Windfall and Probability:  
A Study of “Cause” in Negligence Law

Part I

Uses of Causal Language

Robert H. Cole*

A child darts into the path of a speeding car and is hit. Courts often hold the driver not liable because, even if he had not been speeding, he would have been unable to avoid hitting the child. The negligence, it is said, did not cause the injury.¹

This Article will analyze the unstated content of that argument. The Article will appear in three installments, which are summarized in the following introduction.

INTRODUCTORY SUMMARY

Part I of this Article offers a methodology for giving content to causal statements found in negligence cases. It illustrates this methodology with a survey of some principal uses of “cause” in the cases. Its purpose is to provide some means of control over the varying and sometimes recondite uses of causal language in order to identify any particular concept of cause, render it susceptible to analysis and evaluation, and exclude from the analysis the confusing intrusion of different concepts of cause. The methodology seeks a particularistic treatment of the use of “cause.” It does not yield any causal concept that is a general solvent of liability for negligence. Rather, it emphasizes the varying uses of causal concepts in the decision of differing issues. It results in a number of meanings of “cause” dependent on the legal purpose of the particular causal discussion.

For example, the concept of causation involved in saying whether “the

---

* A.B., 1952, LL.B., 1955, Harvard University; Acting Associate Professor of Law, University of California School of Law, Berkeley.

negligence caused the injury” in the darting-out cases² will be shown to be used for the purpose of arguing the unfairness of a windfall with respect to the issue whether liability is an appropriate sanction for speeding.³ This concept is a different one from that used in deciding whether defendant was involved in the plaintiff's injury, an example of which would be whether the trauma of collision could result in the injury complained of, say, cancer. Yet both concepts are commonly referred to as “causes in fact.” In the methodology offered here, the meaning of “cause” also turns on the applicability of such operational criteria as the process of verification of the causal statement and the independence of its validity from the context of litigation. In these terms, the proposition of medical science concerning the relation of trauma and cancer would be considered a matter of cause “in fact.” In contrast, the relative insusceptibility to verification of “the negligence caused the injury” and its relative dependence on the litigation context show that its characterization as a matter of cause “in fact” is misleading.

With part I as a basis, parts II and III of this Article attempt to demonstrate what is entailed in propositions concerning whether the defendant's negligence “caused” the injury. Part II shows the futility of pursuing those propositions in the terms that unreflecting use of the language of “cause in fact” invites. The inquiry into whether the driver would have been able to avoid hitting the child if he had not been speeding is a complex effort to estimate the probabilities that certain speculative statements are valid. The results of that effort necessarily depend on the form of the speculative statements, restrictions on the range of speculation, the feasibility of making estimates in unusually ambiguous circumstances, assignment of the burden of persuasion, and similar matters. Such matters, however, cannot be analyzed without knowing the legal purpose for making the speculative inquiry. The purpose of the inquiry also determines the relevance of any estimate of probabilities made and what is to be done if no estimate can be made. To start by saying that the inquiry is a “factual” matter of “causation” obscures its legal purpose by suggesting that all that is involved is rational inference from historical facts.

To identify the legal purpose of the speculative inquiry, part II examines what the courts hold in situations in which the same question—would the injury have occurred if the defendant had not been negligent?—is raised, but where the probabilities of what would have happened

² The term “darting-out case” is appropriated from Green, Duties, Risks, Causation Doctrines, 41 TEXAS L. REV. 42, 68 (1962).
³ Justification for the characterizations of issues in this Article and a description of them appear in section II, “Survey of Uses of ‘Cause’ in Negligence Cases,” infra in this part.
seem easily determined. The courts' treatment of those cases—involving, for instance, two consecutive fires burning over the plaintiff's property—indicates that the purpose of the speculative inquiry is to achieve a solution to the problem of the extent of liability that will avoid a windfall to the plaintiff at defendant's expense. The same idea is present in the darting-out cases.

Thus, the purpose of the speculative inquiry into the results of the driver's not being negligent is to decide whether and to what quantitative extent liability would work a windfall. Windfall concerns a policy argument directed to the issue whether liability is an appropriate sanction for the speeding in the particular circumstances being litigated. The operational criteria of its validity will concern its persuasiveness for that purpose. The validity of the argument must be evaluated as that of any other. Evaluation requires that the argument be stated in appropriate, unambiguous, and hence, noncausal terms.

"Cause" in the proposition concerning whether the negligence caused the injury in the darting-out cases has for its content the idea whether recovery would work a windfall. An empirical warrant for this exists in the way people think about situations of which darting-out cases are one example. These situations are two-party competitions over a specific fund (the injury) in which to the extent one competitor gains the other loses and in which the winner takes all (or pays nothing) unless some quantitative division of the fund may be rationally achieved. Windfall is one of a number of ideas that lie deep in the core of our thinking about sanctions and fairness in competitive situations and which are often invoked by causal discussions. Identification of such ideas is important for two distinct issues, alluded to above, that are often indiscriminately intermingled. One is the distribution-oriented, after-the-fact adjudication of whether in the circumstances liability is an appropriate sanction for the defendant's wrongdoing. The other is the determination whether defendant's involvement in the injury justifies subjecting him to the negligence rules of conduct.

Part II includes an attempt to describe a general model of the concept of windfall. Windfalls may involve not only the competition of the parties with each other, but also the competition of each with third persons. In analyzing any of these competitions, further ideas about competitive fairness, again often invoked by the language of causation, appear to be relevant ingredients. Thus, the windfall model also shows how deep in our thinking and how multi-leveled are our ideas of sanctions and competitive fairness. It illustrates the complexity in range and meaning of the language of causation in this connection and thus helps also to account for the ubiquity of causal language in the cases.
Part III of this Article considers the implications of the windfall concept in the substantive solution of the issue of sanctioning wrongdoing with liability in the darting-out cases. The competitive positions of the parties in relation to each other and to third persons involve analysis of such considerations as the extent to which the victim is treated as having "brought the injury on himself," the social policies underlying the rule against the driver's speeding, the seriousness of his particular breach, and certain of his resources and related wrongful behavior. Such considerations guide the assignment of the entire loss to one or the other party when no quantitative division is rationally permissible.

These considerations may, however, also facilitate a rational division of the loss. They may provide the necessary guidance, otherwise lacking according to the analysis in part II, for estimating the probabilities of validity of the relevant speculative statements. Embedded in the concept of windfall is the idea that a quantitative division of the fund in competition is desirable, and the purpose of those estimates of the probabilities is thus to afford a rational quantitative criterion for that division. However, if the judicial terminology of causation is adhered to, the desirability of a quantitative solution is obscured, because other meanings of "cause" import into our thinking a misleading "either/or" quality of supposed factuality: either the negligence was "the cause" of injury, in which case there is full liability, or it was not, in which case there is none.

The above considerations in evaluating the parties' competitive positions tend to recapitulate, within the narrow framework of the windfall argument on the issue of sanctioning wrongdoing, matters that bear on larger issues of plaintiff's fault and of what constitutes negligence. Other examples of multiplicity of uses of any one idea appear in this Article and illustrate the complexity of our thinking in negligence cases. For instance, simple ideas of competitive fairness that may be decisive in one fact situation appear in another only as ingredients in a more complex idea of competitive fairness, such as that of windfall.

Although this Article may illustrate the complexity of our thinking, it does not propose a general theory of negligence law. Nor does it purport to analyze the substance of every competing consideration, in addition to that of windfall, involved in deciding whether to sanction the driver's wrongdoing with liability. It does attempt, with the analysis of one causal argument, to throw some light on what is entailed in rational adjudication. This study is not a description of what the courts explicitly

---

4 This is not to say that the resolution of the issue is determined by deciding what are the risks by reason of the prospect of which defendant is considered to be negligent. See section II, D, 1, "Causal Arguments and the Reasons Why Defendant Is Considered Negligent," infra in this part.
say or do, but it is empirically based in that it attempts, within a framework of holdings, accepted law, and the ways people think on reflection, to analyze the least that people might be persuaded to say is rationally involved in one windfall argument. If it is a normative study, apart from urging agreement with its analysis, it purports to be so only in the sense that it attempts to identify unstated operative factors in decision, to find the implications and rationales of stated and unstated factors, and to express preference for one or another argument in the analysis.

I

GIVING CONTENT TO CAUSAL LANGUAGE

The following discussion begins with the argument that "cause" is used in a variety of contexts in a negligence case and that none of its uses should be assumed to be meaningless. The very facts of usage are important in identifying the substance of the legal arguments in the context of which "cause" appears. However, the substance of those legal arguments cannot be adequately understood in simple causal language. Rather, the criteria which would determine for any legal purpose that some "causal relationship" existed would themselves have to be put in noncausal terms. The discussion concludes with an attempt to suggest the methodology and criteria by which the meaning of "cause" can be adequately understood for purposes of negligence law. The methodology and criteria lead to highly particularistic meanings of "cause."

A. Importance of Causal Usage

Much of the confusion surrounding judicial treatment of "proximate cause" questions in negligence cases has been attributed to unreflecting use of the language of causation.5 Probably the most direct effort to impose order has been to insist that the principal problem discussed in terms of "proximate cause" is that of limiting liability "once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury."6 This "is not a question of causation" but is solely a matter of "legal policy," which has no "connection with questions of causation at all."7 The essential substance of this position, which is Prosser's, may be paraphrased by saying that most "proximate cause" cases are united analytically in that they turn on the court's exercise of its function of adjudging the scope of legal protection between particular

7 Id. § 41, at 241.
competing parties; that at least many of the cases can be categorized by groups, each clustered around a policy argument common to and important in the cases in the group; and that particularistic evaluation of these distinct central policy arguments in terms explicitly relevant to each is required.\footnote{See id. § 49.} Green's position, which has concentrated more on the process of exercising that adjudicative function than on identifying clusters of cases, nevertheless seems in basic accord.\footnote{Green, Rationale of Proximate Cause (1927). Cf. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 32, reprinted in Prosser, Selected Topics on the Law of Torts 191, 241-42 (1953).}

The essential substance of Prosser's and Green's theme appears unquestionably sound. However, it is clear that Prosser's assertion that "causation is a fact"\footnote{PROSSER, TORTS § 41, at 241 (3d ed. 1964).} and his definitive distinction between that and policies which in no sense concern "causation" presuppose a single meaning of "causation." "Cause" in his sense is to be understood as requiring a character of ascertainable factuality, along the lines of statements identifying defendant's historical participation in events or instancing the relationship of events in accordance with the hypotheses of science.\footnote{Id. §§ 41, 49; Green, op. cit. supra note 9.} Difficulty arises because people generally and the courts in particular do not use "cause" only in Prosser's sense.

The language of causation is enormously varied. We speak of "causes" over a spectrum of meanings and for a variety of purposes, including those concerning the relationships of events in accordance with the hypotheses of science (smoking "causes" cancer; the impact of a moving billiard ball on a stationary one "causes" the latter to move); the historical involvement of an individual or thing in an event (the want of a nail "caused" the kingdom to fall);\footnote{Each statement in the chain in the account of the loss of the kingdom has the same, historical characteristic. At what point in the chain the inquiry should terminate depends on the purposes of the inquiry, rather than on the definition of sufficient condition, or "cause" in this historical sense. See text accompanying notes 75-77 infra.} the manipulative or economic power of an individual over things or events (he "caused" the car to swerve, his bank to issue the check, his employee to work); appraisals of the role of conduct in events (his drinking "caused" their divorce); assessments of responsibility in an economic sense (an owner is "a cause" of injuries suffered on his property) or as between individuals (the murderer, not the negligent seller of the weapon, is "the cause" of the murder); the existence of a reason or justification ("probable cause"; "just cause" for firing; "cause of action"). The spectrum could be extended and the distinctions greatly
refined. Even if the purpose were solely to reform usage, it would probably be too much to expect agreement on an exclusive concept of causation.

The difficulties become significant when one considers the effects of disregarding actual usage of "cause." Not all policies are broad social ones. Perhaps the most prevalent arguments in "proximate cause" cases concern fairness between the immediate parties reflecting either their economic competition to avoid the loss or the independent claims of each to be treated justly.13 These arguments are commonly, often unconsciously, put in causal language.14 They may constitute the central arguments that define some of Prosser's categories of "proximate cause" cases. To identify these arguments and evaluate them in unambiguously relevant language, it seems necessary to determine in what sense they do involve "causation." That people talk and write about these arguments in causal terms may be the most important clue to their content and to their eventual explicit identification and formulation.

If arguments of competitive fairness between the parties can be identified, they can be formulated and evaluated in noncausal terms. Reliance on causal language is undesirable because of the ambiguity traceable to the variety of its referents. Reliance on causal language is undesirable also because it encourages reliance on unanalyzed reactions in the nature of intuitions or instincts. Many arguments of competitive fairness turn out to be based on deeply ingrained, felt reactions to the ways injuries come about.15 When such reactions are identified and formulated as arguments, at least some are unpersuasive and can be discarded. Hence, a willingness to explore the facts of usage of "cause" can lead to a fuller recognition of the policies involved in the cases and also reduce reliance on ambiguous and obscuring causal language.

Neglect of actual usage may not be harmful to great writers such as Prosser and Green, whose sense of the right decision is striking and sure. But neglect of usage may account for the failure of the cases to explain the content and relevance of policies based on competitive fairness.

13 Such considerations are central also in cases of contractors' duties to third persons, necessity as a justification for inflicting harm, assumption of risk, last clear chance, and others.
B. Inadequacy of Causal Usage as a Criterion of Liability

1. The Hart and Honoré Thesis

Some commentators have characterized Prosser's position as being that discussions of causation are usually meaningless facades for the unstated operation of policy (usually assumed to be of a social or economic sort) and have characterized Green's position as being essentially an irreducible reliance on intuition. Hart and Honoré, in their study of causation in the law, argue that causal discussions are neither camouflage for social policies nor vehicles for nonprincipled intuitions. Their argument is made by attempting to demonstrate the existence of "common-sense notions of causation" that are held by "ordinary," "plain" men. Not only the language of courts but their thought have been dominated by one or by the other of the group of causal concepts that enter into the structure of ordinary non-legal thought expressed in causal terms.

Certainly, common habits of thinking will find their way into crucial legal language. The obligation to decide cases, concretely and conclusively, in addition to practical pressures of time and workload, brings enormous pressure to bear on the language required either to frame reasons for concrete results or to avoid giving reasons when that seems demanded. Appellate opinions and trial court instructions and rulings, and the arguments of counsel, must be comprehensible, persuasive, and readily forthcoming, although their subject may call for prolonged and refreshing analysis. In these circumstances, the common language of causation may evoke vague feelings of fairness that seem relevant. The language appears to convey a professional gloss and has the supposed virtue of suggesting something dispositive: The harm either was or was not "caused by negligence." In such circumstances, it may be abused into service as the best we have. Moreover, the disinterested sources of values underlying the judges' reasons may include reference to views of the community, and those views are expressed in the community's language.

The presence and seeming vagaries of lay ideas of causation are grounds enough to attempt to reduce the language of causation in the cases to values and policies or arguments which could be stated and evaluated in noncausal terms. However, Hart and Honoré appear to

17 Hart & Honoré 1.
18 Id. at 4.
take a different view. So far as relevant here and to the extent any terse account of their sophisticated study can avoid being Procrustean, their thesis seems to be as follows: The causal language found in the cases is meaningful; it is part of some of the concepts referred to by the language that he who "caused" the loss is (or is not) responsible for it. If one would conclude that a causal relationship exists in an appropriate sense of "cause," there is liability. Since "cause" adequately denotes the concepts that operate to attribute responsibility to pay for a loss, the legal question of liability can be adequately discussed in causal language. Thus, how the word "cause" is in fact used as a conclusion is a criterion of liability.20

The most likely reading of the Hart and Honoré thesis is that the conclusional usage of "cause" to denote concepts that operate to decide liability is that of the legal profession. This usage may reflect extra-legal thought, but the test is whether the judge would conclude that the negligent conduct "caused" the injury in an appropriate sense. If he would, the issue of liability is decided against the defendant.21

20 The sections of the book of concern in this Article are chs. I-X, XV.

"Cause" is used in connection with more than one issue in a negligence case. Although the authors do not adequately distinguish between the issues, see HART & Honoré 80, chs. V and VII, 208, their thesis may fairly be regarded as concerned with the issue whether, in all the circumstances, liability for the injury is an appropriate sanction for the wrongdoing. For purposes of the present discussion of their study, it will be an appropriate ellipsis to refer to this as the issue of "liability." Any distortion in conveying the sense of the thesis will be minimized if the term "negligent conduct" is used as the subject of the authors' verb "cause" and if "the defendant" is the subject where "responsible" is their predicate, as in the text accompanying notes 24 to 27 infra.

21 An alternative means of treating usage as a criterion of liability would be to try the question whether people have been using "the cause," or, would so use it if asked, to characterize wrongdoing in fact situations not distinguishable from the one in litigation. Determining usage through the adversary process would be unwise. Trial and argument about what kinds of evidence to show usage by what class of people under what conditions of talking and in what degree of detailed analogy to the case at bar would add a harmful dimension to litigation. Usage could be determined by simply asking the jury whether it would conclude that the negligent conduct caused the injury. Typically, if the substantive law refers to the jury's or the community's conclusional characterizations, the courts explicitly so describe it. E.g., Posusta v. United States, 285 F.2d 533 (2d Cir. 1961) (good moral character); In re Harris, 56 Cal. 2d 879, 366 P.2d 305, 16 Cal. Rptr. 839 (1961) (obscenity). In jurisdictions in which "proximate cause" is said to be for the jury, the instructions, although perhaps approaching incomprehensibility, do not appear to say that the law is to be determined by reference to whether the jury or the community would conclude that the negligent conduct caused the injury. See BAY, CALIFORNIA JURY INSTRUCTIONS—CIVIL 104—104, E, 1 (1956 and Supp. 1964). Although the question is put to the jury in causal language, it is not resolved in causal terms, according to the argument that follows in the text (which refers to the judge's usage but would be equally applicable to the jury's).

Courts are unlikely to find it desirable to abandon control of the issue of liability to common, lay usage. Doing so would restrict the application of new social policies in the development of solutions to the issue. Lay solutions to the problems of the social sciences are often notoriously inaccurate.
support of the thesis, the authors construct an extensive catalog of cases, essentially in terms of distinctions in the historical facts of the injury's occurrence and in how they would be characterized in causal terms. The evidence of usage in this catalog of cases is what the courts, not others, have said. When the authors refer to examples of ordinary usage, the context is usually that of a litigated situation. The authors do not often resort to noncausal reasons to explain why distinctions in the historical facts make a difference in legal results on the issue of liability. Sometimes they not only describe but also seem to urge that liability ought to be decided in accordance with conclusional causal statements. In other words, their purpose is to demonstrate that liability is decided in accordance with the courts' conclusions whether the negligent conduct "caused" the injury. The courts' conclusions only refer to and correspond with factual patterns of the defendant's historical role in bringing about the injury.

The following critique of this thesis attempts to show that, although legal uses of "cause" are not meaningless, the meaning of "cause" varies and can be adequately understood in legal analysis only if it is reduced to noncausal terms. If it is true that some uses of "cause" denote concepts that operate in our thinking to attribute responsibility for losses, then the criteria by which we determine when we would state a causal conclusion denoting such a concept must themselves be put in noncausal terms. The objection, therefore, is both that it is unlikely that such concepts are adequately described in causal language and that the cases should not be decided on such conclusional bases.

It may be conceded, arguendo, that such terms as "proximate cause" are not self-consciously specialized terms of art and that the origins of judicial conclusions that appropriate causal relationships exist can be found in the common, extralegal structure of thought. Hart and Honoré describe three causal patterns at the base of that structure: causing in the sense of what "initiates a series of physical events" (physical cause), in the sense of "providing another with a reason for doing something" (inducing or enticing), and in the sense of "provision of an opportunity, commonly exploited for good or ill" (occasioning). Each of these covers a variety of fact situations that are examples of the historical facts of the defendant's involvement in the injury. It is clear that these are uses of "cause" to describe history.

However, the spectrum of uses of "cause" suggested above in discussing the need to take account of the facts of usage describes a set

---

22 Hart & Honoré 166, ch. IX.
23 Id. at 2.
24 See text following note 11 supra.
of functions that cuts across these patterns of historical involvements. “Cause” is used for many purposes other than to describe history. For instance, if we want to assess responsibility for some consequence as between individuals, there is no necessary correlation between concluding that an individual is a responsible “cause” and concluding which sort of historical “cause” he may be. Every plaintiff is a physical cause of his personal injuries, but many cases can be found which conclude he is not “the cause” of the injury for purposes of assigning responsibility.25 In some cases defendant clearly enticed the plaintiff to act to his injury but is said not to be the responsible “cause,” and, in others, defendant’s enticement of the plaintiff is the historical ingredient that renders him liable.26 In some cases defendant’s conduct occasions the injury but for purposes of liability is said to be a “condition” and not a “cause,” while in others it is held to have responsibly “caused” the injury.27

Somehow, these independent types of uses of “cause”—its historical uses and its functional uses, one of which assesses responsibility28—must be coordinated. For Hart and Honoré, that seems to be the office of certain of our ordinary, common sense causal concepts, in the sense of which a conclusion that the defendant’s negligent conduct caused the injury is a conclusion of his historical involvement and his responsibility. Some instances of any of the three core causal patterns embody such concepts that operate to attribute responsibility, and their presence would be the usual basis of liability. The authors’ causal concepts also limit liability. If the conjunction of the defendant’s historical involvement with a later event would be characterized as “abnormal” or “coincidental” in bringing about the injury, there is no responsibility. The voluntary action of a third person in the historical pattern of bringing about the injury also may support the conclusion that the negligent conduct was not a “cause” and it relieves the defendant of responsibility.

26 Compare, e.g., Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959), with, e.g., Louisville & N.R.R. v. Anderson, 39 F.2d 403 (5th Cir. 1930). The cases cited in this and in many other footnotes in this Article can be found in Prosser & Smith, Cases on Torts (3d ed. 1962). The cases have been used because of their excellence as examples, and to maximize whatever utility this Article may have for law students.
28 Assessment of responsibility is itself a generalized characterization of several, usefully separable functions of “cause”; responsibility may be assessed for nonlegal or legal purposes, and for different purposes within the legal framework. See sections II, B, 3, “Quality of Involvement and the Rules of Conduct,” and II, D, “Relationship of Wrongdoing to Injury,” infra in this part.
Some reviewers have doubted the accuracy of the authors' identification of these concepts. It is enough for present purposes to point out that abnormality and voluntary intervention are simply additional descriptions of variations in the historical patterns of how injuries come about. Being further historical uses of "cause," they do not coordinate the independent historical and functional uses of the term. They give no principled, legally useful explanation for deciding that historical abnormalities or intervening volunteers affect judgments of economic responsibility.

This objection can be put in terms of the authors' failure to describe or provide criteria for deciding whether any causal conclusion attributing responsibility is a proper use of "cause" for that purpose. The criteria on which one concludes that an historical involvement is abnormal or interrupted by voluntary intervention would decide the issue of liability. Within the categories of physically causing, inducing, and occasioning are a great variety of shadings. Applicable in each of those categories is a variety of the principal concepts that are supposed to preclude liability: abnormalities and voluntary interventions. We may be more willing to hold the physically causing defendant in spite of an intervention or abnormality than we would be willing to hold an occasioning defendant in spite of either. The possible combinations are numerous. In order to conclude which combinations are appropriate "causes," great control must be exercised over the criteria for so concluding. Any control introduced by simply referring to the special historical facts of how the injury came about is inadequate; the argument might quickly reduce to simple assertions that, in view of one or another factual detail, a "cause" was or was not present. Ordinary concepts of thought that attribute responsibility on the basis of distinctions between historical causal patterns, and do so in purely causal terms, would have to be more finely honed and well-established than they are to serve the serious purposes of adjudication.

Hart and Honoré provide an inadequate basis for reasoned, principled argument in a lawsuit that the defendant's negligent conduct is a cause. Counsel and the court must assert in conclusional terms that, in view of the historical events being litigated, defendant is or is not a responsible cause. They can also refer to the equally conclusional statements of other courts in similar fact situations. That historical patterns are

---

30 See section II, B, 3(a), "Qualitative Degrees of Causal Involvement," infra in this part.
not adequate for these purposes is suggested by the authors' apparent concession that sometimes the courts' analysis of liability in terms of "risk" rather than "cause" may be appropriate. Little indication is given of criteria that would guide choice between these seemingly competing irreducible solvents. Similarly, the study takes little account of that variety of economic and social factors that do influence the decision of liability. Indication of what criteria might guide the interplay of such factors with historical causal ones is needed if decision is not to appear idiosyncratic.

These objections are not to deprecate the achievements of the Hart and Honoré study. The study illuminates basic patterns of historical causal involvements and shows that discussion of defendant's involvement as a sufficient condition of injury does not dispose of all causal concepts meaningfully employed in decision of the further issue of liability. It shows some correlations between the decision of that issue and usage of "cause," which is an important step toward analysis of the reasons underlying "causal" judgments that liability is or is not an appropriate sanction in the circumstances. The objection is that legal analysis does not stop with the facts of such correlations. What lies at the bottom of this objection is that, in not recognizing that causal concepts meaningfully comprise reasons that need not be put in irreducible causal terms, the study underestimates the purposive nature of legal language.

2. The Purposive Nature of Legal Language

The purposive nature of legal language, and in particular of "cause" in negligence litigation, may be illustrated first by considering the difference between the demands made on language by ordinary conversation and those made by the litigation process. Plain men do not discuss causation, even regarding competitive situations and even to make lay assessments of responsibility, to decide concretely and systematically questions of economic liability. Ordinary conversation about causes may acceptably be moot, vague, and moralistic.

In contrast, the purpose of causal language in negligence litigation—even when used by the jury—is peculiarly serious. It is a tool used in making a binding allocation of a specific loss between competing parties. The allocation is made in specialized conditions of inquiry and in a relatively controlled environment of rules and practice. The needs of

---

legal language are for precision or controlled ambiguity, persuasion, and susceptibility to argument. The unique and pressing demands of concrete decision and its rationalization strongly suggest that language will be distorted from its meanings in contexts where it need not respond to such pressure. Legal causal language need not be self-consciously artful; even if response to pressure is groping, it remains an attempt to say something especially fashioned to the needs of decision. These results are reinforced because the context of legal language is that of an ongoing, distinct profession.

Legal decisions themselves serve purposes, and therefore the immediate desirability of holdings and their long-range effects—in addition to the fact of decision-making itself and the needs of adjudicative procedure—will affect the content of legal language. Accordingly, if the usage of language itself were to be decisive of some legal matters, the criteria on which one decides to use that language will reflect choices made in view of the desirability and effects of decisions, as well as the needs of the decisional function itself. Such choices inevitably depend on considerations of legal policy that are themselves not matters of usage of "cause." Hence, meaningful analysis simply of the facts and role of usage requires at least a description of its policy determinants.

In summary, "cause" is used in negligence cases to refer to more than the defendant's involvement in the injury as an instance of historical participation in events. That "cause" is used otherwise is relevant to substantive analysis of all issues in the context of which it is used. However, demonstration of the facts of how legal uses of "cause" correlate with the decision of cases or issues does not demonstrate an analytic criterion for decision, either in the form of usage or in the form of descriptions of how injuries come about. "Cause" as used in negligence cases can be adequately understood only (i) if each use is specifically distinguished in accordance with its legal purpose; (ii) if one aspect of the definition of any use is to refer to the criteria by which it is validated for that legal purpose, which are by definition not put in causal terms; and (iii) if the content of the use is described in terms that exclude other uses of "cause."

33 Dramatic illustrations often occur in cases of statutory construction. See, e.g., 28 Ops. Cal. Att'y Gen. 253 (1956) ("two" includes four).

34 If the issue of usage were to be tried, see note 21 supra, policy choices defining the specific usage and kinds of evidence that would be relevant and assigning the risk of non-persuasion would often in practice determine the matter. If the jury is to decide the issue in accordance with its or the community's conclusional characterizations in causal language, the jury's conclusions will presumably reflect the pressures imposed by the decisional function and the purposes served by the particular decision. Cf. H. M. Hart, Jr. & Sacks, The Legal Process 1156, 1173 (tent. ed. 1958).
C. Defining and Distinguishing Legal Uses of "Cause"

1. Functional-Operational Distinctions

Functional definition of causal propositions is peculiarly appropriate for analyzing negligence concepts, since negligence law is mainly the product of litigation. Adjudication entails the acceptance or rejection of propositions offered to achieve particular ends with respect to specific issues. The legal truth, validity, or persuasiveness of discourse can be determined by reference to the use the adjudicator has made of the proposition. Its legal content can be constructed in part from the purpose it serves for the court or party putting it forward. The same causal language may mean different things when directed toward different issues or functions in the lawsuit. Two functions that must be performed in negligence cases and on which "cause" bears have created the most difficulty. They are often indiscriminately confused under the heading "proximate cause." One function is to show that the particular defendant had "something to do" with the injury sued on and that his involvement justifies subjecting him to a system of rules of conduct and litigation under which he may have to pay the full loss. The other is to show that, in view of the way the particular injury came about, it is appropriate to make the defendant pay for his breach.

More than one causal proposition may concern either of these, or other, functions, and identification of causal meanings must involve reference to additional criteria that permit distinction of propositions within one function. To be useful, these criteria cannot be literally in terms of "cause." Operational characterizations meet these needs. A concept would be operationally characterized by referring to the methods by which the validity of a proposition using it is established. These methods include how one goes about proving or establishing the causal proposition, who determines whether the proposition is valid, by what criteria the determination is made, and the degree of independence of these matters from the institutional context of litigation. For differing

35 The character of legal language the context of which is not immediately that of litigation or settlement with an eye to litigation, for instance, some aspects of the language of contract and commercial planning, may well be different.

The adversary and case-by-case processes of negligence law may help confuse as well as clarify causation discourse. Thus, construction of a supposed doctrine or rule of law growing out of the recurrence in the cases of issues concerning some meaning of "cause" may become a misleading end in itself. See Green, THE RATIONALE OF PROXIMATE CAUSE 143 n.11 (1927). In disposing of cases, the court or the parties may cite causal propositions from an earlier case on one issue to support a result on a different issue.

36 The term is suggested by Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60, 66 (1956).

functions of causation there will be differences in the methods by which the validity of the causal proposition is established, each tailored to the function in question.

2. Primary Content

There is normally no need for self-conscious methodology to ascertain what for convenience will be called the “primary content” of a causal proposition. We usually understand readily enough whether the speaker is using “cause” in the sense of the relationship of events in accordance with the hypotheses of science, the historical involvement of an individual in an event, the power of an individual over things or events, or any of the other meanings of “cause” within the spectrum of its literal meanings. Difficulties sometimes arise, however, especially in connection with the use of “cause” to assess responsibility, as, for instance, in a court’s saying that an “act of God,” and not the defendant’s negligence, was “the cause” of an injury. “Cause” in such an example appears to be an attempt to refer to certain reasons or arguments that are thought to justify the assignment of responsibility to one of the competing parties or forces historically involved in an event.

This last observation would be established in a process of theorizing and informal verification commonplace in legal reasoning. The process for determining what those underlying reasons or arguments includes attempts to extrapolate generalizations that harmonize or distinguish a series of related decisions; to verify the rationalization by whether others accede to it and by whether it is consistent with what people do in analogous, often extrajudicial, contexts; and to confirm the rationalization by whether it is consistent with acceptable construction of the language used in opinions. Determining what the underlying reasons or arguments may be exposes the operating factors in the causal conclusions of responsibility and permits evaluation in relevant noncausal language.

The determination of primary content is of course facilitated by reference to the legal function of the causal proposition in question. Ordinarily, lawyers have little difficulty knowing to what issue a proposition is directed. Where there is a confusion of issues or functions, it sometimes results from oversight of what might not seem like evidence of meaning. An important example is the ambiguity resulting from the apparently unconscious habit in the literature and cases of treating as interchangeable in theory the nouns “the defendant” or his “conduct”

38 See text following note 11 supra.
on the one hand and his “negligence” on the other as subjects of the predicate “cause in fact” of injury. The choice between those subject nouns in a decisional context is often not accidental but instead may be an almost instinctive choice that has significant bearing on the meaning of “cause” for the purposes of legal theory. To be concerned with whether “the defendant” or his “conduct” “caused” an injury is usually to consider whether his involvement justifies subjecting him to the system of rules for allocating the loss. To be concerned with whether the defendant’s “negligence” “caused” the injury is usually to consider whether, in the circumstances of how the injury came about, liability is an appropriate sanction for his breach of a rule of conduct.

3. The Special Problem of Competitive Causal Policies

The word “cause” is sometimes used as a conclusion assessing responsibility for an injurious event. An informal empirical process of theorizing and verification confirms that the primary content of “cause” in such cases often comprises reasons or arguments for concluding that there is economic responsibility for the loss. Perhaps some of the “common sense causal notions” of the Hart and Honoré thesis could be shown to be uses of “cause” in this sense. However, if any such notions are to serve as tools of legal analysis, they must be reduced to noncausal terms, not only to render them relatively unambiguous but also to give some reasoned grounds for arguing and concluding that the defendant is or is not a responsible “cause.” If conclusional causal propositions are not reduced to their underlying noncausal contents, they are not useful in terms of their legal functions. They may be validated as history, but there is no way to validate them as propositions directed toward the legal functions in deciding liability.

It may be helpful to illustrate in cursory fashion the kind of content contemplated in this Article for causal reasons for assessing economic responsibility. They will be referred to as “competitive causal policies.” Probably, the early origins of some competitive causal policies, especially the most unpersuasive ones, lie in the primitive psyche’s conception of the role of will in accomplishing manipulative or physical

40 See notes 80, 133 infra. A good example is the influential article by J. Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 223, 303 (1911). The indiscriminate shifting between the “wrongdoer” or his “conduct” as being “a cause” and “the tort” or “the tortious conduct” as “the cause” that recurs therein may account for the difficulty of recognizing whether Smith was in effect analyzing only the first issue to be mentioned in the text above, concerning the adequacy of the defendant’s involvement in the injury. See Gregory, Proximate Cause in Negligence—A Retreat from “Rationalization,” 5 U. CHI. L. REV. 36, 58-61 (1938).

41 See note 133 infra.
change. Thus, there may be no economic responsibility if an "act of God" was a substantial factor in the injury; or if the injury occurred in a manner that suggests that the defendant's involvement was random in that similar injuries happen in circumstances in which no one is liable; or where the injury came about with remarkable peculiarity, or the chances of injury, viewed after the defendant's conduct, appeared to terminate, so as to suggest some abnormality in events. Similarly, perhaps a man is not "accountable for" another man's willful wrongdoing. Simplistic responses may be less animistic and hence less decisively against liability: "the man who 'starts something' should be responsible for what he has started" ("active negligence"); one who entices the plaintiff into the injurious conduct is more responsible than if his causal role seemed indifferent. The rich, moralistic language of causation is an obvious vehicle for groping toward the content of such evaluative, competitive notions generated by the way injuries come about.

At a more complex conceptual level, arguments can be found clustered around the primitive notion of just deserts in "no one shall profit by his own wrongdoing." Other evaluative generalizations concerning types of competitive situations, which appear more sophisticated than this last and which, like it, do not ordinarily find commonplace expression in causal terms, include those clustering around the idea that a man cannot aggressively impose his abnormal sensitivity on the community by forcing others to curtail conduct to protect it. Another

---

47 McLaughlin, Proximate Cause, 39 Harv. L. Rev. 149, 164 (1925).
48 Cf. Best v. District of Columbia, 291 U.S. 411 (1934) (attraction of child trespasser on to property by the injuring agency); Erie R.R. v. Stewart, 40 F.2d 855 (6th Cir.), cert. denied, 282 U.S. 843 (1930) (watchman present on all other occasions of danger); Louisville & N.R.R. v. Anderson, 39 F.2d 403 (5th Cir. 1930) (property deceptively appearing to be on public way); Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948) (misleading assurance to driver that automobile was repaired).
50 Cf. Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888) (abnormal sensitivity to sound
example is that the man who chooses to adopt certain forms of activity associated with others who are subject to special obligations and who benefits from successfully exercising those forms has "bargained for" liability to the special obligations. Another is that one who for his own good faith purposes singles out another and inflicts harm has "bargained for" liability to his innocent victim for the value of the advantages as measured by the harm.

These last policies are mentioned although they are not ordinarily put in causal terms, for they illustrate that causal involvement between the parties is only one mode in which their competitive equities are understood. Their competitive relationship to an injury is also viewed in contract-like terms. The essence of any of these policies is that they are about competitive relationships, a common example of which is the defendant's historical relationship to the plaintiff's injury. Such


Such a concept seems relevant to Negro "sit-in" cases. For instance, on the facts of Bouie v. City of Columbia, 84 Sup. Ct. 1697 (1964); Barr v. City of Columbia, 84 Sup. Ct. 1734 (1964); or Griffin v. Maryland, 84 Sup. Ct. 1770 (1964), the owner's property interests are weak. He will serve Negroes in all but a selected area of his establishment, such as its lunch counter, or he will serve other minorities. Judged by national standards at least, his selectivity is abnormal, and it forces Negroes to be unusually careful in their routine public conduct. To afford the property owner an aggressive remedy in tort, or the state a criminal remedy, against Negroes who disregard his selectivity by seeking only those services of the owner that are available to others without question is contrary to the generalized idea that the property owner cannot force the community to curtail its ordinary conduct to protect his unusual sensitivity. For the state court to afford such remedies may therefore appear to be an alliance with the property owner's interest that is discriminatory and, hence, a violation of the 14th amendment.


policies, as perhaps. Hart and Honoré in effect confirm, typically arise as responses to the patterns of the ways injuries come about.

Not only the parties' historical relationship in bringing about the injury is competitive. By being opposed in the litigation, they compete in a second sense. Thus, competitive causal policies also invoke deeply ingrained attitudes toward sanctions. In particular, they involve considerations of fairness in imposing a sanction on one competitor at the request of the other. The appropriateness of the requested sanction will reflect the competitive advantages or disadvantages between the parties that are suggested by their roles in bringing about the loss. It will also reflect the extent to which the sanction seems to promote one competitor unfairly at the other's expense. Competitive causal policies are neutral, evaluative generalizations about fairness in competitive fact situations in which the economic consequences of the event must be borne by someone and will be forcibly assigned to him.

Competitive causal policies may refer to any competitive situation, of which lawsuits over losses are only an important type. They are a part of both our ordinary, extralegal thinking and our legal thought. They are used in a complex of ways. They bear differently on different issues in negligence cases. In other contexts or where sanctions other than tort damages are sought, they may develop into hardened legal doctrines, such as estoppel or quantum valebat. Some of these policies—such as those referring to the active creation of risks or to conduct that misleads the plaintiff to injury—could be restated in simpler terms of the risk-making quality of conduct. As such, they might be better understood functionally as part of the determination of what constitutes negligent conduct or of what protection is contemplated by a rule of conduct. After all, "patterns of the ways injuries come about" may sometimes be only another way of referring to the foreseeability of injury. Nevertheless, some responses even to these simple patterns of risk-making conduct do seem to take on intellectual autonomy as generalizations about fairness, and they do help to explain some legal distinctions that are not adequately explained only by reference to the riskiness of defendant's conduct.

The generalizations illustrated above are only the crude core of the suggested concepts. In order to identify and evaluate them adequately,


54 There is thus a sense in which the "responsibility" is charged to third forces, such as those of nature, in some cases where the victim pays the loss.

55 See, especially, section II, B, 3(a), "Qualitative Degrees of Causal Involvement," infra in this part.
they must be analyzed in their detailed applications within the legal process. In that analysis, lay usage of such generalizations will surely prove too imprecise and malleable to be a criterion for the sober purposes of legal decision. Nor can the legal validity of competitive causal policies be determined by historical or scientific findings concerning the external events of how the injury came about. These policies are not susceptible to characterization as true or false, and they are dispositive or weighty in a legal issue and in competition with other arguments only to the extent their merits commend them.

II

SURVEY OF USES OF “CAUSE” IN NEGLIGENCE CASES

The purpose of the following discussion is to give meaning to the above observations on defining and distinguishing legal uses of “cause” by offering a few summary illustrations. It also provides a framework for analysis of causal arguments that appear in negligence law, and it will facilitate the isolation of the one use of “cause” to be explored in detail in parts II and III.

To illustrate uses of “cause” in negligence cases requires an outline of major functions that must be performed in determining liability. One function is to decide whether the plaintiff’s injured interest is legally protectible. Here, propositions that may be called matters of cause “in fact” are used as reasons in making a judgment of legal policy. A second function is that of deciding whether the defendant’s involvement in the injury justifies subjecting him to rules of conduct and of litigation under which he may be forced to bear its full cost. Several types of causal propositions are involved in this function, and their operational characteristics range from those that are relatively those of fact to some that are relatively those of moral judgments used in fashioning duties that reflect the quality of the defendant’s involvement.

A third function is to determine what constitutes a breach of duty. Here causal propositions in the form of predictions of injuries are relevant. Such predictions may be thought a species of statements of fact, although the probabilities of injury that they predict are low. The final function considered is that of adjudging whether liability is an appropriate sanction for wrongdoing in the particular circumstances litigated. Here also several types of causal propositions are ingredients in the exercise of judgment, including prominently causal propositions with the operational characteristics of evaluations of competitive relationships.
A. Reality of Injury

One function that must be performed in a negligence case is to decide whether the interest the plaintiff claims was injured is one protected by law. Cases in which the exercise of this function has turned on causal considerations include those in which the plaintiff's entire injury is insult, fright, shock, or other indefinite nervous symptoms or those in which shock and the like are claimed alone to have produced definite illnesses and disabilities. Skepticism concerning adequate proof in such cases has been important in the judicial development of rules governing recovery for nervous symptoms alone or for the more definite bodily effects of nervous shock.

Skepticism may involve causal propositions the primary contents of which include: whether the plaintiff did suffer the nervous symptoms in some unusual and measurable degree, whether some external stimulus was important in producing the symptoms, whether a particular kind of identified stimulus produced them, and by what somatic or psychical means nervous shock produced other physical symptoms. Each of these primary contents can be formulated into relevant propositions at three levels of generality: whether such things can happen, whether they did happen in the instant case, and to what extent they can be shown to have happened in the typical cases that are expected to raise similar claims.

The principal operational characteristics common to these propositions seem to raise little difficulty in practice. Their operational characteristics entitle them to be thought of as matters of fact. Although legal rules determine in part how the proposition shall be proved and who shall decide its validity, validity is largely independent of the litigation purpose of the inquiry (i.e., whether the interest is protectible). The propositions would be proved and believed on the same grounds whether in or out of litigation. These propositions concern the

---

58 See Restatement, Torts § 46, comment i (Supp. 1948).
CAUSE" IN NEGLIGENCE LAW

relationships of events in accordance with the hypotheses of natural science (e.g., can sudden noises cause nervous reactions?) or its predictions (with what reliability can that be typically shown?), or the application of those propositions of science, as shown by the historical evidence (did a certain noise cause these reactions?). Proof would therefore require affirmative data about independent, external events. Validity would depend on observation of data, prediction in its light, and verification or expected verification of predictions.

These factual characteristics of the causal propositions do not determine how the legal function should be performed, or, in other words, whether the interest is protectible. Failure of proof need only imply that no interest of the particular plaintiff has in fact been invaded; the type of interest asserted could still be held protectible. The function of deciding whether the type of interest is protectible is a matter relatively not of fact but of legal policy. A proposition deciding it is validated on different criteria, and its validity is heavily dependent on the immediate legal context and the purposes it serves. It is neither proved nor believed valid in accordance with the type processes of scientific or historical investigation. It is validated on criteria of judgment, which requires, among other things, a highly evaluative accommodation of the reliability of the causal predictive propositions, matters of judicial administration, and policies directed toward compensation and toward the defendant's wrongdoing.

The function of these relatively factual causal propositions is thus to serve as reasons bearing on a question of judgment. No one would think it accurate or useful to characterize or treat the conclusions of this judgmental function as propositions of fact, or of causation, simply because causal propositions of fact are taken account of in its exercise.

B. Basis of Duty

Another function that must be performed in a negligence case is to determine whether the defendant had "something to do" with the injury to the plaintiff's protectible interest and whether his involvement justifies subjecting him to the negligence rules of conduct and to suit. The rules of conduct and of suit governing the allocation of losses are such

---

62 For present purposes, the operational characteristics of predictions do not differ significantly from those of scientific hypotheses. The characteristics of predictions are suggested more fully in section II, D, 1, "Causal Arguments and the Reasons Why Defendant is Considered Negligent," infra in this part.

63 Operational characteristics of these propositions are detailed more fully in section II, B, 1, "Causation as Historical Involvement," infra in this part.

64 See, e.g., FLEMING, TORTS 34-37, 157-64 (2d ed. 1961).
that the loser is classically forced to bear the entire loss. The defendant's involvement in the injury must be sufficiently significant to subject him to the burdens of litigation and to the risks of losing a suit that, were it not for the court's deference to results within the jury's competence, it might be thought ideally he should win. More important, his involvement must be substantial enough to apply, retrospectively to him, rules of conduct stringent enough to govern those who are to be held for the full amounts of losses and which will be applied prospectively to those whose conduct places them in analogous situations. Of course, the defendant may not have violated any such rule of conduct. It is unnecessary to know that. To perform the present function, nothing need be said about negligence or whether the risk-making character of any of the defendant's activities was unreasonably high. The exercise of this function serves both the conduct-guiding, normative ends of negligence law and those concerned more with awarding compensation.

The traditional legal issue to which the present function corresponds is often referred to as embodying a simple requirement of "cause in fact." The following discussion shows that in resolving the issue several kinds of causal propositions may be involved. They serve different purposes. Their operational characteristics range from those of propositions that would be readily considered factual, to propositions that have characteristics that are less factual and more judgmental, to those that are usefully thought of only as evaluative and nonfactual. Accordingly, the discussion shows a variety of meanings of "cause" in one major function and indicates some limits of utility in using the language of "cause" and of "fact."

1. Causation as Historical Involvement

To say that the defendant is involved in the injury is ordinarily to say that "he caused it." Hart and Honoré have shown that the patterns of historical involvements of individuals in injuries forming primary contents of "cause" are susceptible to considerable factual distinction. But propositions describing any such pattern—including those of the authors' common sense notions that are said to operate to limit liability—share certain operational features that characterize them as being about matters of fact. A classic illustration of these features in a case in which the defendant's involvement is seriously questioned is a suit against a cigarette manufacturer for damages due to lung cancer.67

65 See note 40 supra.
66 E.g., 2 Harper & James, Torts § 20.2, at 1110 (1956).
For purposes of showing that the manufacturer is historically involved in the injury, the plaintiff must prove the validity of a generalization about what can happen in experience of the type "smoking causes lung cancer." In optimum conditions, this proposition is established by affirmative evidence, presumably in the form of statistical data, observations of experiments, and assessments of the data and results by qualified experimenters, looking toward a significant statistical association of variables. The validity of the proposition is presumably determined by such criteria as its simplicity, its utility in explaining the observable data and in predicting further events, the verification of data results so predicted, its utility in generating other useful and verifiable generalizations, and its coherence with other generalizations. These hypotheses of science exhibit minimal dependence on personal judgment and language choice.

Of course, scientific generalizations are not entirely independent of such human choices. All empirical matters may depend on the means of inquiring into them or of demonstrating their validity and on the judgmental standards for deciding validity that are imposed in the forum. This is true for the question whether smoking causes cancer in the laboratory. It is also true for whether smoking causes cancer in a law court, the validity of which depends additionally on the rules of evidence and the role of the trier. The question before the jury is not what they believe as experimental scientists, but rather which beliefs of the experimental scientists before them they believe. Still, that question is safely considered to be a matter of fact, and the jurors doubtless know that the reason to believe a scientist depends upon the case he has made on those criteria by which scientists judge the validity of empirical generalizations. These propositions are thus maximally independent of the litigation context. They would be proved and believed in the same way out of court and regardless of their function in the lawsuit.

Many similar generalizations (e.g., "collisions cause injuries") are assumed or proved in litigation without the help of scientists, but they all exhibit the same operational features, attested to by ordinary, rather than laboratory, experience. For such generalizations, the jury need not be instructed as to the meaning of "cause" or how the mind comes to form the concept. The operational meaning of this "cause" is known to the common man and the scientist from experience: valid causal generalizations are those that one is obliged to take account of or to ignore at his peril. One may sanely choose to smoke (because he enjoys it), but ap-

69 See ibid.
parently he may no longer sanely choose to believe that no risk is thereby incurred.

To connect the defendant with the injuries, the plaintiff must also prove that smoking occurred in this case and that it caused his particular cancer. These are both instances of historical particulars. The latter probably requires no additional proof beyond what is necessary to show that smoking of the plaintiff’s type causes cancer, for, in the present state of the art, to prove smoking causes cancer apparently excludes any competing, affirmative causal explanation of the same level of significance. Both the generalization and its historical instance are in effect probabilistic statements. With respect to smoking, there is presently presumably no ground for disregarding the probabilities that validate the generalization in applying it to the particular case.

Whatever may be the refinements of empiricism as applied to historical inquiry, for present purposes these historical propositions do not differ operationally from the generalizations in major respects. The very reason for proving general propositions of science is to permit inference of an historical particular. The latter assertions are the archetypal propositions of what may be called “fact” determined in litigation. They are, or can be made to be, relatively independent of value and linguistic choices and of the litigation context.

Any causal proposition the primary content of which describes the defendant’s historical involvement in the injury, including any instance of the causal patterns analyzed by Hart and Honoré, would share these operational characteristics of “matters of fact.” Normally, of course, they may be believed, often justifiably, on the basis of off-hand and informal processes, which, however, presuppose these operational features. Whether the defendant is historically involved is typically a

71 See cases cited note 67 supra. Proof would concern a specified sub-type of cancer. See U.S. PUB. HEALTH SERV., SMOKING AND HEALTH ch. 9 (1964). If the experts disagree, the jury’s belief of one presumably would operate to exclude the alternative explanations. Cf. Daly v. Bergstedt, 126 N.W.2d 242 (Minn. 1964) (trauma caused breast cancer). The jury’s remaining doubts concerning historical involvement might be expressed in a discounting of the damages. Cf. section II, B, 4, “The Special Problem of Failure to Act,” infra in this part.

72 One operational difference is that the process of proving historical propositions is relatively more dependent on the testimony of witnesses and circumstances than on a careful process of prediction, verification, and systematic control of the standards for deciding validity. A second difference is that, although it is intellectually not “honest” to disregard historical propositions demonstrated to be valid, they may be ignored with relative physical safety, since risky behavior is not ordinarily premised on their validity.

73 I.e., initiating a series of physical changes that includes the injury, inducing it, occasioning it, and, within any of these categories, relationships between defendant’s conduct and the injurious event that would be characterized as exhibiting an abnormal conjunction of events or a voluntary intervention on the part of a third person.
simple inquiry and often not disputable. Apart from cases where hypotheses of science are at stake, the question would most likely be disputed where the issue is one of the presence of competing historical explanations.74

2. **Substantiality of Historical Involvement**

A causal proposition with the above operational characteristics does not assert that its subject (e.g., smoking; the defendant) is the only cause of the event under investigation.75 To be a cause in this sense implies only membership in some set of conditions sufficient to have brought about the result.76 Precise formulation of what such sets are and of any distinctions between historical and scientific sets is acutely difficult. For present purposes, that need not be pursued, for the very function of discussions of causation in showing the defendant’s involvement in the injury assures that the particular member being singled out (e.g., smoking; the defendant), although not called *the* cause, will be a sufficiently significant member of any set referred to and that the set itself will be significant. This is true because that function is to include the defendant within a system of rules for allocating the entire amounts of losses, and the defendant’s involvement must be viewed as at least not insubstantial in relation to the potential economic consequences to him. To hold him liable for the entire injury because he is an historical cause when his contribution is trivial—say, where he negligently raised the water level of a flood by a few inches—is thought unfair.77 How far back into history the plaintiff can successfully choose to pursue the defendant’s involvement will thus turn, not on the difficulties of defining sets of conditions sufficient to bring about the injury, but on the other considerations that determine judgments of the substantiality of the defendant’s involvement and of the propriety of sanctioning the conduct chosen for complaint with liability for the injury.

It is only on this question of the substantiality of the involvement of “the defendant” or “his conduct,” that the so-called substantial factor test78 adequately conveys any reliable meaning. It embodies a rule of law that the defendant may not be subjected to the risks of bear-

---


The question whether the defendant was a substantial factor in bringing about the loss thus is analytically independent of any determination that the defendant was negligent, and any meaningful attempt to ask whether his "negligence" or "negligent conduct" was a substantial factor in the injury must concern some other function.80

The operational characteristics of a proposition concerning whether, in view of defendant's involvement in the loss, it is fair to include him in the system of rules for all-or-nothing allocation of the loss (or, whether his historical role was substantial) differ importantly from those of the propositions simply establishing the facts of his involvement. Of course, propositions making judgments of fairness in the present sense are not entirely different operationally from those of fact. Legal discourse has probably suffered from failing to concede that such differences are often ones of degree of dependence on similar operational criteria. The tools of legal analysis, professional discipline, and precedent, and empirical tools of the social sciences may be used to identify values, estimate social effects of decisions, and illuminate the process of accommodating varying interests in the decision. Such analyses may be formulated in propositions susceptible to validation on

79 Such a rule would seem required under the due process clause of the 14th amendment, and it might be understood as the equivalent of what due process requires. See section II, B, 3(c), "Qualitative Degrees of Involvement and Valuation of the Loss," infra in this part.

80 See Prosser, Torts § 49, at 286-87 (3d ed. 1964). The instructions approved in Anderson v. Minneapolis, St. P. & S. Sts. M. Ry., 146 Minn. 430, 434, 179 N.W. 45, 46 (1920), were that the jury was to determine whether the "fire . . . was a material or substantial factor in causing plaintiff's damage." (Emphasis added.) Cf. Restatement, Torts § 431 (1934): "The actor's negligent conduct is a legal cause of harm . . . if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." (Emphasis added.)

The language of clause (a) standing alone is consistent with the Anderson case, supra, and with the function of the "substantial factor test," but it is unclear whether the three italicized subjects in § 431 are supposed to be equivalent. Compare id. § 433 (Supp. 1948) with id. § 435(2) (Supp. 1948). All three subjects are commonly used interchangeably as the subject of the "substantial factor test." E.g., see Green, The Rationale of Proximate Cause 144-50 (1927); 2 Harper & James, Torts ch. XX (1956); Hart & Honoré 90, 111-12, 114-16, 208-13, 267-68 (subjects of "cause").

As will appear from parts II and III of this Article, the choice between these subjects may beg the very legal question that an inquiry concerning "substantial factor" is designed to raise. For instance, to ask whether the "negligence (or negligent conduct) was a substantial factor in bringing about the injury" is too crude and too ambiguous to raise the considerations involved in an argument against liability to the effect that the injury would have come about even if defendant had not been negligent. To ask whether the "defendant (or his conduct) was a substantial factor in bringing about the injury" may, perhaps, be adequate and not too oblique to convey the question whether it is fundamentally fair to include him in the system for all-or-nothing allocation of the loss. Cf. Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 548-51 (1962).
criteria akin to those of fact. Often such propositions will be conclusive of questions of judgment.

Nevertheless, the validity of propositions of fairness or substantiality is relatively dependent on matters of value choice, and it is even more dependent on the legal purposes for which the propositions are made and on the language chosen to state them. Persuasion, as distinct from demonstration, is important in the process of proof and belief. These operational characteristics of judgments of substantiality may favor a judicial rather than a jury application of the judicially-imposed requirement of substantiality. However, the question of the existence of defendant's involvement is for the jury, and there may ordinarily be little point in separating the judgment of substantiality from its major factual ingredients. In any event, there do not seem to be many cases in which the defendant's involvement is insubstantial, and in few of those would reasonable men be likely to disagree.

Whether the defendant is sufficiently involved to be subjected to the rules for all-or-nothing allocation of the loss is thus not simply a question of fact. It involves a sense of proportion between the defendant's involvement and its economic consequences that has somewhat different operational characteristics. "Cause" in establishing involvement and "cause" in justifying suit against the defendant are different concepts. Yet the use of "cause" in defining substantial involvement may not be entirely misleading. The choice whether to include the defendant is an either/or one and will usually be made on rather crude criteria. The connotations of "cause" that invite yes-or-no decisions may not be harmful here.

3. Quality of Involvement and the Rules of Conduct

(a) Qualitative Degrees of Causal Involvement.—A sense of proportion between the defendant's involvement and its economic consequences, however, can entail more subtle shadings to which causation concepts are relevant but for which causal language is misleading. Whether defendant's involvement is proportioned to its economic consequences depends on the chances that a particular type of involvement will result in his losing the suit, which in turn is a function of how lenient or demanding the negligence rules are. If the rules of conduct are lenient for one involved as is the defendant, compliance is easier for him and the requirement of substantiality may reasonably be relaxed. Similarly, the quality of involvement will affect the formulation of rules of con-

---

82 See Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60 (1956).
duct. If the defendant's involvement is not insubstantial but is also not great, the rules of conduct he is asked to obey may reasonably be lenient. In short, the quality of the defendant's involvement and the rules of conduct governing one included in the loss-allocation system reciprocally determine each other. They are classically fashioned together, by the court. 8

In the typical personal injury case, the defendant is sufficiently involved in the injury in that he was a member of a set of conditions sufficient to have brought it about. The rule of conduct typically fashioned to implement such involvement is that one must act reasonably in the circumstances to avoid causing injury. Shadings in the details of how the defendant caused the injury are typically too various and too fine to be taken account of in formulating differing rules of conduct. Rather, the jury shapes the particular rule to the involvement simply by giving content to the reasonable man standard through its decision whether the defendant's conduct satisfied that standard. The shadings are subtle and the jury is not even asked to articulate specifically what the rule of conduct was (i.e., what the defendant should have done).

There is an intermediate range of distinctions in historical involvements that are less crude than the either/or question of substantiality and not ineffable as are the shadings of causing injury in the typical cases. Here categories of types of involvements can be articulated and the differences between them can be implemented through promulgation of various standards of conduct in different terms from that of the reasonable man. 8 Here, rather than in establishing that defendant was involved, or even substantially involved, distinctions in the types of patterns of historical involvement such as some of those made by Hart and Honoré—distinctions between physically initiating the injurious events, inducing the injury, or only occasioning it—become significant. These distinctions are significant because one can and does make qualitative evaluations of the defendant's involvement that reflect them and which may be implemented through the imposition of more or less


8 This is a different matter from the ill-fated judicial definition of what the reasonable man would do in specific fact situations to avoid causing injury in the typical sense. See Pokora v. Wabash Ry., 292 U.S. 98 (1934), disapproving Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927) ("stop, look, and listen" rule). Concrete definitions of reasonable conduct such as the stop, look, and listen rule are attempts to specify the standard within the class of typically-causing cases; the differentiation of standards of conduct discussed in the text attempts to specify standards as between classes of historical involvements. See text accompanying note 90 infra.
onerous and effective obligations for the plaintiff's protection. Certainly, the negligence law provides many examples of standards of conduct that reflect differences of this sort in the quality of the defendant's involvement. The defendant who incidentally entices or misleads the plaintiff to his injury may have the heavy obligation of foregoing entirely the advantages of his gains from the conduct; but the man who maintains a static obstruction may be subject only to the lenient duty of sometimes giving warning, which still permits him to receive the advantages of his conduct.86 Similarly, the man who initiates a series of physical changes, including an event unusually tempting to third persons to exploit to the plaintiff's injury, may be obliged to use considerable resources to protect the plaintiff; but the defendant whose conduct is seriously risk-making only if someone else initiates a series of changes may be obliged to expend few resources to protect the plaintiff.86

In making these qualitative evaluations of types of historical involvement, two kinds of causal propositions are employed in addition to those establishing the facts of defendant's involvement. First, there are predictive or probabilistic propositions stating the chances that various kinds of injurious events would be associated with conduct like that of defendant. The operational characteristics of these propositions are similar to those, for instance, of the propositions involved in deciding whether plaintiffs will be able to prove the reality of injuries often enough to permit any plaintiff to recover for nervous shock.87 Their purpose here is normative, not historical. They are reasons for concluding that defendant's involvement calls for heavy or light duties of care. For instance, one might say that leading someone to think he was invited on land that is unsafe is more likely to lead to injuries than simply maintaining the land in that condition to the hazard only of adventurous trespassers. Therefore, one might conclude that the owner must do more in the former than in the latter case to protect the plaintiff.88 The operational characteristics of this conclusion obviously entail evaluative criteria that depend heavily on the legal purposes at hand, which are forward-oriented and creative.

88 See text accompanying note 62 supra. The operational characteristics of predictions are suggested more fully in section II, D, 1, "Causal Arguments and the Reasons Why Defendant Is Considered Negligent," infra in this part.
88 Louisville & N.R.R. v. Anderson, 39 F.2d 403 (5th Cir. 1930).
The second kind of causal proposition employed in the qualitative evaluation of historical involvement is that stating a competitive causal policy. It must be remembered that this qualitative evaluation is the basis for the court's promulgating a standard of conduct in terms different from those of the reasonable man standard and specifically fashioned to the defendant's type of historical involvement. Differences in the risk-making potential of the conduct would alone probably not account for this special exercise of judicial power, for such differences are already implemented in the jury's application of the reasonable man standard.\(^8\)

A more adequate explanation may be that differences in the risk-making quality of different patterns of historical involvement and their normative implications have been crystallized into generalizations of competitive fairness between the parties to such patterns. If a man has unwittingly enticed another on his land, he has bargained for the obligation to care for the latter as he would someone whom he had expressly invited.

Competitive causal policies seem to be one ingredient in explaining the courts' conclusions that some types of competitive involvements call for unusual control over the jury, to insure that similar cases evidencing such involvements are more likely to be decided similarly. Such types of involvements are sufficiently recognizable, as types, to be taken account of through the specification of a standard of conduct more selective than the reasonable man standard and to be used in all similar cases. These particular standards of conduct would typically limit the question of negligence to questions of, for instance, giving warnings, making inspections, or making land safe for those who may come on it.\(^9\)

Competitive causal policies operate here only to give character to defendant's involvement. They are not dispositive of the formulation of a duty nor, of course, of liability. Obviously, the operational characteristics of normative competitive causal policies are very different from those of propositions of historical involvement. They are not usefully characterized as factual, nor are they validated simply by confirmation that they exist. They are arguments and are committed to relatively free use by the judge in the exercise of disciplined, professional judgment. They are validated largely on grounds of persuasiveness in a context of other arguments. Their validity is heavily dependent on the form in which they are stated. Their validity is heavily dependent also on their legal purpose in potentially forcing the actor to bear the whole loss.

\(^8\) Judicial specification of what the reasonable man must do in particular types of danger has generally not been successful. See Pokora v. Wabash Ry., 292 U.S. 98 (1934).

\(^9\) Other considerations that influence the formulation of duties, along with the foregoing causal considerations, appear in sections II, B, 3(b) & (c), "Qualitative Degrees of Involvement Not Based on Causation" and "Qualitative Degrees of Involvement and Valuation of the Loss," infra in this part.
In short, "cause" is used in at least four senses, with differing operational characteristics and purposes, to determine whether defendant is involved in the system for the allocation of losses. "Cause" may be used in propositions of a factual character stating defendant's involvement in the injury; in propositions factual to a lesser, and evaluative to a greater, degree, stating the substantiality of his involvement for the purpose of subjecting him to any duties to care for the plaintiff; in propositions stating the injurious tendencies of conduct such as his for the purpose of formulating normative propositions indicating the kinds of duties owed the plaintiff; and in propositions stating competitive causal policies also for the purpose of indicating the kinds of duties owed the plaintiff. The function of including the defendant in the system of loss-allocation rules and of fashioning its conduct rules involves causal concepts elaborately. To call it one of finding a "cause-in-fact" relation between the defendant and the injury submerges the subtle and graduated character of its conclusions in a misleading yes-or-no decisiveness. It invites the carelessness of trying to validate one type of proposition on the operational criteria of another. The danger is a real one. It has contributed to the confusion of deciding the large, creative question of what duties to impose by referring to the criteria of validity of the narrow, factual question of the defendant's historical involvement.  

(b) Qualitative Degrees of Involvement Not Based on Causation.—Perhaps the function of evaluating the defendant's involvement in the injury and fashioning rules of conduct in proportion to his involvement can be generalized as one of deciding whether defendant's relationship to the plaintiff justifies requiring him to care for the plaintiff. Thinking in terms of relationships may facilitate recognition of noncausal bases of duty. For instance, it might be useful to say that the basis of defendant's duties of care in some cases should be put, not in terms of his historical causal role, but in terms of his property (from which he presumably benefits) being historically involved in the injury, or in terms of some special relationship of trust or guardianship requiring him to care for the plaintiff.  

The parties' relationship to property or their special relationship of trust are not entirely independent of causal thinking. The owner of prop-

---

91 Cases involving failure to rescue a stranger are classic illustrations. See section II, B, 4, "The Special Problem of Failure to Act," infra in this part. See Malone, supra note 82; Edgerton, Legal Cause, 72 U. Pa. L. Rev. 211, 343 (1924).

92 Cf. Brett, M. R., in Heaven v. Pender, [1883] 11 Q.B.D. 503, 507-08: "The [question is]... what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe... such ordinary care or skill as may be necessary to prevent injury... ."

93 Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 75-83 (1942).
property is historically involved in any injuries in which the property is historically involved, for his economic power over the property accounts for its condition and use. But, for instance, if the defendant should inherit property moments before injury occurs on it, his role as a “cause” in the sense of historical involvement seems somewhat fictitious. Special relationships of trust also entail a sense of defendant's historical involvement in that the beneficiary may have relied on the defendant for care, or the relationship may inevitably keep the plaintiff out of the reach of others who might help him, or others may be excluded from caring for the plaintiff in general reliance on the guardian's assumed role. Here, too, perhaps the particular defendant's causal role may in fact be largely fiction. In a case of failure to care for a new-born infant, it may seem overly imaginative to say the infant relied or that others were deterred from helping.\textsuperscript{94}

Consideration of the bearing of property or special relationships in formulating the bases of defendant's duties illuminates the similar uses of causal concepts in three respects. First, it indicates that causal propositions stating the defendant's historical involvement may be nothing more than generalizations of the usual effects of certain relationships (e.g., people who own property can usually control its use and safety; children whose parents do not care for them are usually not adequately cared for by anyone else). The operational characteristics of these propositions are similar to those of propositions stating scientific hypotheses or historical particulars, but they differ in degree in that the probabilities that ultimately validate them may be considerably lower. There would typically be less assurance that any given case in litigation is an historical instance of the generalization. Hence, to show that the defendant is historically involved in the injury in such cases could be relatively unimportant.

Second, such unimportance could make the defendant's historical involvement seem insubstantial. It may be the presence of the property or special relationship that renders the involvement substantial enough to justify imposing any duties of care on the defendant. Thus, it may not be meaningful in every case to ask whether the defendant was “a substantial factor in bringing about the injury.” The “substantial factor test” is only a special case of the requirement that there be some sub-

\textsuperscript{94} Of course, there is historical involvement in giving birth. As to the filial relation as a basis of duty, see Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), holding unenforceable as a violation of the requirements of equal protection a statutory claim against an adult child for support of her mother, a committed inmate in a state hospital.
stantial basis for subjecting the defendant to a system of rules of conduct and suit under which he may be forced to pay the full loss.

Third, consideration of the bearing of property or special relationships on the bases of duties illustrates that the causal propositions either stating the risk-making potential of conduct such as defendant’s or stating some competitive causal policy, which shape defendant’s duties, are also only special cases of something more general. They are ingredients in what appears to be a relatively frank moral judgment about how one ought to act. If that is the character of propositions formulating what duties are imposed on one who is substantially involved as was the defendant, presumably any arguments that are morally persuasive and judicially manageable should be relevant to the exercise of this function in a negligence case.\footnote{Cf., e.g., Bohlen, \textit{The Moral Duty to Aid Others as a Basis of Tort Liability}, 56 U. Pa. L. Rev. 217, 316, 334-38 (1908).}

In short, the varying causal propositions at each level of inquiry in the exercise of the function of determining the defendant’s involvement and its substantiality and formulating his duties need be viewed as no more than one of numerous relevant, and usually complementary, ingredients in judgment. They need not independently justify imposition of duties on the defendant.\footnote{Cf. Leflar, Book Review, 75 Harv. L. Rev. 1691, 1694 (1962). The major justification for vicarious liability lies in social and economic policy. Although an employer is historically involved in his employee’s torts, his inclusion in the loss-allocation system is more fruitfully discussed in terms of other, noncausal, relationships. See id. at 1693.} For instance, if the involvement of defendant’s property in the injury is important in justifying the inclusion of defendant in the loss-allocating system, the relative equities of the parties in relationship to the property, rather than the defendant’s historical involvement, is crucial in formulating the defendant’s duties. Trespassers can expect little of an owner and more of the owner’s licensee. Invitees can expect a good deal of the owner. If a special relationship between the parties justifies inclusion of defendant in the loss-allocating system, say, where plaintiff is defendant’s employee, that relationship and the bare possibility of some significant historical involvement of the defendant justify subjecting him to the risk of paying the full loss.\footnote{See Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956), in which the plaintiff showed that her decedent was last seen returning to his place of work, the defendant’s tugboats; that the decks of the tugs were inadequately lighted and, in places, slippery with ice; and that two weeks later decedent was found nearby, drowned. The Court held it was error under the Jones and Federal Employers’ Liability Acts for the district court to direct a verdict for defendant. See also, e.g., American President Lines, Ltd. v. Lundstrom, 323 F.2d 817 (9th Cir. 1963) (carrier’s duty to passenger); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (basis of duty of care with language); Gilmore & Black, \textit{Admiralty} § 6-6 (1957) (bases of duty of maintenance and cure).}
One further variable in making judgments of substantiality of the defendant's involvement and in formulating his duties illuminates the use of causal propositions in the exercise of that function. The sense of proportion between involvement and its economic implications to the actor depends also on the variable of what share of the loss he may be forced to bear. If the rules for allocating the loss do not follow the classic pattern of allocating the entire loss to the losing defendant, his involvement can reasonably be less substantial and still justify his inclusion in the loss-allocation system. Similarly, the rules of conduct imposed on him can be increasingly onerous, and may reach the point of not requiring negligence at all, if his share of the loss is small. If the basis of compensation moves from tort to social insurance, the "actor" bears a minute share of the loss and is involved simply in his capacity as a member of society. Thus, some general features of the economy are thought to explain phenomena of unemployment, and any employer, or indeed each member of society, is involved significantly enough to be taxed a small portion of each loss to compensate those out of work. The negligence cases have not yet explored in detail the effects of contribution or of comparative negligence and other methods for scaling down the plaintiff's claim on the substantiality of defendant's involvement in the loss or on the extent of his duties of care.

See Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521-25 (1937); Kelly v. Pittsburg, 104 U.S. 78, 81 (1881). It need not follow that the availability of bases for spreading the loss precludes finding a basis of duty in some causal or other relationship for charging an individual with a larger share or with all of the loss. But see Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).

Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), offers an example. There, two defendants simultaneously and negligently shot in the direction of the plaintiff, a third member of their hunting party. Shot from one gun struck him. The court affirmed a judgment against each defendant although the plaintiff had not proved from which gun the injurious shot came. The alternative to requiring the plaintiff to make that impossible showing was to force either defendant to pay for the injury unless he could show that it was inflicted by the other. In the circumstances, the latter alternative is preferable. Both defendants were involved as members of a common party raising common risks, and the chance of holding the "wrong" defendant for the whole loss is minimized to 1 in 2. Both were negligent. Their conduct was dangerous and that may justify asking them to bear the risk of relevant factual doubts created by each concurrently. See generally parts II and III of this Article.

The holding would have been facilitated if contribution had been available between the defendants under Cal. Code Civ. Proc. § 875, which was not enacted until 1957. Ideally, the chance of either defendant bearing part of the loss would increase from 1 in 2 to 1 in 1, but the amount either would pay would be reduced to 50% of the damage. In the nature of things, the defendant's involvement in the injury cannot be known historically on the basis of propositions that state probabilities higher than 1 in 2. These are nevertheless historical statements, see text accompanying note 71 supra, and form an adequate basis of duty for a loss scaled down in half. Cf. text accompanying note 97 supra. The basis of duty in Summers v. Tice may also reflect the defendants' common undertaking with the plaintiff, but the decision should not differ in a case where the plaintiff is a stranger.
4. The Special Problem of Failure to Act

The foregoing may be recapitulated by way of noting briefly the role of causal discussions in cases of omissions to act. With respect to the function of determining whether defendant's historical involvement justifies including him in the system of rules for allocating losses, most so-called failure-to-act cases are not special. In most, the defendant has failed to use his brakes, to issue a warning, to inspect, to perform a promise relied upon, to aid someone hurt on his property or in his employ or care, and the like. None of these cases need present a serious problem of showing defendant's historical involvement or of justifying the imposition of some duty on him. In such cases the defendant's conduct or property is clearly historically involved in the injury, or he stands in a special relationship to the plaintiff. The problem arises out of the quality of defendant's substantial involvement, or out of the affirmative and burdensome nature of the changes in defendant's conduct that plaintiff would have imposed. Thus, the problem in such cases concerns the judgment of either how extensive the duties should be, whether they have been violated, or whether liability is an appropriate sanction for the wrongdoing in the circumstances.

A special problem in imposing a duty for reasons put in causal terms is clearly presented, however, in a case where the defendant fortuitously comes upon a stranger in need of rescue and does nothing. The courts' refusal to impose any duty cannot be justified by saying defendant was not "a cause" of (i.e., historically involved in) the injury. Presumably, a meaningful set of conditions sufficient to have brought about the injury might be defined, if one chooses to do so, that would include the defendant's failure to help.\(^{101}\) Indeed, the injury so caused need not be defined by the victim's life expectancy or physical state before he became in danger. The legal rules may reasonably define the loss by his life expectancy or normal physical state at the time of the failure to act (i.e., discounted by the improbability of success of the rescue attempt).\(^{102}\) Defendant's membership in a set of conditions sufficient to bring about the loss of a chance of rescue, the discounted statement of the loss, and a well-tempered moral reaction to his failure to act in the circumstances would justify treating him as involved and including him in the system of rules under which he might be forced to bear (the full value of) the

\(^{100}\) Prosser, Torts § 54, at 336 (3d ed. 1964).
\(^{101}\) See Hart & Honore 35-37.
\(^{102}\) See generally, Malone, supra note 82. Cf., e.g., Silvers v. Wesson, 122 Cal. App. 2d 902, 266 P.2d 169 (1954) (doctor's failure to diagnose existing condition). If the defendant is one of a number who failed to act, the loss could be further discounted by the possibility of other rescuers, or if each defendant is singled out for the full loss, there could be contribution among them. See note 99 supra.
discounted loss. If discounting renders the loss substantially worthless, there would be no recovery.

Since an important ingredient in finding the defendant involved is a causal proposition put in unusually candid terms of probabilities or lost chances, his proportioned duties of care may be lenient. Perhaps the defendant need only telephone the police or otherwise seek the help of third persons, or his simply allowing himself to be seen may frighten the plaintiff's assailant. If it may not be unreasonable to do nothing if the chances of success are small or if others also appear available to render aid. In recognition of the difficulties of the defendant's assessing whether the risks and inconvenience to himself may reasonably be undertaken in light of the chances of success, the court might even disable the jury from judging the reasonableness of defendant's lack of resolve unless his conduct at the time indicated that he considered intervention of some sort worthwhile.

These alternatives, based on the extent or existence of any loss or of any negligence, probably would account for most of the case results. They avoid the use of "cause" as a solvent and hence they avoid denial of any duty in that occasional case in which it is both quite clear that some effort would have helped the plaintiff and quite outrageous that none was made. They illustrate that "cause" is an ambiguous and entirely inadequate solvent of the function of setting bases of duty.

C. Breach of Duty

Another function that must be performed in a negligence case is to determine whether the defendant violated a rule of conduct within the loss-allocation system. One type of causation concept is particularly relevant in that determination. In the formulation and application of a standard of conduct, it is necessary to weigh, along with the utility of the defendant's conduct and the burdens of requiring him to alter it, the

---

106 There is no accounting for Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928), and Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959), in both of which the defendant also stood in some business or property relationship to the victim. See Prosser, Torts § 54, at 336 n.43.
likelihood and likely seriousness of injuries resulting from his conduct. These likelihoods may be formulated as propositions stating, or predictions of, the frequency of injuries associated with conduct exemplified by that of the defendant. In either formulation they are propositions of probabilities that are validated by reference to operational criteria similar to those involved in validating scientific hypotheses and historical particulars.

They differ, however, in that these predictions may be relied on even if the probabilities they validly state are low. This is true because their function is to influence conduct in the exercise of a normative aim of negligence law. That is, these propositions are thought of as being part of the jury’s analysis of what a reasonable man in defendant’s circumstances would have taken account of before the injury. The odds that an injury would occur can be very small to have justified a change in the defendant’s conduct. For instance—to attempt to state quantitatively what is rarely, if ever, expressly put quantitatively, and then only with the greatest difficulty—one would imagine that consciousness of injury occurring in particular circumstances in an order of magnitude from 1-in-100 to 1-in-1000 would require a reasonable man to bear the burden of altering his behavior in driving an automobile at a given moment.

Furthermore, depending again on the value of and burdens on defendant’s conduct, such propositions may be functionally valid, that is, reliable for guiding conduct, even if the accuracy of their estimates is low. It may not matter in particular circumstances that one could tell whether the odds should be thought to be, say, something like 1-in-100 or 1-in-1000 if an encounter of either likelihood seems unreasonably risky. The more such predictions of types of injury there are, the less reliable any one need be. Scientific and historical propositions would individually have to state higher probabilities and be considerably more accurate to be thought valid for the purposes for which they are customarily used. Finally, in practice, the process of proof of these predictions is likely to be informal, or their validity is often assumed as a matter of common knowledge.\textsuperscript{108}

The causal propositions in determining reasonableness of conduct thus fall into a distinguishable class of factual propositions. They are much like those discussed above concerning judicial expectations of reliable proof of the reality of nervous shock in typical cases\textsuperscript{109} and con-

\textsuperscript{108}There is reason to suppose that beliefs, of judge or jury, resulting from such informal processes and ready assumptions would at least occasionally prove false on a more careful inquiry. See Karst, Legislative Facts in Constitutional Litigation, 1960 \textit{Supreme Court Review} 75; Traynor, No Magic Words Could Do It Justice, 49 \textit{Calif. L. Rev.} 615, 625-29 (1961); text accompanying notes 135-37, and note 123 infra.

\textsuperscript{109}See text accompanying note 62 supra.
cerning the typical effects of special relationships of trust.\textsuperscript{110} These propositions create little ambiguity or confusion for causal analysis, especially when passing, as they usually do, under the name of “risk.”\textsuperscript{111}

\textbf{D. Relationship of Wrongdoing to Injury}

A final function that must be performed in a negligence suit and on which causal discussions bear is to determine that the defendant’s breach had some relevance to the injury which justifies forcing him to pay for it. The fault system of compensation assumes that recovery is appropriate only if there is wrongdoing. If that requirement is to be meaningful, the particular fault must be relevant, in some appropriate way, to the plaintiff’s particular plea for compensation.\textsuperscript{112} The exercise of this function is one of judgment specifying which party \textit{must} win on the particular facts in litigation, given the application of the other conditions of liability formulated by the court. Such a judgment is inescapable in making a binding adjudication and is unavoidably made in the light of hindsight. It principally embodies the compensatory and retributive aims of negligence law. Within the context of the fault system, it seems useful to characterize this as the function of determining whether, in the particular circumstances, liability is an appropriate sanction for the wrongdoing. An historic role of courts is to adjudge the law as between the particular competing parties. There is every reason for the judge to retain the measure of control over the outcome of litigation conferred by deciding this issue.\textsuperscript{113} The jury has ample latitude, in deciding what may be thought to be factual ingredients in this issue,\textsuperscript{114} and in its other functions, to import its or the community’s views of the fairness of imposing liability in the circumstances.

Propositions concluding that liability is or is not an appropriate sanction in the circumstances are not susceptible to validation on criteria that permit their characterization as matters of fact. Their validity is heavily dependent on value and language choices and on the legal aims of the adjudication. This of course does not make them simple intuitions. They are susceptible to extensive theoretical analysis and evaluation in terms of such concepts as persuasiveness and relevance. Moreover, ingredient

\textsuperscript{110} See text following note 94 \textit{supra}.

\textsuperscript{111} Some ambiguities in “risk” and further uses and operational characteristics of these propositions are discussed in section II, D, 1, “Causal Arguments and the Reasons Why Defendant Is Considered Negligent,” \textit{infra} in this part.


\textsuperscript{113} See Green, \textit{The Rationale of Proximate Cause} (1927); note 21 \textit{supra}. But see Edgerton, \textit{Legal Cause}, 72 \textit{U. Pa. L. Rev.} 211, 343 (1924).

in these judgments are arguments or policies that are not invoked for the particular case alone and many propositions that are susceptible to validation as factual. Such propositions may concern the identification and source of values and of social and economic policies, the effects of particular decisions and of legal rules, and so on. But such factual propositions are used as reasons or arguments for or against sanctioning wrongdoing. No such factual proposition is decisive simply because it can be said to be true or false, unless the adjudicator chooses, for reasons of legal policy, that it shall be decisive.

It is understandable that a function such as this would often be discussed in terms of "cause," whether or not its usual modifier, "proxi-

mate," is equally explicable. The inquiry is an after-the-fact effort to characterize the relationship of conduct and its effects; fairness as between competitors is often thought of in terms of competitive causal policies: the language of causation has connotations of moral and economic responsibility; and the yes-or-no influence on thought of causal language may seem pertinent to the all-or-nothing aspect of the adjudication to be made. Yet if the above description of the function is accurate, there is no sense in which "cause" is its solvent or usefully describes it. "Cause" is ambiguous and imports a misleading suggestion of fact finding in the making of a yes-or-no judgment. The same is true of the language of "risk." Although its connotations may be more useful to some analysts in characterizing this function and its principal determinants, "risk," like "cause," serves a variety of uses in litigation. It refers to a variety of considerations within the one function now under discussion. It is also in need of particularistic analysis. If there were a formula solvent of this function, it could only be generalized in such nonsolving terms as "relevance for purposes of adjudging who shall bear the particular loss in the circumstances."

\[115\] See Kadish, supra note 81. Cf. text accompanying notes 80-81 supra.


\[117\] The use of unanalyzed causal language to resolve issues of competitive fairness is at least as old as the classical period of Roman law. DAWSON, UNJUST ENRICHMENT 44-47 (1951). "Cause" apparently has satisfied a felt need for a general solvent without preventing decision reflecting some of the complexities of experience. Cf. JOHNSON, PEOPLE IN QUANDARIES 6-10 (1946); text accompanying note 91 supra.


\[119\] "Risk" could be used in connection with a number of propositions involved in a negligence case. See, e.g., the propositions referred to in the text accompanying notes 59, 60, 62, 68, 72, 87, 108, supra; text following note 94 supra; and text accompanying notes 122-23, 127-29, and 146 infra.

\[120\] The same function in cases of conversion is well suggested by RESTATEMENT (SECOND), TORTS § 222A (Tent. Draft No. 3, 1958). In contrast, this function is submerged in the
The variety of considerations referred to by "cause" as it is used in relating wrongdoing to injury might be tentatively categorized in three general classes, which are not mutually exclusive. The classes are ones of causal arguments primarily based on the reasons why defendant's conduct is considered wrongful; those primarily directed toward economic fairness between the immediate parties in the resolution of two-party, winner-take-all competitions; and those primarily directed toward economic fairness to either party independently and not growing strictly out of the nature of two-party competitions. The following brief illustrations of these three categories concern only one type of arguments, causal ones, used in adjudging the propriety of liability as a sanction. Other arguments may call for extending liability when causal ones would limit liability, and the reverse may also be true. These categories of causal arguments are understood, of course, within the confining assumptions of the fault system.

1. Causal Arguments and the Reasons Why Defendant Is Considered Negligent

What can be expected from behavior is the major factor in regulating it for purposes of avoiding injuries. Whether liability is an appropriate sanction in the circumstances should depend in the first instance on consideration of the frequency of association of classes of injuries with the type of behavior in which defendant engaged. Plaintiff's injury may be within a general class associated with defendant's behavior. If the frequency of that class of injuries is unreasonably high, and defendant was therefore negligent, he is held liable. In the vast majority of negligence cases, the plaintiff's injury would be said, in this sense, to be one of the hazards by reason of the prospect of which defendant is considered negligent. If the injury was the kind of event he should have acted to avoid, that alone constitutes a persuasive reason to sanction wrongdoing with liability, at least if, as typically, defendant has no excuse.\textsuperscript{121}

To illustrate, suppose the defendant leaves a key in the ignition of his unlocked automobile parked on a city street. A thief, seeing this, takes the car and, while driving it, runs down the plaintiff. In deciding whether the hazard that befell the plaintiff was within the class of injuries by reason of the prospect of which defendant is considered negligent for leaving the key,\textsuperscript{122} one would attempt several estimates. These would

\textsuperscript{121} Necessary qualifications of the general statements in this paragraph will be developed in the following text.

\textsuperscript{122} See, e.g., Williams v. Mickens, 247 N.C. 262, 263-64, 100 S.E.2d 511, 513 (1957).

The issue may equally be characterized as whether the defendant's behavior was negligent,
include the order of magnitude of unauthorized uses of automobiles left in similar circumstances. Such uses might be childish intermeddlings, borrowed joyrides, or thefts. One would estimate whether unauthorized uses are associated with cars containing the keys at a noticeably higher frequency than with other cars and, even if not, whether the frequency of unauthorized uses would be reduced by reducing the occasions of leaving keys in cars. One would estimate whether the frequency of unauthorized uses was unusually high in light of any unusual circumstances at the time of defendant's action. Next, estimates would be needed of the extent to which any class of users associated with defendant's type of conduct would also be associated with a noticeable frequency of injury to third persons or themselves. Children, joyriders, and drunks constitute such classes no doubt; perhaps thieves do also, if they are nervous at the time of getaway or unreliable for normal behavioral purposes.

Each of these estimates, or statements of causal patterns, is susceptible to validation on the operational criteria of matters of fact. In practice, such propositions are usually believed or rejected, at levels of substantial imprecision and inarticulation, on the basis of supposed common knowledge or hunches, which exemplify our workaday use of such criteria. Belief in these propositions itself decides nothing. It is, again, a matter of judgment whether the combination and reliability of the estimates justify treating the particular injury complained of as within the class of injuries associated with defendant's conduct for purposes of sanctioning the conduct.

The extent to which these statements estimating associations of injuries with conduct reflect matters of judgment appears on a more detailed examination. These predictions can refer to one or more subclasses of unauthorized users, such as children, joyriders, and thieves. Each of these could be divided into further subclasses, such as those of drunken and sober thieves. For each subdivision of users, the predictions could refer to one or more subclasses of their mishaps, such as those during the getaway or later, and in either case, to the further subclasses of thieves who were negligent and nonnegligent. Additional predictions could be made, for instance, for subclasses of qualitative kinds and magnitudes of damage. Some combination of all of these subclasses may form a class that is the general class of injuries noticeably associated


with defendant's conduct. For purposes of this discussion, it will be assumed that the class of injuries is associated with defendant's conduct significantly enough to permit treating his conduct (in light of the advantages of the conduct and the burdens of altering it) as unreasonably risky.

How broad or narrow this general class of injuries will be depends upon the choices made in deciding whether and how far to subclassify users, mishaps, damage, and so on. For instance, one might choose not to subclassify among unauthorized users, even though most injuries were associated, say, with children and not with joyriders or thieves. In that case, a thief's hitting the plaintiff could be within the class of injuries associated with defendant's behavior. The choice of how much detail in which to make predictions in large part reflects a shrewd understanding of the feasibility of doing so reliably. It also reflects such considerations as a very high likelihood of any one type of injury, for "risky" conduct is often disapproved of and thought to cast a broad shadow of liability. The choice would also reflect the purpose of the prediction; for guiding conduct prospectively, broad or vague classes of injury, or only one particular hazard, may be adequate.

The detail of the class for which predictions are made depends on judgment in still further respects. Choice is involved in deciding what information will be the basis of prediction. We may be interested in what predictions would have been adequate to have required the defendant to alter his conduct, in light of any advantages in leaving a key in the car and the burdens of not doing so. If so, the predictions would be made from the point of view of a reasonable man in defendant's position at the time of the conduct complained of. This predicted class of injuries will be called the "prospective" class. Since the purpose of the prospective class is to guide conduct, it may often be sufficient to state it at a very high level of generality, sometimes including, perhaps, a simple statement that "someone might get hurt."

On the other hand, a different prediction might be made on the basis of the information available on hindsight. This prediction would reflect what could have been predicted by one knowing more than the defendant knew or should have known and it would also reflect what did in fact happen by way of an injury. In other words, at the time of trial, an estimate could be made of the frequency of association with

the defendant's behavior of a different class of injuries that specifically includes the injury complained of. If one's purpose were to determine whether protection against the particular injury should be attributed to a rule regulating the defendant's behavior, predictions from the standpoint of hindsight would be used. This second predicted class of injuries will be called the "retrospective" class. Such a class includes all subclasses into which the injury falls. How broadly or narrowly to define the subclasses into which the injury falls, and what additional or broader subclasses to include in the retrospective class, are again clearly matters of judgment. The judgment so made is not made explicitly for the end of guiding conduct, and it therefore need not be equally influenced by the policies that shape the prospective class.\textsuperscript{126}

If one's purpose were to decide that the risks by reason of which defendant is considered negligent include within their scope the injury that occurred, it would seem necessary to compare the prospective and retrospective classes of injuries.\textsuperscript{127} If the two classes are comparable, one might say that the "result (the retrospective class) is within the scope of the risks created by defendant's conduct (the prospective class)." It is difficult to conclude that something different is implicit in the view that the appropriateness of sanctioning wrongdoing with liability is determined by what is meant in characterizing the defendant's conduct as negligent in the circumstances, or by what is the scope of the risks by reason of which the defendant is said to be negligent.\textsuperscript{128}

If the retrospective class (and, hence, the injury that occurred) would be stated at the same level of generality as the prospective class

\textsuperscript{127} Cf. Restatement, Torts § 435(2) (Supp. 1948); Leposki v. Railway Express Agency, Inc., 297 F.2d 849 (3d Cir. 1962).
and the two are equivalent, there is good reason to hold the defendant liable; the injury would plainly be the kind of event he should have acted to avoid. There might be good reason to hold the defendant not liable if the retrospective class were stated at a lower level of generality than was the prospective class. Liability would be more appropriate to the extent the two classes approach similarity (e.g., how readily the retrospective class may be generalized without distortion into a class equivalent to the prospective class). Liability would also be more appropriate to the extent the order of magnitude of the frequency of association of the defendant's behavior with the retrospective class approaches that of the prospective class (e.g., to the extent "thieves might negligently hit other people" is comparable in probability in the circumstances to "someone might get hurt"). Similarly, if the retrospective class would be stated at a higher level of generality, or is a broader class, than the prospective class, the propriety of liability would depend on the similarity of the two classes and the approximation of the frequencies of their association with the defendant's behavior.129

The answers to these questions whether the two classes are sufficiently similar or comparable enough in frequencies of association with the defendant's behavior are, again, matters of judgment. The judgment must be made after the fact of injury and in the light of hindsight. Simply to state the predictive propositions that are taken to define the classes being compared is not enough. Foresight, in the sense of defining either the prospective or the retrospective class, does not determine whether the result is within the risk. It is only an ingredient in defining the issue by defining the classes to be compared. Foresight also is reflected in a reason for sanctioning wrongdoing with liability if the classes are comparable.

The decision whether to sanction wrongdoing with liability in light of the risks by reason of which the conduct is considered wrongful (i.e., in light of the composition and comparability of the prospective and retrospective classes of injuries) therefore must reflect an array of policies. One such policy is a kind of respect for fact. The quantitative character of predictions circumscribes judgment in that one may not disregard quantitative similarities or differences which are respected in analogous contexts; or one may not regard classes as comparable when to do so seems to distort the reason for a narrow characterization of one of them; or one may not define a predicted class broadly if experience reflects only an association with a specific type of mishap.

129 Cf. text following note 77 supra. Incomparabilities can be disregarded if other arguments for extending liability are persuasive. See text accompanying notes 130-34 infra.
Other relevant policies concern evaluations of the defendant's conduct, the compensatory purposes of negligence law, and the parties' competing equities. It is the consideration of these policies that determines how broadly the scope of the risks of liability for defendant's conduct will be expanded, or how narrowly it will be contracted. It is in the comparison of two predicted classes of injuries that the "relationship" of risk to result, or wrongdoing to injury, would be determined. That relationship is an intellectual one, imposed by the mind of the adjudicator. There is no utility whatever in characterizing it as a "causal" relationship.


122 See section II, D, 2, "The Influence of Causal Arguments Based on Economic Fairness in Two-Party, Winner-Take-All Competitions," infra in this part; Hergenrether v. East, 61 Cal. 2d —, 393 P.2d 164, 39 Cal. Rptr. 4 (1964) (enticement by defendant). Since the defendant's basis of duty is in part the role of his property, an automobile, in the injury, the scope of his liability could also reflect policies promoting traffic safety and providing financially responsible or insured defendants. See cases cited note 131 supra.

123 R. Keeton, LEGAL CAUSATION IN THE LAW OF TORTS (1963), illustrates how causal usage may burden analysis. Keeton's thesis is that "the Risk Rule is indeed a rule of causation in a cause-in-fact sense." Id. at 13. This is explained and supported principally by an effort to show the equivalence of three formulations of the risk rule:

A negligent actor is legally responsible for that harm, and only that harm, of which his negligence is a cause in fact. Id. at 4.

A negligent actor is legally responsible for that harm, and only that harm, of which the negligent aspect of his conduct is a cause in fact. Id. at 9.

A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent. Id. at 10.

In the first two formulations, the sense of "cause in fact" is identical, but in clause (1) of the third formulation "caused in fact" is used differently. "Cause in fact" is the entire criterion of liability in the first two formulations but not in the third. Yet the overall criterion of liability in the third, of which "caused in fact" is only a part, is supposed to be the equivalent of that in the first two formulations. This difference in meanings of "cause" reflects its different subjects. In the first two formulations, "negligence" and "aspect," both abstract characterizations of behavioral events, are the subjects. In the third, "conduct," a concrete denotation of behavioral events, is the subject.

Since the first two formulations are equivalent to the third, it follows that "cause in fact" in the first two formulations is not an irreducible criterion of liability. Nor is it a useful one. That it is readily reducible to another verbalization (e.g., the third formulation) suggests that it is unlikely to be used. Moreover, it seems to have almost no reliable meaning unless it is reduced to other terms. It is one thing to say that "conduct" is a "cause in fact." But in what sense does one say "negligence" or an "aspect" is a "cause in fact" of injury?

"Negligence" refers to a legal conclusion, a characterization of conduct as involving unreasonable risks of harm. Keeton emphasizes that he is using "negligence" and "aspect" as characterizations. Id. at 126 n.11. In some circumstances given behavior may be negligent and in others not. Suppose defendant drives 30 miles per hour and runs down the plaintiff.
Moreover, in the exercise of judgment that the relationship of wrongdoing to injury justifies liability, one may be persuaded that liability is appropriate in the circumstances on the basis of other relevant considerations, apart from comparison of the two predicted classes of injuries. The implication of a balanced assessment of the above policies may well conflict with important differences between the prospective and retrospective classes of injury that seem fairly implied in the predictions. If so, the predictions are often disregarded in favor of the other policies supporting liability. Determining similarity of the predicted classes is thus a special case of the more general function of relating wrongdoing to injury.

In summary, causal propositions stating patterns of association of injuries with conduct are involved in sanctioning wrongdoing with injury. These propositions are in the nature of predictions and they may be better understood in terms of "foresight" or "risk." When the ambiguities in those terms are avoided, the propositions are seen as factual ingredients in a large judgment of policy to the effect that liability for injuries similar to those the prospect of which would call for alteration of behavior is an appropriate sanction for not having altered the behavior.

The operational characteristics of a description of defendant's involvement in the injury that entitle the description to be characterized as a matter of "fact" would not be affected by whether the speed limit was 25 miles per hour or whether defendant should have known that. Characterizations do not normally "cause" events, at least not "in fact." When we say our host is killing us with kindness, we take that only for what it is grammatically, an ironic conceit, a telescoping of propositions describing events and characterizing the situation so described. However it may differ in spirit, being killed by negligence seems no different in grammar.

All that "cause in fact" in the first two formulations can mean functionally is something like "related to the harm in such a way that justifies liability," a broad conclusion of law, one ingredient of which may be an appropriate historical involvement of defendant or his conduct. This seems to be what the third formulation says, its clause (1) referring to such an historical role and its clause (2) describing additional content of the relationship that justifies liability. To use "cause" and "fact" for these large purposes puts more pressure on the words than they can bear. Cf. id. at 14-16. The effort invites a confusing merger of two functions, that of finding and formulating a basis of duty [clause (1)] and that of sanctioning wrongdoing with liability [clause (2)], each of which it states too narrowly. With respect to the latter function alone, it is not illuminating to use "cause" to denote an intellectual relationship, one of relevance, between such abstractions as "negligence" and "harm."

Parts II and III of this Article show in detail that "cause" is no better a solvent when its subject is not a characterization of conduct but is "the negligent conduct," a supposed physical or temporal "segment" of the defendant's behavior that is singled out for characterization as negligent. Contra, BECK & MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961).

A classic example is the defendant's liability for aggravation, including death, of the plaintiff's pre-existing infirmities. See FROSTER, TORTS § 50, at 300-01 (3d ed. 1964). Others are liability for the bodily effects of the injury inflicted, and for the effects of medical treatment for such injuries. See Seavey, Principles of Torts, 56 HARV. L. REV. 72, 91-92 (1942); Vance, LIABILITY FOR CONSEQUENTIAL INJURIES, 42 TEXAS L. REV. 86 (1963).
behavior. They are also ingredients in the narrower policy decision whether the particular injury should be considered to be similar to those the prospect of which would have been adequate to call for alteration of the defendant's behavior.

However, policy judgments based on such propositions do not account for many decisions sanctioning wrongdoing or refusing to do so. For instance, as the following examples show, other causal arguments and excuses less obviously related to the reasons for the rules of conduct defendant violated are also relevant in performing the function of judging whether, on the particular facts, liability is an appropriate sanction.

2. The Influence of Causal Arguments Based on Economic Fairness in Two-Party, Winner-Take-All Competitions

In deciding whether liability is a relevant sanction in the car-key case, one would want to know more than the facts given at the outset above. Two further variables are particularly important: whether the thief was negligent in running down the plaintiff, and the time and place of the accident. Consider first the variable of the thief's negligence. The defendant would not be liable if the thief is not negligent. It may be thought that thieves are not a subclass of noticeably negligent drivers and that the jury may not find that it was negligent for the defendant to have facilitated the theft. Some courts have permitted a finding of negligence without stating whether thieves are thought to be a subclass of negligent drivers, and, if not, whether injuries from thieves are nevertheless within the class of injuries protected against because other unauthorized users would form a class of noticeably negligent drivers. Hence, it is difficult to harmonize the decisions reliably on predictions of likelihoods that thieves will drive negligently. Moreover, arguments based on predictions need not require denial of liability to a plaintiff nonnegligently hit by a thief if thieves as a subclass are thought noticeably negligent.

Further reasons for exclusion of the injuries inflicted by the nonnegligent thief would be useful and may be found in competitive causal policies. Ordinarily, an innocent victim of an innocent driver (the thief) cannot recover compensation under the fault system. In the

---

138 See text accompanying note 124 supra. Cf. Simmons v. Lollar, 304 F.2d 774 (10th Cir. 1962) (defendant liable for death following nonnegligent necessary medical treatment).
car-key case, he is seeking to do just that, on the basis of the unauthorized status of the driver. To a third-person observer, the plaintiff's relation to that status might seem purely random, in that he could not recover if anyone else driving the same way might have hit him.\textsuperscript{130} Of course no one else did hit him, but the argument is that the critical fact, the unauthorized status of the driver, would ordinarily be of no concern to the plaintiff. The theft was a wrong only to the defendant.

There is a sense in which the plaintiff seems to be grasping straws to find compensation. Although the thief drove nonnegligently, no one would deny the desirability of plaintiff's being compensated from some source. The question is whether this source can be found in the defendant's expense. The argument is that the plaintiff's equities are too weak to justify his claim against the defendant, in other words, that liability for the particular injury would be an inappropriate sanction for the wrongdoing. The argument is an instance of a competitive causal policy that appears generally applicable in, and explanatory of, a number of two-party competitions in which one party's gain is the other's loss and in which the winner takes it all. It might be thought of as an argument of windfall to the plaintiff and unjust deprivation to the defendant.

The variable of the time and place of accident also illuminates the role of competitive causal policies in defining the hazards protected against. If the plaintiff is run down—even negligently—hours or days after the theft, or after the car has been driven for a number of blocks or miles, there would ordinarily be no liability.\textsuperscript{140} If there is liability, it is where an unusual frequency of injury could have been predicted by defendant to be associated with his behavior and would have been specifically of injuries occurring long after the time or far from the place of the theft.\textsuperscript{141} But "foreseeability" does not so easily account for the usual holdings of no liability for accidents remote in time or space, because the chances of one who has a car (e.g., who was facilitated in stealing it) running down someone increase over time. Of course, it is more difficult to predict when and where the long-term thief may run someone

\textsuperscript{130} A case such as Atchison, T. & S.F. Ry. v. Parry, 67 Kan. 515, 73 Pac. 105 (1903), is distinguishable. There, the defendant put a helpless passenger off its train. He was struck 5 miles and 4 hours later, nonnegligently, by another of defendant's trains on the same track. The defendant was held liable. The retrospective class of injuries would be comparable to the prospective class at the time the passenger was put off, which class would be broadly defined in light of the defendant's special relationship to him.


down than it is to predict in equal detail the less likely occurrence of his doing so during his getaway. If prospective or retrospective predictions were to be decisive, decision would have to turn on how specific the predictions must be. That is a matter of legal policy not simply determined by considerations of what is foreseeable and of what is the feasibility of making predictions.

Additional arguments must be used to define the "scope of the risks" in terms of the time and place of their occurrence. Competitive causal policies may constitute such arguments. For instance, one might think that, by the time of the accident, the thief might have stolen another car or at least might be driving another one and could have hit the plaintiff with it. Also, the possibility that the defendant's car could have been recovered before the accident is independent of the defendant's conduct. There are a number of times and ways the plaintiff might have been injured by other automobiles after the defendant's conduct. The defendant's automobile itself could have done the damage in the hands of an authorized driver.

These arguments appear to invoke vague but identifiable evaluative generalizations. One generalization the arguments are calculated to show is that, to a third person observing the plaintiff, the defendant's historical involvement in the injury can be characterized as random, and sometimes no one should be singled out to pay for a random event. The speculations that a similar injury could happen to the plaintiff even if the defendant had not acted negligently are calculated to suggest a second generalization: sometimes the defendant should not be forced to pay for injuries if they might have happened in other ways for which he would not be liable. The argument concedes that it is desirable to compensate the plaintiff from some source, including, of course, the negligent thief if he could be found. The point of the argument is to show that the relatively weak equities of the plaintiff, viewed in competition with the defendant, render the forced assumption of plaintiff's loss by defendant too harsh a sanction in the circumstances.\footnote{See note 53 supra and accompanying text.}

The substantive content and operational characteristics of competitive causal policy arguments based on two-party competitions can be briefly noted. Judicial conclusions accepting or rejecting arguments like those above appear in such simple statements of the type "the negligence did (or did not) cause the injury."\footnote{See, e.g., Stanko v. Zillen, 33 Ill. App. 2d 364, 179 N.E.2d 436 (1961); Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948).} The primary content of that conclusive statement refers to competitive causal policies.
The purpose of the conclusion is to decide whether liability is an appropriate sanction, and it is validated by reference to criteria of persuasiveness for purposes of achieving distributive justice. The arguments on which the conclusion is based, which state the parties' competitive equities, would have similar operational characteristics.

Statements of the parties' competitive equities may in turn be based on propositions suggesting various other ways injuries such as plaintiff's can happen. These last propositions are neither of historical particulars nor hypotheses of science. Nor are they propositions stating the frequency of association of injuries with types of conduct. They are statements of causal patterns that, standing alone, are less reliable and state a lower order of probability than any of these other propositions. The more reliable they are, the more persuasive is the defendant's exculpatory argument. But, in order to be rationally valid, these speculative generalizations do not need to be persuasive that plaintiff would indeed have been run down in some other way. They can be reliable and in some degree persuasive of the inappropriateness of liability as a sanction, if the adjudicator chooses, so long as they are coherent with experience, credible, and not of an order of improbability that is uncommonly high for similar propositions of causal patterns.

3. *The Influence of Causal Arguments of Economic Fairness to Either Party Not Based on Their Two-Party Competition*

It may seem inappropriate to sanction defendant's wrongdoing with liability for the injury even though the plaintiff's competitive equities would not be too weak to justify freeing him of the loss at defendant's expense. The defendant may have another excuse. His excuse may be less related to arguments about the reasons why he is said to be negligent than are the foregoing competitive causal policy arguments. Suppose the escaping thief in the car-key case deliberately runs down the plaintiff in making a getaway. Assume there is a noticeable frequency of injury during getaways associated with leaving keys in cars and that it is unreasonable to create that risk. Ordinarily on such assumptions, the defendant is not excused from liability on the basis of the improbability of the details of the injury,\(^{144}\) even if a thief's willfulness is improbable relative to the improbability of any injuries during getaways. Whatever notions of unfairness are generated by unlikely causal patterns are generally inadequate to outweigh the dilemmas that would result from requiring typicality of the details of injury.

In the present example, however, the arguments underlying holdings that the conduct of an unanticipated malicious intervenor relieves the defendant from liability are relevant and might be thought persuasive. These arguments include competitive causal policies. One argument is that, in view of the thief’s character, he would have done similar harm to someone regardless of the defendant’s role. There is no way to guard against a malicious person at large in society; he will inevitably hurt innocent people whether or not the defendant also facilitates his doing so. This shades into the second argument, that the defendant should not bear the cost of a random event. The historical involvement of both plaintiff and defendant was dependent on the thief’s choices, which were consciously evil and were beyond defendant’s influence. Since they were willed events, but not willed by defendant, they are random with respect to him. It is irrational to single out his conduct at random to be sanctioned for a willed event. This in turn shades into a third argument, that it is unethical to force the defendant to pay for events that were also sufficiently conditioned on another man’s evil conduct. Sin is personal, and the defendant should not be sanctioned for another’s sin. In each of these arguments, the sanction of liability is thought inappropriate, not because of competitive unfairness in shifting the loss from the plaintiff to defendant, but because of the defendant’s independent claims not to be held to “answer (in damages) for” an event.

The use of causal language in malicious-intervenor cases holding defendant not liable may be explained by the unacknowledged presence of competitive causal policies and helps confirm that they are present. In arguing that harm would have happened regardless of the defendant, he is not its “cause” in the sense of a necessary condition. In arguing that the event was random, defendant is not a “cause” in the sense of having willed it into existence. In the argument that he cannot be held for another’s sin, defendant is not a “cause” in the sense of being morally responsible for an event to which judgments of moral responsibility are highly relevant. Since he is not a “cause” in those senses, he is not a “cause” of the injury in the sense of being economically responsible for it.

147 See text accompanying notes 44, 140-42 supra.
148 See text accompanying notes 43-44 supra. Cf. text accompanying note 52 supra.
149 See generally parts II and III of this Article.
With this part as background for analysis and for particularistic control of "cause," this Article attempts now to analyze what is involved in the courts' decisions of darting-out cases as dependent on whether the defendant's negligence in speeding "caused" the injury.

*To be continued*