

(Wyo. 1985).


201 Accord 1 DOBBS, supra note 150, § 190, at 472 (“Today’s courts usually recognize that foreseeability, in the nature of things, is fact-specific, so they now often permit juries to find that a criminal act was foreseeable and not a superseding cause.”).

202 See supra notes 192-95 and accompanying text.

203 See infra notes 204-42 and accompanying text.
i. joint and several liability

As is well-chronicled elsewhere, the 1970s and 1980s brought a wealth of tort reform by both courts and legislatures.204 One of the most significant of these reforms was the elimination, in whole or in part, of joint and several liability.205 Under joint and several liability, when two or more tortfeasors are jointly liable for harm caused to another, the tortfeasors are individually and collectively liable for the entirety of the damages suffered.206 This means that even if one tortfeasor is only fractionally responsible, that tortfeasor can be forced to pay the entire amount of the judgment. Therefore, under a system of joint and several liability, there are only two possible outcomes for a potentially responsible tortfeasor—0% or 100%.207 If the tortfeasor is found to be liable in any amount, then that tortfeasor can be held responsible for the whole amount.208 The perceived unfairness to a fractionally responsible tortfeasor, which is inherent in this system, led courts to search for ways to diminish this unfairness. Over the years, courts have utilized several legal developments in this quest.209


206 See, e.g., Tucker v. Union Oil Co., 603 P.2d 156, 165 (Idaho 1979), overruled by State v. Alger, 764 P.2d 119 (Idaho Ct. App. 1988) (noting that, under joint and several liability, "each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury" (quoting Am. Motorcycle Ass'n v. Superior Ct., 578 P.2d 899, 902 (Cal. 1978))); Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 348 (N.D. 1983) (noting that, under joint and several liability, a "'negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause'" and that "'the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused'" (quoting Am. Motorcycle, 578 P.2d at 899)).

207 See Green, supra note 177, at 1132 ("defendant is subject to liability for the entire damages . . . if joint and several liability [is] retained. Courts may be tempted to employ superseding cause to avoid what might appear to be excessive liability. Yet, doing so leaves the entirety of the loss on the plaintiff.").

208 See supra note 206.

209 See infra notes 210-42 and accompanying text.
A hypothetical fact scenario will serve to illustrate the jurisprudential evolution toward a more precise, and arguably more fair, apportionment of damages. Assume a drunk driver hits a jogger on a dark road at night. Assume the driver did not see the jogger because: (i) the driver’s perception is greatly impaired by alcohol; (ii) a street light maintained by the city is burned out and this was known by the city; and (iii) the jogger was not wearing reflective clothing. Assume that a jury would find that all three parties breached a duty of care and were factual causes of the accident, and that the jury would apportion fault, if asked to do so, as follows:

Drunk Driver: 90%
City: 5%
Jogger: 5%

ii. the evolution of comparative fault

Under the common law system of contributory negligence, a plaintiff is completely barred from recovering if that plaintiff is found to be even fractionally responsible for her own injuries. Accordingly, even a plaintiff who was 5% responsible for her own damages would be able to recover nothing. This rule was designed, at least in part, to prevent a plaintiff who was a factual cause of her own injuries from using the court system to seek compensation from others. This, however, gives the court only two possible alternatives in assessing a plaintiff’s liability—all or nothing (i.e., the plaintiff is 0% responsible or 100% responsible). In other words, an injured plaintiff is either able to recover all of her damages or none. This complete bar to recovery may seem fair when a plaintiff is 90% responsible (close to 100%), but seems patently unfair when that plaintiff is only 5% responsible (close to 0%). Why should a 5% responsible plaintiff have to bear 100% of the loss?

Applying contributory negligence to the drunk driving hypothetical, the jogger would be completely barred from recovery because she was found to be 5% responsible. As is clear from this hypothetical, while contributory negligence protects defendants against plaintiffs who are at least partially responsible for their own injuries, it often unfairly imposes all of the costs upon fractionally responsible plaintiffs. It is also rather imprecise in allocating costs in accordance with responsibility.

210 See 1 DOBBS, supra note 150, § 199, at 494; PROSSER, supra note 29, at 416.
211 This is particularly true when joint and several liability operates concurrently. See supra notes 206-10 and accompanying text.
Out of this unfairness and imprecision grew dissatisfaction with contributory negligence, and ultimately rejection of this system by all but four states. In its place came a system of comparative negligence (later called comparative fault), under which a plaintiff is not completely barred from recovering her damages merely because she was apportioned a certain percentage of the fault. Instead, the plaintiff’s damage award is reduced in proportion with her allocated fault. Therefore, in the above hypothetical, the jogger would be able to recover 95% percent of her damages from the two defendants. While this shift to comparative negligence reaches a more precise outcome and eliminates the unfairness to plaintiffs under contributory negligence, it fails to address the potential unfairness in the allocation of liability among defendants.

iii. equitable indemnity

Under the common law system of joint and several liability, a plaintiff was entitled to collect her entire judgment against any of the jointly liable defendants, even if the defendant chosen was only fractionally responsible. That defendant, however, had no right to seek contribution or indemnity against any other jointly liable defendant. Consequently, a

212 See, e.g., Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975) (characterizing contributory negligence as “inequitable in its operation because it fails to distribute responsibility in proportion to fault”); Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (rejecting a rule of contributory negligence and accepting a rule of comparative negligence because comparative negligence “is simply a more equitable system of determining liability and a more socially desirable method of loss distribution”); Scott v. Rizzo, 634 P.2d 1234, 1239 (N.M. 1981) (holding that “the contributory negligence rule has long since reached that point of obsolescence”); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883-84 (W. Va. 1979) (recognizing that “there is an obvious injustice in the . . . contributory negligence rule”).


214 See 1 Dobbs, supra note 150, § 201, at 503.

215 1 id. § 201, at 503-04.

216 This figure is reached by merely subtracting the 5% attributable to the plaintiff from the overall 100% of fault.

217 See supra note 207.

218 See George W. Lumber Co. v. Bush, 116 N.E. 480, 481 (Mass. 1917) (holding that “[t]here can be no contribution enforced in the courts between joint wrongdoers in the ordinary case. Each is left by the law where his wrongful act
defendant who was 5% responsible could end up paying the entire judgment without any recourse against any other defendant. Applying this system to the drunk driving hypothetical, and assuming the plaintiff chose to recover against the city, it would have to pay 95% of the plaintiff’s damages without any recourse against the drunk driver.

Over time, the unfairness of completely prohibiting indemnity led courts to abandon this harsh rule. Jurisdictions began allowing the defendant against whom a plaintiff collected to seek indemnity on a pro rata basis from other defendants. Under this system, assuming plaintiff chose to recover against the city, it would have to pay 95% of the plaintiff’s damages, but could then seek to collect half (47.5%) of the plaintiff’s damages from the drunk driver. While more precise and more fair, courts were not completely satisfied with this approach either because it still failed to place the ultimate costs on defendants in proportion to their allocated percentages of fault. Ultimately, courts adopted a system of

leaves him.”); 1 DOBBS, supra note 150, § 386, at 1078; Robert A. Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. PA. L. REV. 130, 130 (1932).

219 See, e.g., Am. Motorcycle Ass’n v. Superior Ct., 578 P.2d 899, 902 (Cal. 1978) (adopting a system of “equitable indemnity” to conform to the “objective of establishing ‘a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault’” (quoting Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975))).


221 The risk that this amount was uncollectible from the drunk driver was borne by the city. See supra note 207.

222 See, e.g., Bielski v. Schulze, 114 N.W.2d 105 (Wis. 1962), overruled on other grounds by Wangan v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). In Bielski, the court noted:

If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle. It is difficult to justify, either on a layman’s sense of justice or on natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount he paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5%
equitable indemnity, under which a defendant against whom plaintiff collected could seek indemnity in proportion to the percentage of fault allocated to the remaining defendant(s). Under the drunk driving hypothetical, the city would be able to seek indemnity from the drunk driver in an amount equal to 90% of plaintiff's damages. The risk of uncollectibility, however, due to the insolvency of the drunk driver, still rests with the city.

iv. abrogation of joint and several liability

In the mid-1980s, courts and legislatures in many states abandoned or modified common law joint and several liability in favor of a several liability system. Under several liability, parties are legally responsible only for the proportion of damages assigned to them by the jury. Many other states have substantially modified joint and several liability such that joint and several liability applies to only certain types of claims or certain types of damages. Under the drunk driving hypothetical in a several liability jurisdiction the city would be responsible for paying only 5% of the jogger's damages. The jogger would have to collect the remaining 90% of damages from the drunk driver. Consequently, under a several liability system, the risk that the drunk driver will be unable to pay the jogger causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent.

Id. at 109.

See, e.g., Expressions at Rancho Niguel Ass'n v. Ahmanson Developments, Inc., 103 Cal. Rptr. 2d 895, 898 (Ct. App. 2001) (explaining that "[e]quitable indemnity principles govern the allocation of loss or damages among multiple tortfeasors whose liability for the underlying injury is joint and several" (citing Am. Motorcycle, 578 P.2d at 899)).

Id. at 1140 ("Such principles are designed, generally, to do equity among defendants who are legally responsible for an indivisible injury by providing a basis on which liability for damage will be borne by each joint tortfeasor 'in direct proportion to [its] respective fault.'" (quoting Am. Motorcycle, 578 P.2d at 899)).

This is true because the city would be responsible first to pay the jogger 95% of her damages because this represents the defendants' share of responsibility. The city could then seek reimbursement of 90% of the damages, which represents the drunk driver's allocated share of responsibility.

Only fifteen states still retain joint and several liability. See Green, supra note 177, at 1105.

See 1 DOBBS, supra note 150, § 389, at 1087.

1 id.
because of lack of insurance and/or insolvency is borne by the jogger, not by the city.\footnote{See 1 id. § 387, at 1082.}

The rejection of joint and several liability, in whole or part, thus seems to complete the jurisprudential evolution from an imprecise and unfair apportionment of ultimate liability to a precise and fair system where both plaintiffs and defendants bear ultimate liability in direct proportion to their assigned percentages of fault. Not quite. One noteworthy exception to this precise and fair system is the traditional approach to intervening acts and superseding causes.

As discussed above, the traditional approach to intervening acts and superseding causes requires the jury to ascertain whether, following an actor’s negligent act, the intervening culpable conduct of another tortfeasor is foreseeable or unforeseeable.\footnote{See supra notes 196-201 and accompanying text.} If the intervening act is foreseeable, then the original actor remains liable to the injured party.\footnote{See supra note 197.} If the intervening act is not foreseeable, then the original actor is not liable because the intervening act will be deemed to be a superseding cause.\footnote{See supra note 198.} Because this approach was developed when joint and several liability was the uniform rule, it was necessarily limited to one of two possible outcomes. The original actor was either completely responsible for all of the damages attributable to any defendant (100%), or not responsible for any of the damages (0%).\footnote{See supra notes 207-09 and accompanying text.} This approach does not mesh with a system that equitably apportions fault, or with one that has rejected or modified common law joint and several liability,\footnote{See supra notes 210-16 and accompanying text.} because it is ill-equipped to achieve the same level of precision and fairness these changes have brought.\footnote{See supra notes 207-09 and accompanying text.}

Under the traditional approach to the drunk driving hypothetical, the city would bear no responsibility whatsoever for the jogger’s injuries if the jury determined that the drunk driver was an unforeseeable criminal.

\footnote{To say that the traditional approach is ill-equipped to operate efficiently within a comparative fault system is not to say that it is entirely incompatible. In fact, the United States Supreme Court recently determined that the adoption of comparative fault does not \textit{ipso facto} mean that intervening act/superseding cause analysis is thereby rejected. See Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 835 (1996) (declaring that there is nothing “internally inconsistent” with having a superseding cause analysis in the context of comparative fault).}
This is true even if the jury really thought that the city, in fairness, should bear a 5% share of the damages. To be sure, under a joint and several liability system, finding the drunk driver's intervening act to be a superseding cause and thus holding the city responsible for 0% of the damages would be more fair and more precise than would be a finding that the city was responsible for 100% of the damages attributable to the defendants—especially if the drunk driver was insolvent. This is true because 5% (the precise proportion of fault that the city would otherwise be assigned) is much closer to 0% than it is to 100%. But why should we limit ourselves to all or nothing, when we now have the tools and experience to allow us to be precise? Equitable apportionment of fault and several liability (in most states) now allow this precision and fairness. Accordingly, the time for leaving behind the intervening act/superseding cause analysis has come. The Restatement Third approach, which accomplishes precisely that, should be adopted.

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237 This is true because drunk driving comfortably fits within the definition of a criminal act.

238 See Restatement (Third) of Torts: Liability for Physical Harm § 33, cmt. c (Tentative Draft No. 2, Mar. 25, 2002) (allowing that under a system of joint and several liability, "reliance on superseding cause to eliminate the liability of negligent tortfeasors when there were other, more culpable tortfeasors who were a cause of the injury was quite attractive and understandable").

239 See Green, supra note 177, at 1104 ("Employing a 100-unit scale for apportioning liability meant courts no longer had to choose from the crude array of tools for apportioning liability among the parties to a suit, which sometimes required selecting the tool that produced the lesser of two evils.").

240 Accord Restatement (Third) of Torts: Liability for Physical Harm § 33 cmt. a (Tentative Draft No. 2, Mar. 25, 2002). The comment states:

The advent of comparative responsibility, comparative contribution, and substantial modification of joint and several liability also has undermined one important rationale for these rules—namely the use of scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of other, more culpable persons were also a cause of the harm.

Id.

241 Restatement (Third) of Torts: Liability for Physical Harm § 33 Reporters' Note cmt. c ("Thus, in many jurisdictions today, the concern that a negligent tortfeasor, whose comparative culpability is quite modest by contrast to an intentional tortfeasor who was also a cause of the harm, may be subject to liability for all of the harm, no longer exists.").

242 This is subject to one important caveat. In jurisdictions that have either not adopted comparative fault principles or have retained joint and several liability, the traditional approach may continue to be preferable because the full range of options
b. The Language of Section 33

Section 33 of the Restatement Third addresses the situation that has heretofore fallen under the category of intervening acts and superseding causes. Section 33 provides:

§ 33. Intervening Acts and Superseding Causes
(a) When an actor’s tortious conduct is a factual cause of harm that is among the harms whose risks made the actor’s conduct tortious, the actor is subject to liability for the harm even if an unforeseeable intervening act, including an unusual force of nature or independent culpable or nonculpable human act, is also a factual cause of the harm.
(b) When, after an actor’s tortious conduct occurs, another act, including an unusual force of nature or independent human act, occurs and both the tortious conduct and other act are factual causes of harm different from the harm whose risks made the actor’s conduct tortious, the actor is not liable for any such harm.\(^{243}\)

Under subsection (a), even if the intervening act is an entirely unforeseeable criminal act, the original actor can still be liable for the harm suffered by the plaintiff. Likewise, under subsection (b), even if the intervening act is perfectly foreseeable from the standpoint of the original actor, that actor may still not be liable. Section 33 emphatically rejects the traditional approach and declares that approach’s foundational question of whether or not the intervening act was foreseeable entirely irrelevant.

Section 33 instead focuses the inquiry on whether the type of harm suffered by the injured party was within the scope of risk presented by the original actor’s tortious conduct. If the type of harm suffered was one of the risks the occurrence of which rendered the original actor’s conduct tortious in the first instance, then that actor is liable regardless of whether the intervening act was foreseeable or unforeseeable, and even regardless of (0% - 100%) are not available. Accordingly, finding a marginally responsible actor’s negligence to be entirely superseded by a later, more responsible intervening actor’s conduct would be more fair than holding the original actor entirely responsible. Accord Restatement (Third) of Torts: Liability for Physical Harm cmt. e (Tentative Draft No. 2, Mar. 25, 2002) (“Jurisdictions that retain joint and several liability and which do not permit apportionment between negligent and intentional tortfeasors would have the strongest grounds for rejecting the ... [Restatement Third approach].”).

whether there was an intervening act at all.\textsuperscript{244} Conversely, if the type of harm suffered was not one of the risks that rendered the original actor’s conduct tortious, then that actor is not liable at all, even if a foreseeable intervening act helped to cause that harm.

This is not to say that foreseeability no longer plays any role in determining whether an intervening act can relieve the original actor of liability. To the contrary, foreseeability still plays a vital role in this determination. The difference is in where the foreseeability inquiry is focused. Under the traditional approach, the foreseeability spotlight is aimed at the intervening act. If that intervening act is foreseeable, then there is liability; if unforeseeable, then there is no liability. In contrast, under the \textit{Restatement Third} approach, the foreseeability spotlight is aimed at the ultimate harm caused. If that harm is within the scope of risk that makes the actor’s conduct tortious, then that actor is liable. This scope of risk inquiry is merely a more precise, but somewhat more complicated, way of asking whether or not the ultimate harm suffered was foreseeable from the standpoint of the actor at the time of the conduct at issue. Likewise, if the ultimate harm is not foreseeable from the standpoint of the actor (again, regardless of whether or not an intervening act, if any, was foreseeable), then the actor is not liable.

This approach amounts to nothing more and nothing less than a straightforward application of the proximate cause test urged by Section 29.\textsuperscript{245} The fact that this approach removes an extra layer of inquiry in the proximate cause analysis by simply applying the general rule (without having to take the additional step of asking whether there was a foreseeable or unforeseeable intervening act) may be a sufficient reason in and of itself to prefer it over the traditional approach. But this is not the only reason (or even the best reason) that the \textit{Restatement Third} approach is superior to the traditional approach. The \textit{Restatement Third} approach is also analytically superior to the traditional approach because it assigns liability where it properly belongs for the precise reasons it belongs there.

As discussed in Part I of this Article, Section 29 imposes liability upon actors only if the probability that the harm ultimately suffered would occur, when coupled with the gravity of the harm risked, is sufficiently high that a reasonable person would not engage in the conduct for fear of causing the

\textsuperscript{244} \textit{See id.} § 33 cmt. e ("Even when the intervening acts are unforeseeable and even when the basis for finding the actor negligent is not specifically the risk created by those intervening acts, whether negligent or intentional, this subsection does not relieve the actor from liability.").

\textsuperscript{245} \textit{Id.} § 33, cmt. a ("[t]his section adopts a rule on scope of liability that is functionally the same as § 29").
precise type of harm suffered. In other words, before engaging in the conduct at issue, the reasonable person would recognize that the probability of causing the harm actually suffered multiplied by the gravity of that harm outweighed the potential benefit of engaging in the conduct at issue, and as a consequence, would not engage in that conduct.

While the linguistic formulation of the proximate cause rule and its application to the intervening act, superseding cause context may appear to be somewhat novel, the underlying foundational changes it brings about are relatively minor, if they exist at all. That this is true is being recognized by an increasing number of courts and commentators. In addition, when the rubber actually meets the road, the results reached under the traditional approach and the Restatement Third approach will actually diverge somewhat infrequently. In the small minority of cases in which the result turns upon which of the approaches is applied, the Restatement Third is usually the best approach to follow.

a. The Role of Foreseeability in the Restatement Third Approach

The Restatement Third’s “scope of risk” standard may, at first, feel a bit unfamiliar and awkward because the term “foreseeability” is conspicuously absent. However, the foreseeability concept, when properly defined and understood, is very much a part of the scope of risk inquiry. Indeed, the scope of risk terminology is what defines the role foreseeability ought to play in the proximate cause analysis. The level of foreseeability that the ultimate harm will occur actually dictates the value of P in the B<PL equation. That is, the more foreseeable it is that someone will be injured by

246 See supra notes 43-76 and accompanying text.
247 See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 33 Reporters’ Note, cmt. c (Tentative Draft No. 2, Mar. 25, 2002) (collecting cases documenting recognition that principles of comparative fault minimizes if not eliminates the need for intervening act, superseding cause analysis); SCHWARTZ, supra note 213, § 4-5(b), at 102-04; Terry Christlieb, Note, Why Superseding Cause Analysis Should be Abandoned, 72 TEX. L. REV. 161, 165 (1993).
248 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. k (Tentative Draft No. 2, Mar. 25, 2002) (“Properly understood, [the Restatement approach] ... exclude[s] liability for harms that were sufficiently unforeseeable at the time of the actor’s tortious conduct that they were not among the risks—potential harms—that made the actor negligent” (emphasis added)); id. § 29 cmt. j (“Currently, virtually all jurisdictions employ the risk standard, or its equivalent in negligence cases, foreseeability, for some range of proximate-cause issues.” (emphasis added)).
the actor's conduct, the higher we say the probability of injury is. Likewise, the greater the gravity of harm that is foreseeable, the higher the value of L in the B<PL equation. Stated another way, the more foreseeable it is that someone will be hurt badly, the higher the gravity of harm risked.249

In the context of the intervening act, superseding cause analysis, determining whether or not the intervening act was foreseeable goes a long way toward predicting whether liability ought to be imposed.250 Instead, while it might be an easy-to-understand, though imperfect and imprecise, description of what the inquiry actually involves, it still remains only a rough proxy for the controlling question of whether the harm caused was within the scope of risk that rendered the actor’s conduct tortious in the first instance. Whether or not an actor can foresee someone or something intervening after the actor’s conduct remains an abstract question unless tethered to the ultimate harm caused by the combination of original conduct and intervening act. This is demonstrably true because whether or not the intervening act occurs has no bearing on liability unless the ultimate harm also occurs. It is the ultimate harm that animates the lawsuit, not the intervening act.251

For example, if a landlord fails to repair a lock to an apartment complex in a high crime area, one of the foreseeable risks is that a criminal will enter the complex. The landlord will not be sued and thus will have no liability unless the ultimate harm risked (e.g., rape of a tenant) actually occurs. If a criminal merely enters through the gate and then leaves having committed no crime, then we have a foreseeable intervening act but no ultimate harm. Therefore, it is the harm that animates the lawsuit, rather than the act. Certainly one could argue that the intervening act that needs to be foreseeable is the entry by the criminal and the act of committing the rape. While this may be true, if one defines the act as including the harm

249 Id. § 29 cmt. f (“The magnitude of the risk is the foreseeable severity of the harm discounted by the foreseeable probability that it will occur.”).

250 See id. § 29 cmt. k (“The risk standard provides greater clarity and facilitates analysis because it focuses attention on the particular circumstances that existed at the time of the actor’s conduct and the risks that were posed by that conduct.”). Accord 1 DOBBS, supra note 150, § 190, at 471 (“As in other superseding cause cases, the real reason to relieve the defendant of liability is not merely that a new cause has intervened but rather that the risk represented is not one that the defendant negligently created.”).

251 1 DOBBS, supra note 150, § 193, at 483 (“[T]he superseding cause determination is quite often merely a specific instance of and a way of talking about the fundamental rule that liability is limited to the risks that the defendant has negligently imposed.”).
caused by the act, then one has succeeded in proving the uselessness of the inquiry into the act in the first place. In other words, if the act includes within it the assumption of the harm, then there is no reason not to focus solely on the harm. The inquiry into whether or not the act was foreseeable is thus empty unless the harm is included in the definition of the act. As a practical matter, if a reasonable person can foresee that his or her conduct presents the risk that an intervening act is sufficiently likely to cause a foreseeable type of harm which is sufficiently grave, then, almost by definition, that harm falls within the scope of risk presented by that conduct and liability will attach.

The recognition that the traditional and the Restatement Third approaches essentially accomplish the same goals is not particularly controversial. For example, in his respected treatise, Professor Dobbs explains, "[a]n intervening act is regarded as a superseding cause when it is outside the scope of the risk the defendant negligently created. This idea is usually expressed in shorthand by saying that if the intervening act is itself unforeseeable, then it may become a superseding cause." But if the intervening cause analysis is simply a "shorthand" way (arguably an analytically imprecise and somewhat flawed "shorthand" way) of applying the scope of risk standard, then why should we continue to apply it? Indeed, as Dobbs further recognizes, "[t]he intervening cause cases all entail questions about the scope of the risk, so they can be resolved without a mention of intervening or superseding causes." Lately, an increasing number of courts have come to realize just that and are applying what amounts to the Restatement Third approach, though their application appears to be uneven.

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252 See 1 id. § 190, at 471 ("If the harm caused by an intervening actor's criminal act is within the risk negligently created by the defendant, foreseeability of the criminal act itself seems unimportant.").

253 1 id. § 193, at 482; see also 1 id. § 186, at 462 ("Put more generally, an intervening cause does not supersede the defendant's negligence when it reflects the same general kind of risk which rendered the defendant negligent.").

254 1 id. § 183, at 452; see also id. § 186, at 460 ("[I]n some instances, the second actor causes a harm that may be outside the scope of the risk originally created by the first. Such cases are simply subsets or particular examples of the basic scope of the risk problem and can be resolved under ordinary foreseeability rules."). By "ordinary foreseeability rules" Dobbs means scope of risk principles.


256 See 1 DOBBS, supra note 150, at 452 ("[I]n some cases, courts selectively ignore intervening cause analysis while in others they reach out for it. If the result is the same overall, the language of the opinions is not, so the distinction cannot be
Applying the *Restatement Third* approach to the drunk driver hypothetical shows its superiority. Under the *Restatement Third* approach, the jury would first ascertain what risks were presented by the city’s failure to replace a burned-out light on a dark road. In doing so, the jury would decide how probable it was that this type of harm would occur and how grave the danger would be to the public. Then the jury would compare the probability and gravity of the danger to how much of a burden it would have been to change the bulb before the accident.

If the jury determined that the burden to the city of changing the bulb before the accident was greater than the small likelihood that a jogger would be hit by a drunk driver at that very point in the road, then there would be no liability because the failure to change the bulb could not be said to have been a proximate cause of the jogger’s injuries. If, however, the jury found that the burden of changing the bulb was less than the probability of the harm multiplied by its gravity, then the jury would find proximate cause. In making these determinations, the jury would not be limited to an all or nothing apportionment, but would have the full range of 0% to 100% available to them. Assuming the jury found the city to be 5% at fault, then in the majority of courts, the city would have to pay 5%, and only 5%, of the jogger’s damages. Therefore, the *Restatement Third* approach is superior because it operates within the current analytical framework and reaches the most precise and fair result.

### III. Application to September 11th

Each of the three approaches outlined in Part II can be applied to the September 11th tragedy to ascertain how a jury might decide the proximate cause question if asked to do so. In applying the historical, traditional, and *Restatement Third* approaches, this Article assumes the following material facts to be undisputed:

1. The airlines employed and trained the security guards who screened the passengers as they boarded the planes;
2. The hijackers passed through the airlines’ security prior to boarding the planes;
3. The airlines utilized screening equipment that was capable of detecting two-inch blades carried by passengers attempting to board the planes;

wholly ignored.”).  

257 An example would be if the city had reasonably discovered that the bulb was burned out only moments before the accident.
(4) The airlines instructed their security guards to allow passengers to board the planes while carrying two-inch blades;
(5) The hijackers boarded the planes carrying box-cutters with two-inch blades;
(6) The hijackers gained control of the planes after they were airborne by brandishing the box-cutters with two-inch blades;
(7) After gaining control of the planes, the hijackers flew the planes into the World Trade Center Towers; and
(8) Thousands of individuals were injured or killed when the planes struck the World Trade Center Towers.

Having made these assumptions, it is now possible to analyze the proximate cause question under each of the three approaches.

A. The Historical Approach

Under the historical approach, an actor who engages in tortious conduct is relieved of liability if a criminal or intentionally tortious act intervenes and is also a factual cause of the harm suffered. This type of intervening act is deemed to be unforeseeable as a matter of law and is treated as a superseding cause. While this historical approach has almost completely fallen out of favor with courts and commentators, one could make a compelling policy-based argument that terrorist attacks can and should be treated differently than other criminal actions.

Applying the historical approach to the undisputed material facts is simple and straightforward. We have a breach of duty by the airlines, assuming that a jury would find that the airlines have breached a duty of care in allowing the terrorists onto the planes with box-cutters with two-inch blades. In addition, it is beyond dispute that allowing the terrorists

258 All of the assumed facts are likely to be undisputed at trial.
259 See supra notes 173-95 and accompanying text.
260 See supra notes 173-95.
261 See supra note 193.
263 Once again, I am assuming the above facts will be undisputed.
264 I fully realize this is a huge assumption that will be hotly contested. I also realize that assuming this fact in many ways overlaps with what I argue is the proper way to perform the proximate cause inquiry. Nevertheless, assuming there
onto the plane with the box-cutters was a factual cause of the harm suffered. The attention then turns to whether there was an intervening act that was also a factual cause of the ultimate harm. Because the terrorists hijacked the plane after the airlines breached a duty of care, the terrorists' actions are properly deemed to be intervening acts. Because the hijacking and crashing of the planes into the World Trade Center Towers is both criminal and intentionally tortious, then under the historical approach the intervening acts of the terrorists would be deemed to be superseding causes as a matter of law. Accordingly, the airlines would be relieved of all liability for the resulting damages.

B. The Traditional Approach

Most of the analysis under the traditional approach is identical to that of the historical approach. Under the traditional approach, the original tortious actor is relieved of liability only if the intervening criminal or intentionally tortious act is unforeseeable.\textsuperscript{265} Accordingly, the analysis begins with the determination of whether or not the actor breached a duty of due care. The focus then turns to determining whether or not that conduct was a factual cause of the ultimate harm. Assuming both questions are answered in the affirmative, then one must determine whether there was an intervening act that was also a factual cause of the ultimate harm. If there was an intervening act that was also a factual cause of the ultimate harm, the dispositive question is whether that intervening act was foreseeable from the standpoint of the original actor. If it was foreseeable, then the original actor is liable. If it was unforeseeable, then the intervening act is deemed to have been a superseding cause and the original actor is not liable.\textsuperscript{266}

Applying the traditional approach to the September 11th facts is almost as simple a task as under the historical approach, but less clear in the answer it yields. As under the historical approach, the airlines can be assumed to have breached a duty of care and to be a factual cause of the harm.\textsuperscript{267} Moreover, the terrorists' actions followed the airlines' breach and

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\textsuperscript{265} See supra note 197.
\textsuperscript{266} See supra notes 196-201 and accompanying text.
\textsuperscript{267} See supra note 264 and accompanying text.
are both intervening acts and factual causes of the harm. Accordingly, the sole remaining question is whether these intervening acts were foreseeable from the standpoint of the airlines. To be clear, under the traditional approach, the focus is on whether the *intervening acts* were foreseeable, whereas under the *Restatement Third* approach, the focus is on whether the *ultimate harm* was foreseeable or within the scope of risk.

Whether the intervening acts were foreseeable is, of course, a jury question. As discussed in Part I, the ultimate answer to this question will turn upon the level of generality the jury chooses to apply to the foreseeability question. The plaintiffs will argue for a very broad view of foreseeability, while the airlines will argue for a very narrow view of foreseeability. Accordingly, how the foreseeability question is ultimately framed in the jurors' minds will likely determine the outcome of the case.

1. *The Airlines' Argument*

The airlines will attempt to convince the jury to view foreseeability in specific terms. They might phrase the dispositive foreseeability question like this: “Unless you find that it is foreseeable that individuals allowed onto a plane in Boston with two-inch blades will hijack the plane and intentionally fly it into a skyscraper in New York, you must find that [United or American] was not a proximate cause of the plaintiffs' injuries.”

Under this formulation, the answer seems to be relatively easy. Of course it is not reasonably foreseeable that letting individuals carrying two-inch blades onto a plane in Boston will cause death or serious injury to workers in a skyscraper in New York and cause the destruction of that building. Therefore, by successfully framing the question in very narrow terms, the airlines will likely prevail on the proximate cause question.

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268 *See supra* notes 196-201 and accompanying text.
269 *See supra* notes 243-44 and accompanying text.
270 *See supra* note 199.
271 *See supra* notes 137-52 and accompanying text. The level of generality discussion in Part I took place in the context of the *Restatement Third* approach to intervening act/superseding cause analysis. *See supra* notes 137-52 and accompanying text. But this same level of generality determination will have to made in the traditional approach analysis because the level of foreseeability plays an integral part under each approach, *see supra* notes 244-56 and accompanying text, albeit with a slightly different focus, *see supra* notes 244-45 and accompanying text.
272 *See 1* DOBBS, *supra* note 150, at 468 ("As a matter of argumentation, it always serves the defendant to describe the risk as precisely as possible and the plaintiff to describe it as abstractly as possible.").
2. Plaintiffs' Argument

In contrast, plaintiffs will attempt to convince the jury to view foreseeability in very broad terms. Plaintiffs might phrase the dispositive foreseeability question like this: "If you find that allowing individuals onto a plane with two-inch blades creates a foreseeable risk of personal injury or property damage to others, then you must find that [United or American] was a proximate cause of plaintiff's injuries."

Under such a formulation, the answer also seems to be relatively easy, though very different. Of course it is foreseeable that individuals on airplanes carrying two-inch blades might cause personal injury or property damage to others. Therefore, by successfully framing the question in very broad terms, the plaintiffs will likely prevail on the proximate cause question.273

C. The Restatement Third Approach

Under the Restatement Third approach, the focus is on whether at the time of the actor's conduct, the risk of the harm ultimately caused was sufficiently high so as to render the actor's conduct tortious.274 In other words, at the time of the actor's conduct, was the probability of causing the particular type of harm ultimately suffered multiplied by the gravity of that harm sufficiently high that a reasonable person would not engage in that conduct?275 Once again, under the Restatement Third approach, the focus

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273 The question of whether intervening terrorist acts are unforeseeable and thus superseding causes is not entirely novel. See, e.g., Port Authority v. Arcadian Corp., 189 F.3d 305, 319 (3d Cir. 1999) (affirming dismissal of suit against fertilizer manufacturer in conjunction with the 1993 terrorist bombing of The World Trade Center and finding as a matter of law that the bombing was unforeseeable and thus a superseding cause); Gaines-Tabb v. ICI Explosives, 160 F.3d 613, 621 (10th Cir. 1998) (affirming dismissal of suit against ammonium nitrate manufacturer in conjunction with the bombing of The Murrah Building in Oklahoma City on grounds that the bombing was unforeseeable and thus a superseding cause as a matter of law). While these cases seem to suggest that foreseeability can and should be decided as a matter of law, a more factually analogous case suggests otherwise. See Stanford v. Kuwait Airways, 89 F.3d 117, 127 (2d Cir. 1996) (reversing grant of airline's motion for judgment as a matter of law in case brought by passengers injured in hijacking of Kuwait Airways plane and finding that foreseeability of hijacking is a question of fact for the jury).

274 See supra notes 243-44 and accompanying text.

275 See supra notes 43-76.
is solely upon the harm that was ultimately suffered rather than upon whether an intervening act, if any, was foreseeable. 276

As with the traditional approach, the outcome will hinge upon the level of generality one applies to the analysis. 277 The airlines will argue for an extremely narrow view of the type of harm risked by its conduct, while the plaintiffs will argue for a broad view of the type of harm risked.

1. The Airlines' Argument

As in the traveling salesman hypothetical used to illustrate how Section 29 of the Restatement Third generally operates, 278 the defendants will attempt to divide the type of harm inquiry into numerous individual risk blocks. To accomplish this, the airlines will try to convince the jury that there are numerous discrete types of harms that are risked by allowing individuals carrying two-inch blades aboard planes, each of which is very small when compared to the burden on the airlines and on their passengers of not allowing such blades on planes. Among the types of harm the airlines might identify are the following:

(1) The passenger carrying the box-cutter might accidentally cut the person's leg sitting in the next seat;
(2) The passenger carrying the box-cutter might vandalize the tray table by carving his initials in it;
(3) The passenger carrying the box-cutter might damage the plane in such a way that it loses pressure at a high altitude causing passengers to suffer ear drum damage and difficulty breathing;
(4) The passenger carrying the box-cutter might cause emotional harm to passengers on the plane by threatening someone with the blade;
(5) The passenger carrying the box-cutter might intentionally cut another passenger on the plane;
(6) The passenger carrying the box-cutter might intentionally cut a flight attendant or pilot on the plane;
(7) The passenger carrying the box-cutter might use the blade to gain entrance into the cockpit and force the pilot to land the plane at an unscheduled destination;
(8) The passenger carrying the box-cutter might use the blade to gain entrance into the cockpit and cause the plane to crash into the ocean or a desolate area, killing all passengers on board;

276 See supra notes 243-44 and accompanying text.
277 See supra notes 137-52 and accompanying text.
278 See Graphs 7-20 & 23-28.
(9) The passenger carrying the box-cutter might use the blade to gain entrance into the cockpit and cause the plane to crash into a corn field, killing all passengers on board and damaging the corn crops; and

(10) The passenger carrying the box-cutter might use the blade to gain entrance into the cockpit and seize control of the plane and then fly it into a skyscraper, killing many in the building and all passengers on board.

As is apparent from this list, it is possible to conjure up an almost infinite list of possible types of harms potentially risked by a given act if the type of harm is defined narrowly enough.

As in Part I, probability levels and dollar figures for the types of harm risked can be assigned to each type of harm and plotted onto individual bar graphs. Each bar can then be placed on the same chart and measured against a value at which the burden of not allowing passengers to carry such blades onto planes would exactly equal the magnitude of risk that a reasonable airline would be able to tolerate, for example, \( B = P \times L \). For each of the ten individual types of harm hypothesized above I will assume the following projected magnitude of risk (in dollars) per flight:

1. Accidental cut to passenger: $ .25^{282}
2. Tray table vandalism: $ .28^{283}

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279 See Graph 13.

280 See id.

281 These figures are the product of multiplying the probability of this type of harm occurring on any given flight on which a passenger carrying a two-inch blade is allowed on board (\( P \)) times the estimated gravity of this type of harm calculated in dollar value (\( L \)). The probabilities assigned to each type of harm are the product of my speculation which is based upon little more than intuition. Nevertheless, these numbers are necessary to illustrate the concepts at work.

282 This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .005%, and by assuming that the expected monetary value of this type of injury would be $5,000. Therefore, \(.005\% \times 5,000 = .25\).

283 This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .07%, and by assuming that the expected monetary value of this type of injury would be $400. Therefore, \(.07\% \times 400 = .28\).
3. Loss of cabin pressure: $1.00\textsuperscript{284}
4. Emotional harm from threat: $6.00\textsuperscript{285}
5. Intentional cut to passenger: $6.00\textsuperscript{286}
6. Intentional cut to airline personnel: $6.00\textsuperscript{287}
7. Unscheduled landing: $0.20\textsuperscript{288}
8. Crash in water or desolate area: $5.00\textsuperscript{289}
9. Crash into corn field: $2.51\textsuperscript{290}
10. Crash into skyscraper: $1.00\textsuperscript{291}
Total: $28.24\textsuperscript{292}

\textsuperscript{284} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .0001%, and by assuming that the expected monetary value of this type of injury would be $1,000,000. Therefore, .0001% x $1,000,000 = $1.00.

\textsuperscript{285} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .006%, and by assuming that the expected monetary value of this type of injury would be $100,000. Therefore, .006% x $100,000 = $6.00.

\textsuperscript{286} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .0006%, and by assuming that the expected monetary value of this type of injury would be $1,000,000. Therefore, .0006% x $1,000,000 = $6.00.

\textsuperscript{287} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .0006%, and by assuming that the expected monetary value of this type of injury would be $1,000,000. Therefore, .0006% x $1,000,000 = $6.00.

\textsuperscript{288} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .0002%, and by assuming that the expected monetary value of this type of injury would be $1,000,000. Therefore, .0002% x $1,000,000 = $.20.

\textsuperscript{289} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .000001%, and by assuming that the expected monetary value of this type of injury would be $500,000,000. Therefore, .000001% x $500,000,000 = $5.00.

\textsuperscript{290} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .0000005%, and by assuming that the expected monetary value of this type of injury would be $502,000,000. Therefore, .0000005% x $502,000,000 = $2.51.

\textsuperscript{291} This dollar value is derived by assuming that the probability of this type of harm occurring on any given flight is .00000001%, and by assuming that the expected monetary value of this type of injury would be $10,000,000,000. Therefore, .00000001% x $10,000,000,000 = $1.00.

\textsuperscript{292} This number is merely the sum of the expected values for each individual type of harm listed.
Each of the above-listed potential types of harm risked by allowing passengers to board carrying a two-inch blade can then be depicted on a bar graph.

![GRAPH 29: Risks of Harm](image)

As shown on the graph, the value at which the probability of harm multiplied by the gravity of harm equals the burden of preventing passengers from carrying two-inch blades onto the plane is set at $20. This number represents the projected per flight burden (reduced to dollars) on the airlines of disallowing the blades on planes.

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293 See Graph 29.

294 This burden reflects, *inter alia,* the additional cost associated with checking the passengers' belongings more carefully, and the lost revenue when individuals choose not to fly because of the increased hassle associated with flying due to less privacy and longer check-in times.

295 Once again, this value is pure speculation on my part and does not pretend to be derived scientifically. As with the projected values assigned to each specific type of harm, the mathematical accuracy of these numbers is entirely beside the point; these numbers merely provide a baseline for illustrating the concepts at work.
As the graph also demonstrates, there is no single type of harm risked whose projected dollar value exceeds the projected burden placed upon the airlines by disallowing two-inch blades. Accordingly, if the airlines are able to convince the jury to view the type of harm risked by allowing two-inch blades on planes very narrowly, then the jury will likely conclude that the airlines are not a proximate cause of the plaintiffs' damages.

### 2. Plaintiffs' Argument

Plaintiffs' incentive will be to convince the jury to view the type of harm risked by allowing two-inch blades onto planes at a broad level of generality. As demonstrated in Part I, whether or not United and/or American breached a duty of care in the first instance depends upon whether the risk blocks in the preceding graph, when stacked upon one another, exceed the B=PL line.

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**GRAPH 30:** Risks of Harm

- Crash into Skyscraper
- Crash into Corn Field
- Crash in Water or Desolate Area
- Unscheduled Landing
- Intentional Cut to Airline Personnel
- Intentional Cut to Passenger
- Emotional Harm from Threat
- Loss of Cabin Pressure
- Tray Table Vandalism
- Accidental Cut to Passenger

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296 See supra notes 137-52 and accompanying text.
297 See Graph 29.
298 See Graph 30.
As depicted in the graph, stacking all of the risk blocks upon one another results in a finding of breach. The inquiry would necessarily then focus upon how many of the risk blocks should be stacked when determining proximate cause. Characterizing the type of harm risked as personal injury or property damage to others caused by the use of a blade would arguably encompass all ten of the risks listed above, resulting in the proximate cause risk block being the same as the breach block. This type of stacking would result in a finding that the airlines not only breached a duty of care, but also that they were a proximate cause of the injuries.

3. Who Will Prevail?

Based upon the above arguments, it is conceivable that either the airlines or the plaintiffs could prevail on the proximate cause question. Who should prevail? Which level of generality is the correct level at which to view this question? As discussed earlier, there is no correct answer. Like most questions of fact, the ultimate conclusion reached by a jury will depend on the quality of the lawyering and the jury’s rough sense of justice, taking into account the sympathies of the case. The side likely to prevail on this issue will be the side that is best able to convince the jury of how narrowly or broadly to view the type of harm risked. In graphic terms, the prevailing side will be the one with which the jury agrees on how much or how little stacking of the individual risk blocks is appropriate. The more varied the types of harm the jury envisions, the more likely the jury will be to find for the airlines. In contrast, the more monolithic the jury envisions the types of harm risked, the more likely the plaintiffs will be to prevail.

For example, if the jury decides that the appropriate level of generality at which to view the types of harm risked is personal bodily injury, then most, but not all, of the hypothesized types of harm would be considered. In such a case, three of the risk blocks from the previous graph would be unstacked, but the rest would remain stacked.

299 See id.
300 See supra note 150 and accompanying text.
301 See Graph 31.
As depicted in the graph, even when the tray table risk block, the emotional disturbance risk block, and the unscheduled landing risk block are unstacked, the remaining personal bodily injury risk block still exceeds the B=PL line. Accordingly, adopting this fairly broad level of generality would result in a finding that the airlines were a proximate cause of the plaintiffs’ injuries.

On the other hand, if the jury decides that the appropriate level of generality at which to view the type of harm risked is an airplane crash, then most of the hypothesized types of harm would not be considered. In such a case, seven of the risk blocks would be unstacked, leaving only three still stacked.\footnote{See Graph 32.}
As depicted in the graph, when only the three individual crash blocks remain stacked, the resulting risk block fails to reach the $B=PL$ line. Accordingly, adopting this fairly narrow level of generality would result in a finding that the airlines were not a proximate cause of the plaintiff’s injuries.

CONCLUSION

The Restatement Third’s proposed chapter on the scope of liability materially advances the quest for an understandable and conceptually sound proximate cause analysis. Section 29 offers a simple, straightforward test that accurately reflects the reason for imposing a limit on the scope of an actor’s liability as part of our tort system. An actor should be liable only for the type of harm the risk of which made the actor’s conduct tortious in the first place. This test substantially mirrors the approach Justice Cardozo followed to determine whether an actor’s conduct was properly deemed to be a breach of a duty of care.

The Restatement Third approach to proximate cause can also be illustrated graphically by using Judge Learned Hand’s $B<PL$ equation as
the tool. Under the B<PL formula, an actor breaches a duty of care when the probability of causing harm risked by certain conduct multiplied by the gravity of harm risked exceeds the burden to the actor of not engaging in that conduct. This breach determination cumulates all of the types of harm risked by the conduct at issue. The proximate cause analysis simply deconstructs the breach analysis into its building blocks and evaluates each block independently. Therefore, if at the time of the actor’s conduct, the probability of causing the type of harm actually suffered multiplied by the gravity of that type of harm exceeds the burden to the actor of not engaging in the conduct, then the actor is properly deemed to be a proximate cause of the injury suffered.

Section 33’s proposal to replace the traditional analysis when evaluating whether an intervening act will be deemed to be a superseding cause with a straightforward application of Section 29 is also preferable. Changes in substantive law, such as the widespread modification of joint and several liability and nearly uniform adoption of comparative fault, render the traditional analysis virtually obsolete. In addition, focusing on the foreseeability of the type of harm suffered rather than on the foreseeability of the intervening act more truly reflects the purpose of proximate cause. This shift in focus can be illustrated graphically using the B<PL formula. This formula can then be applied to any factual scenario, including the facts of September 11th, to ascertain whether the scope of liability limitations operate to relieve a party of ultimate liability for harm caused.

Applying the historical approach to intervening acts and superseding causes to the facts of September 11th would lead to victory for the airlines because the hijacking of the planes was an intentional, culpable act and would thus be deemed unforeseeable as a matter of law. If the traditional approach were applied, the result would depend upon whether or not the jury found the hijacking of the planes to be foreseeable. Finally, whether applying the Restatement Third approach to the facts of September 11th would lead a jury to find in favor of the plaintiffs or the airlines would depend upon the level of generality at which the jury viewed the harm risked by allowing individuals to board a plane carrying two-inch blades. The more narrowly the jury viewed the type of harm risked, the more likely it would be that the airlines would prevail. Likewise, the more broadly the jury viewed the type of harm risked, the more likely it would be that the plaintiffs would prevail.