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Confused Culpability, Contrived Causation, and the Collapse of Tort Theory

Larry Alexander & Kimberly Kessler Ferzan

What justifies tort law? Once we identify a domain that is central to if not co-extensive with “torts,” we will find that it consists of a motley collection of doctrines that are impossible to justify under any recognizable and attractive normative principles.

I. The Target Field

If one looks inside a standard torts casebook, one finds a vast and quite variegated collection of cases. Nevertheless, all torts casebooks do contain two groups of cases with the following characteristics: (1) In both groups, the plaintiff has claimed that his person has been (or will be) injured, his property damaged, or his livelihood adversely affected by defendant’s conduct, conduct that does not involve a breach of contract or of trust. (2) In one group, the defendant has claimed that he did not mean to injure, damage, or adversely affect plaintiff’s interests, nor was he aware of an unjustifiable risk that his conduct would do so. (3) In the other group, defendant was either aware of an unjustifiable risk that his conduct would adversely affect plaintiff’s interests or acted with the purpose of adversely affecting those interests. (4) In both groups, the plaintiff is seeking monetary compensation for that injury or damage.

Can cases in those two groups be explained and justified by attractive normative principles? To answer, one ought to take into account other mechanisms for dealing with loss and culpability. Tort law functions in a rather ad hoc manner, only repairing losses caused by other humans and not losses caused by Mother Nature, and imposing liability on those who cause harm

and not those who merely **risk it**.¹ We think that an insurance scheme, coupled with administrative regulations and the criminal law, may be a better mechanism.

II. Is There a Duty in the House?

We agree with Greg Keating that tort law cannot be explained and justified without locating some duty that defendant has breached that accounts for why he and not others—or the plaintiff himself—must compensate plaintiff for plaintiff’s losses in those cases in which the plaintiff prevails. What is it about defendant that justifies plaintiff collecting from *him*? Providing recourse to an injured plaintiff does not explain and justify giving plaintiff recourse *against defendant*. Nor does invoking “corrective justice” tell us why it is “just” in any sense of just for defendant to be held **liable**.²

But what would account for plaintiff’s claim against defendant for compensation? For Keating and for us, the most obvious candidate would be that defendant breached a duty toward plaintiff that resulted in plaintiff’s loss.

Coming up with a duty that defendants have breached in these cases is no easy task, however. Remember, in one group of cases the defendant acted without intending to harm plaintiff’s interests and without advertent to an unjustifiable risk to those interests that his conduct was creating. Let us look at such cases to see if we can locate a breach of duty.

A. A Duty Not to Cause Harm?

If we had a duty never to cause harm to others’ interests, we would have made some progress in locating the duty we need. But such a duty can neither explain nor justify the case results.

¹ See Ronen Avraham & Issa Kohler-Hausmann, “Accident Law for Egalitarians,” 12 *Legal Theory* 181 (2006).

² On these points, see Gregory C. Keating, “The Priority of Respect Over Repair,” 18 *Legal Theory* 293 (2012). The law and economics, cheapest cost-avoider, approach is not duty-based but rather is an ex ante insurance, not an ex post damage, approach.

To begin with, if there were such a duty, we would be hard pressed to explain all those cases in which the defendant was held to have caused plaintiff's losses but in which defendant prevailed. There are many such cases and countless that are never litigated because the plaintiff knows he will not prevail.

It seems doubtful those cases are all incorrect. One reason it should be doubtful is the Coasean point that plaintiff's injuries have also been caused by *his* **conduct**.³ Indeed, if plaintiff recovers, defendant's resulting loss has been caused by plaintiff's acts of, say, using defendant's product, or driving on the same road as defendant, plus his act of suing defendant.

There are other reasons aside from the Coasean such "strict liability" cannot be justified. Richard Epstein's argument in favor of strict liability on the ground that it followed logically from plaintiff's entitlement to his life, bodily integrity, and property was question **begging**.⁴ For the question can be reposed: why do plaintiff's entitlements extend to entitlements to be compensated for accidental damage, and why is defendant not entitled to secure *his* property against accidental damage claims by plaintiffs? There is no good answer to these questions.

B. A Duty Not Cause Harm Through "Faulty" Conduct?

In a large number of cases in the torts casebooks, plaintiff recovers his losses from defendant because the trier finds that defendant caused plaintiff's losses through *faulty conduct*. For many, the fact that defendant's conduct was faulty justifies making defendant, and not others, pay for plaintiff's losses.

But what kind of fault is exhibited by defendant's conduct in these cases? It cannot be this: (1) that had defendant not acted exactly as he did, plaintiff would not have suffered the losses he suffered; and (2) that the social benefits (however calculated) of defendant's acting *exactly as he*

³ Ronald H. Coase, "The Problem of Social Cost," 3 *J. Law and Econ.* 1 (1960), 2.

⁴ Richard A. Epstein, "A Theory of Strict Liability," 2 *J. Legal Stud.* 151 (1973).

did were not sufficient to justify plaintiff's losses. Even leaving aside the problematic counterfactual in (1)—a point we shall return to later in this chapter—(1) and (2) are present even in those cases in which plaintiff lost because the court did not find defendant to have been at fault. In other words, leaving aside cases in which defendant's act was a justifiable one *on the condition that he pay for any damage it causes*—cases that can be considered a species of private eminent domain—in the bulk of cases meeting conditions (1) and (2), the plaintiff will lose.

What condition in addition to (1) and (2) is required for “fault” to exist? Remember, we are not at this point dealing with a defendant who is conscious of an unjustifiable risk to plaintiff's person or property, or who intends to injure plaintiff's person or property. We are dealing with defendants who have not adverted to those conditions that were present when they acted and the presence of which in conjunction with defendant's act brought about plaintiff's injuries or property damages.

1. *What is the fault in not adverting?*

The orthodox doctrinal response is that defendant's “fault” in these cases was his failure to alter his conduct because *he was not adverting* to those harm-causing conditions that were present when he acted as he did. But what kind of fault is not adverting?

First, it is worth noting that in some pockets of tort law, even the most ardent proponents of the reasonable person test for fault must admit that their test amounts to a form of strict liability. This is because when the defendant is held to an objective standard that he utterly lacks the capacity to meet, he is not demonstrating any fault on his **part**.⁵ When being the best that you can be is simply not good enough for tort law, there's a name for that—strict **liability**.⁶

⁵ See, eg, *Vaughan v. Menlove*, (1837) 132 E.R. 490.

⁶ See also Avihay Dorfman, “Reasonable Care: Equality as Objectivity,” 41 *Law & Phil.* 369 (2012).

Second, we see the problem as going beyond these handful of examples. Consider two cases:

Hard Worker

Kimberly has an important job and has been asked to write a legal memorandum by the end of the week. She works through lunch and leaves the office to drive home at 7:30 p.m. Because she is still deep in thought, because she has been looking at a computer screen all day, and because her blood sugar is low from not eating, she mistakenly interprets the light as a green light for her. She hits the accelerator and collides with another car.

Excellent Driver

Mike reads a scientific article that discusses the strength of peripheral vision and becomes convinced that reading the newspaper while driving is not problematic. Mike reads the paper while driving and rear-ends a car that he failed to see had braked.

Kimberly and Mike each get the Learned Hand *Carroll Towing*⁷ formula wrong. Kimberly fails to run the formula at all because she never sees the risk. Mike, we shall assume, is falsely confident in his abilities and therefore discounts the probability of harm to a point at which his running the risk is justified under the Hand formula. Indeed, this is why the Hand formula is not a test for inadvertent negligence. Rather, that test posits a defendant who weighs the costs and benefits of an act, finds that the costs outweigh the benefits, and then despite this chooses to engage in that act. Such a defendant would indeed be culpable, but he would be culpable because he is *consciously* disregarding an unjustifiable risk. He is *reckless*, not inadvertently negligent. (The inadvertently negligent actor is not advertent to the Hand formula's costs and benefits; and the costs and benefits of uncovering the true costs and benefits do not appear to him to be Hand-formula cost-justified.)⁸

Tort law would find that both of these individuals are "at fault," but wherein does the fault lie? In our book on criminal law theory, we devoted a chapter to establishing the proposition that

⁷ United States v. Carroll Towing Co., 159 F. 2d 169 (2d Cir. 1947).

⁸ A more complete discussion of this problem of non-actuarial risks is found in Larry A. Alexander, "Causation and Corrective Justice: Does Tort Law Make Sense?," 6 *Law & Phil.* 1 (1987), 18–23.

merely not advertent to dangerous aspects of one's conduct is *not culpable*.⁹ In the criminal law context, theorists have struggled in their attempts to drive a wedge between Kimberly, whom many theorists think should not be held criminally responsible, and Mike, whom many think should be responsible, allegedly because he manifests an indifference to others that Kimberly does *not*.¹⁰ We reject that distinction, but no matter; for tort law makes Kimberly pay, too. But why?

As we noted in our book, “an actor may fail to form a belief (or a correct belief) if he (1) lacks the requisite background beliefs, (2) lacks the intellectual ability, or (3) lacks the motivation to form the *belief*.”¹¹ Michael Moore and Heidi Hurd have identified those capacity defects as motor control defects, cognitive defects, conational defects, and motivational *deficiencies*.¹² As they clearly elucidate, anytime we wish to say that someone *could have* adverted, what we are saying is that the actor *would have* adverted *if* some condition C. The moral work, then, is done by articulating why the lack of C is blameworthy. (We assume that tort law does not mean “fault” as simply in some way faulty or deficient, but means to carry some suggestion of moral blame, and thus must show why the failing in question is blameworthy.)

These failings themselves, however, may not be “faulty.” Even if it is true that Kimberly *could have* adverted to the red light had some condition not been present that was present, wherein lies the fault in her perceptual failure? Even if it is true that Mike *could have* correctly appraised the chance of an accident had he had a lower opinion of his abilities, wherein lies the

⁹ See Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (2009), ch. 3.

¹⁰ See, eg, Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *Crim. L. & Phil.* 137 (2008).

¹¹ Alexander and Ferzan, *Crime and Culpability*, 83.

¹² Michael S. Moore & Heidi M. Hurd, “Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence,” 5 *Crim. L. and Phil.* 147 (2011).

fault in having a high opinion of his driving skill and perceptual abilities? Unless tort law aims to be an ad hoc redistributive system whereby when one's perceptual or intellectual mechanisms falter and cause harm, one's goods are simply redistributed to another human being, tort law must explain wherein the fault in having the faulty mechanism lies.

Moreover, when there is fault, it is because we can point to a prior point in time when the actor made a deliberate choice. That is, we can trace the present defect to an earlier act of *recklessness*—a conscious decision to take an unjustified risk. But tort law never directly focuses on these upstream measures, nor does it ever assess whether those upstream measures would have been reasonable to take. What would Kimberly have had to forgo (1) to write a note to remember to eat, and (2) to take that lunch break? She clearly would have done less work, and important work at that. What should Mike have done to assess the validity of the scientific study he read or to evaluate further his perceptual abilities? And why would Kimberly and Mike believe they needed to do these things? After all, if you believe the risk created by your act is X, and X is low enough to make your act justifiable, what *reason* do you have to desist and investigate further? Desisting and investigating are costly in time and resources. It is true, of course, that you may discover that the risk of your act is Y, which is higher than X and sufficiently high to render your act unjustifiable. But it is also true that you may discover the act's risk is Z, which is lower than X, rendering the act even more justifiable than you thought. And there is no probability that you can attribute to discovering that either Y or Z is the case. If you believe that the risk presented by your act is X, then you must predict that upon further investigation, the risk will still turn out to be X, and you will have wasted time and resources on the investigation. If the act turns out to cause damage that could have been averted at a justifiable cost—if its actual risk of damage was 1, thus higher than X (and Y)—then it is true in one sense

that defendant's act, which he thought justifiable, was not justifiable, and he *should* not have taken that act. That is the "should" of 20-20 hindsight. And that is really the only "should" that makes sense in claiming that defendant should have adverted to the higher risk. But the same "should" is available in the strict liability cases and is not a "should" that suggests any culpability-reflecting "fault."

Merely claiming that a "reasonable" and implicitly nonculpable person would have adverted is not itself an argument that confronts the points that Moore, Hurd, and we have made, points that can be encapsulated in the observation that we cannot, at the time of action, directly control to what we are adverting. (We would have to be adverting to that to which we are not adverting in order to do so.)

Are we inconsistent in deeming actors culpable for their misperceptions of reasons but not for their misperceptions of risks? If the latter misperceptions are outside of the actor's control, are not the former misperceptions as well?

There are deep waters here that we can only dip a toe into in this chapter. A quick response, which will have to suffice, is that giving the interests of others too little weight—insufficient concern—just *is* the basis of culpability. *Why* the culpable actor gives others' interests insufficient concern would move the discussion into the heart of the free will/determinism/moral responsibility debates as well as into the debate over whether psychopaths, who give others' interests *no* weight, can be deemed morally responsible and culpable. We admit that these issues must be resolved to have a complete account of culpable acts. We admit also that there are difficult issues raised when actors give others' interests insufficient concern because they subscribe to moral norms—norms which activate in them the reactive emotions of blame, indignation, and guilt—that *require* insufficient concern for some

others. (Honor killings may be an example.) Here, we assert only that nonpsychopaths who, in acting, give others' interests insufficient weight are culpable and distinguishable from those who misassess risks.

Finally, some will agree with us that inadvertent negligence is not culpable. Nonetheless, they will respond that we are wrong to assume that "fault" in tort law is equivalent to culpability, the concern of criminal law. However, because tort theorists distinguish between fault-based liability and strict liability, for this criticism to have any traction, there must be a notion of fault that is neither culpability nor strict liability. In the following section, we deny that possibility.

2. *Why negligence is indistinguishable from strict liability*

Not only is inadvertent negligence not culpable—or so we contend—but *inadvertent negligence is indistinguishable from strict liability*. We have elsewhere argued that the distinction between negligence and strict liability cannot be maintained because there is no non-arbitrary way to construct the notion of the "reasonable person" who would have adverted to the risk created by his proposed **conduct**.¹³ Here, we want to argue against the distinction between negligence and strict liability on different, but ultimately related, grounds. We want to argue that there is no non-arbitrary way to assess the riskiness of conduct *ex post* that will produce a negligence-strict liability distinction among those defendants who failed to advert to the **risk**.¹⁴ There is no non-arbitrary way because, *ex post*, the risk of harm created by conduct is either one or zero, and neither risk will produce the needed distinction.

To illustrate our point, we offer some cases:

¹³ See Alexander and Ferzan, *Crime and Culpability*, ch. 3. See also Larry Alexander, "Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law," 7 *Soc. Phil. & Pol'y* 84 (1990).

¹⁴ This argument draws from Larry Alexander, "Foreword: Coleman and Corrective Justice," 15 *Harv. J. L. & Pub. Pol'y* 621 (1992), 631–36.

- (1) Nellie, looking for some spices in a cabinet, takes out some rat poison and places it on a kitchen counter. She is so preoccupied with her cooking that she forgets she has left the poison there. Later, her three-year-old brother Oscar comes into the kitchen, thinks the poison is sugar, and eats it, becoming very ill.
- (2) Same case as (1), except Oscar slips while he is reaching for the rat poison, hurts himself, and begins crying. Nellie rushes into the kitchen, where she sees that Oscar had almost eaten the poison. With a great sense of relief, she puts the poison back in the cabinet.
- (3) The Wrinkled Prune Company sells pitted prunes. Its prunes are pitted by a state-of-the-art technological process. There is no cost-justified technology or process design that will guarantee that no pits will remain. Wrinkled puts a notice on every box of its prunes that warns consumers that some pits may remain.

Paula, a six-year-old, loves to eat prunes. She bites down on one of Wrinkled's prunes and breaks a tooth on a pit that had not been removed. A worker at Wrinkled could have inspected this particular box of prunes for less cost than Paula's dentist bill.

- (4) This case is the same as (3), only Paula discovers the pit before biting down and avoids injury.

Traditionally, these four cases would be analyzed along the following lines. In case (1), Nellie was negligent, and her negligence resulted in injury to Oscar. In case (2), she was again negligent, but her negligence led to no harm. In case (3), in many jurisdictions, Wrinkled would be strictly liable to Paula because its product, pitted prunes, was defective and caused Paula's injury. Wrinkled is not negligent, however, because its process for pitting was cost-justified, even given the risks of an occasional incompletely pitted prune. In case (4), there is neither negligence nor strict liability.

Now what were the risks of harm in these cases? Because we are operating *ex post*, the answers are easy. In cases (1) and (3), the risk of harm was one. In cases (2) and (4), it was zero. The actual risks fail to distinguish negligence and strict liability. They distinguish only the cases of harm from the cases of no harm.

What if we add the condition that the risks of harm must be unjustifiable if conduct is to be deemed negligent? That still does not produce the outcomes of the traditional analysis. In case (3), given that the actual risk of harm to Paula was one, Wrinkled was “unjustified” in not having a worker inspect the box bound for Paula’s house. Of course, it did not know that particular box contained an incompletely pitted prune. But neither did Nellie know that she had left the rat poison out, at least in the sense that she was not advertent to that fact. Moreover, in case (2), the risk is zero, which can hardly be deemed an unjustifiable risk.

To make the traditional analysis work, we must delete the information about injury that we possess *ex post* in such a way as to produce risks in cases (1) and (2) that are between one and zero, equal to each other, and higher than the risks in cases (3) and (4) (which are also between one and zero and equal to each other). The problem is how to select which information about the actual cases to delete.

This is not a problem in cases of recklessness. There, we let the actor’s subjective estimate of the risk *ex ante* determine our characterization of his conduct. If he estimates the risk as high, so high that we would deem taking such a risk unjustifiable, then he is reckless whether the risk was one or zero (that is, whether the harm risked came to pass).

In cases (1) – (4), however, we cannot avail ourselves of the actor’s *ex ante* subjective estimate of risk if we want to produce the traditional outcomes. Nellie undoubtedly believes her activity, which she would describe as “cooking,” is only minimally risky, because she is unaware that it includes her leaving rat poison in a place accessible to Oscar. Wrinkled has an *ex ante* estimate of the risks of injury to Paula which equals the risks to any consumer of its pitted prunes chosen at random. By hypothesis, that risk is low and reasonable to impose. The risk is ascertained by abstracting from the details of all reported cases of incompletely pitted prunes

information that can serve as the basis for efficient actuarial categories. Thus, the percentage of prunes that are incompletely pitted and the total damage caused by incompletely pitted prunes will probably be the only information that is gathered, the more specific details being too expensive to gather or incapable of affecting Wrinkled's conduct even if gathered. (An example of the latter information would be information that consumers are more likely to bite down on a pit at breakfast, when they are less alert, than at lunch; here, unless the differential risk were sufficient to warrant a special "breakfast warning," Wrinkled must lump the risks together.)

The cases of Nellie and Wrinkled resist being distinguished upon close analysis despite the traditional view that they are different. In all four cases, the actors have in a sense misgauged the risks. In cases (1) and (3), Nellie and Wrinkled have underestimated the risk—Nellie, because she views her act as "cooking" rather than as "cooking while leaving rat poison where Oscar will eat it"; Wrinkled, because it is not concerned with the risks in any individual case but only with the average risks in the aggregate. In both cases the actual risk of one could have been reduced to zero by cost-justified actions, but neither actor was aware of the factors that would justify those actions. Nellie was unaware that she had forgotten to put the rat poison back in the cabinet. Wrinkled was not aware that the box bound for Paula contained an incompletely pitted prune. So although Nellie and Wrinkled believed that their conduct was risky, but justifiably so under the description "cooking" and "selling prunes pitted by a particular process," both were unaware that their conduct caused a risk of one under the descriptions "cooking (or selling prunes) under the circumstances that actually exist in these cases." Likewise, in cases (2) and (4), where no harm occurs, Nellie and Wrinkled have overestimated the risk in the particular circumstances.

To summarize the analysis thus far, the risk in every case is actually either one or zero. In each case there are general features on which the actor will focus to predict a risk of harm that lies somewhere between one and zero. The actor who predicts a risk that is unjustifiably high and then proceeds to act is reckless even if the harm risked does not eventuate (the actual risk is zero). The actor who predicts a low risk—a risk that it is justifiable to take—is not reckless if he acts. If his prediction is actuarially sound, yet harm eventuates (the actual risk is one), then any liability he faces is paradigmatic strict liability (for example, our case (3)). This is so even though in the particular case, acting was not cost-justified. (Wrinkled was not cost-justified in selling the particular box of prunes to Paula in case (3), or was not cost-justified in failing to inspect that particular box.)

What if the actor incorrectly underestimates the actuarial **risk**?¹⁵ This may occur when an act has a general feature or features that lend themselves to determining the actuarial risk, but the actor is either unaware of those features or is aware of the features but not of the actuarial risk associated with them. These are the cases of inadvertent negligence, such as Nellie’s leaving the rat poison within Oscar’s reach (cases (1) and (2)). In these cases we must ask why the actor is ignorant of the important features or the risks associated with them. And in doing so we repeat the preceding analysis, only this time we replace risk of harm with risk of ignorance (of features or **risks**).¹⁶ The risk of ignorance may be either reckless, or it may be cost-justified. (For example, Nellie may be employing an efficient level of advertence that in cases (1) and (2) just happened to result in inadvertence to risk.) Or the actor could be ignorant of the risk of ignorance, in which case the analysis repeats again. Ultimately, we end up with either a reckless

¹⁵ Here we continue a discussion begun in Alexander, “Causation and Corrective Justice,” 18–23.

¹⁶ See also Mark Grady, “Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion,” 82 *Nw. U. L. Rev.* 293 (1988).

actor or a strictly liable one. Inadvertent negligence breaks down into one of those two categories; it is not a third category.

True risks—one or zero—do not distinguish within the class of human-caused accidents, because the risk is always one in those cases. The focus must therefore be on *ex ante* subjective estimates of the risk. The subjective estimates may show the action to be *ex ante* cost-justified (strict liability) because the action is a particular instance of a general class whose actuarial risk of harm is low relative to its benefits and the costs of refining the actuarial estimates. The subjective estimates may show the action to be reckless. Or the subjective estimates may, were they correct, show the action to be *ex ante* cost-justified, but they may be incorrect subjective estimates. In the latter case our focus must switch to the subjective estimate of risks associated with features of acts, the subjective estimates regarding the degree of confidence warranted in the subjective estimates of risks associated with features of acts, the subjective estimates of the benefits of using different actuarial categories, or the subjective estimates of the likelihood of not advertenting to a feature whose associated risk is known. The subjective estimates of those subjective estimates may either reveal reasonable behavior, and hence strict liability, or reveal recklessness.

In short, every case of inadvertent negligence—Nellie in cases (1) and (2)—is at bottom either a case of recklessness or a case of strict liability. And every case of strict liability—Wrinkled in case (3)—can be viewed as a case of inadvertent negligence if we ignore subjective estimates of risk and focus on the particulars that make the true risk one.

To the extent that tort law is concerned with deterring culpable behavior and requiring culpable actors to pay for the damage caused by their acts, both inadvertent negligence and strict liability are outside its purview. To the extent that tort law is concerned with placing the costs of

interactions on those—injurers or injured, third-party insurers or first-party insurers—who possess actuarial information about risks, providing (cost-justified) incentives to obtain actuarial information, or effecting distributional patterns and reducing transaction costs (including litigation costs), cases of both inadvertent negligence and strict liability are within its purview, although the distinction between them is wholly chimerical and irrelevant. This is why, from an economist’s view, when strategic concerns relative to the costs and likelihood of proving negligence in court are put to one side, the choice between a negligence rule and a strict liability rule is inconsequential: They would lead to exactly the same conduct.

Ultimately, everything comes down to what to do about non-actuarial risks. When we lack information we cannot act on the information we lack, nor can we assess the value of obtaining that information. (We must have the information in order to assess the value of obtaining it.) Ignorance cannot be assigned an actuarial value. Except for reckless, knowing, or intentional harm causing, all harm-causing results from ignorance of true risk. An actor who acts in the face of his own estimate of unjustifiably high risks has acted unjustifiably and can be dealt with in the same manner as are knowing and intentional injurers. But an actor whose ignorance leads him to assess a risk as sufficiently low to make taking it justifiable is an actor whose liability, if any, is strict. And when the strict liability attaches to ignorance that, *at the level it occurs*, cannot be actuarialized, the case for liability and internalizing costs rather than socializing them cannot rest on attaching the proper incentives to rational calculation.

We conclude that, limiting ourselves to cases of inadvertent negligence and strict liability, whatever “fault” is present in the former is also present in the latter, and that form of fault is not a form of culpability. Any alleged duty to avoid faulty conduct in this sense really boils down to

a duty not to cause harm, and we have already argued that such a duty cannot be justified and, moreover, cannot explain torts cases.

C. A Duty Not to Cause Harm Through Culpable Conduct

There is surely a general duty not to engage in culpable conduct. For us, culpable conduct, rightly conceived, is conduct that the actor believes imposes risks to others' legally-protected interests that are beyond the actor's ability to reduce once he engages in the conduct in question, and that are not justified by the reasons that favor the conduct that the actor believes **exist**.¹⁷ Therefore, on our conception of culpable conduct, the actor must be advertent to the relevant risks and reasons that determine his culpability. The question of whether tort law is an appropriate means for dealing with culpably caused harms then leads to our second worry—causation.

III. Causation

For criminal culpability, what happens once the actor engages in culpable conduct—whether his conduct does or does not cause harm to others' legally-protected interests—should be immaterial, or so we have argued **elsewhere**.¹⁸ In the realm of tort law, however, if culpable conduct does not produce harm to the plaintiff's legally-protected interests, then no tort has occurred. So, for purposes of tort law, when we focus on truly culpable conduct, we focus solely on culpable conduct by the defendant that has resulted in damage to legally-protected interests of the plaintiff.

The “resulted in” notion is typically cashed out in terms of causation. Defendant's culpable conduct must have “caused” plaintiff's injuries. But this causation relation, without which there

¹⁷ Or *might* exist, discounted by their improbability as the actor perceives it.

¹⁸ See Alexander and Ferzan, *Crime and Culpability*, ch. 5.

would be no recognizable tort law, has proven to be quite troublesome. If it cannot be adequately theorized in the context of truly culpable conduct, then tort law in that context cannot be fully theoretically justified. And if it cannot be theoretically justified when defendant has acted culpably, then it surely cannot be theoretically justified when defendant's conduct has displayed only a nonculpable "fault."

A. Problem One: The Mismatch Between Degree of Culpability and Degree of Harm, or Does Corrective Justice Trump Retributive Justice?

Suppose Ed commits a minimally culpable act, one for which he would deserve only a smallish penalty—say, a \$50 fine. Unfortunately, Ed's minimally culpable act results in Edith's suffering catastrophic losses. Her two children—prodigies with heretofore fabulous earning capacities—are severely crippled. Her Westminster dog show first-prize winning Papillon is killed. Her fourteen Picassos are destroyed. Compensating Edith for her losses will bankrupt Ed, who has been quite prosperous due to having provided many socially valuable products and services.

Should Ed have to compensate Edith for her losses beyond \$50 and his fair share of the balance? (We leave unstated what that fair share might be.) Tort law says "yes." If Ed had intentionally lightly kicked Edith's shin, a minimally culpable act that Ed expected to cause a slight momentary pain but no injury, but Edith had the proverbial "eggshell skull" (or shin) and suffered massive injury or even death, tort law has it that Ed would be on the hook for all the damage that Edith (or her heirs) suffered.

Is it just that Ed should be impoverished by Edith's tort suit? Why should not first-party insurance take over after Ed has paid Edith \$50? It would surely be prudent for Edith, if she has

an eggshell skull, or if she is transporting prodigies, prize-winning Papillons, and Picassos, to have first-party insurance. After all, if she doesn't, then she is extremely fortunate if Ed is capable of giving her full compensation.

Or if first-party insurance seems like an unfair burden to place on Edith, how about social insurance to cover the balance? Once Ed pays the \$50, he has suffered to the extent he deserves for his culpable act, and he is effectively as innocent as Edith and everyone else.

It is possible perhaps that Ed could purchase liability insurance that covers his culpable conduct so that he can socialize the risk just as easily as can Edith or the rest of society. So we might get at the basic issue more easily if we completely eliminate insurance from the picture. Suppose Ed and Edith are the only two people who exist. The costs of their activities cannot be spread to others. If Ed's slightly culpable conduct results in catastrophic losses for Edith, should Ed have to pay full compensation, or should Ed and Edith have to split the damages after Ed pays \$50? Tort law says Ed must pay full compensation. Perhaps the logic is that if you engage in culpable conduct, you should bear the full risk of whatever losses result. Some culpable actors will pay nothing, for the risks they foresee will never materialize. Others will pay amounts that are proportionate to their culpability. And some, like Ed, will pay amounts greatly in excess of the risks they foresee. But if you engage in culpable conduct, no matter how minimal your culpability, you are gambling that the losses that result are no greater than what you deserve to pay, and that is a gamble that you may lose big time.

We are not going to contest tort doctrine on this point. For we are dealing by hypothesis with truly culpable conduct. Yet tort law extends its "eggshell skull" and other doctrines of cataclysmic damages to conduct that is "faulty" but not culpable. And even if it is fair to impose the risk of cataclysmic damage awards on the minimally but truly culpable, it seems ludicrous to

assert that it is also fair to impose that risk on the nonculpable—the stupid, the ignorant, the forgetful, and so on. For however “faulty” their conduct is in some sense, it is not truly culpable. Nor is it distinguishable from the harm-producing conduct involved in cases of strict liability.

So we conclude that tort doctrine gives the wrong verdict in cases of catastrophic injury when the defendant’s conduct is only “faulty” but not culpable. And we have left unresolved the question whether tort doctrine has the correct verdict when it is culpable conduct that results in catastrophic injury—though we are doubtful that it does.

We leave the latter question unresolved because even in cases of truly culpable conduct, we need to establish that defendant’s conduct resulted in plaintiff’s injuries. In other words, we need to link plaintiff’s injuries to defendant’s conduct, whether or not that conduct is culpable. Causation is supposed to be the linkage that we need. But causation as the link between defendant’s conduct and plaintiff’s injuries has proved to be quite problematic.

B. Proximate Causation

Before turning directly to factual causation, we should start with our significant reservations about proximate causation. Determinations about proximate causation, whether harms are “foreseeable” or “within the risk” or otherwise attributable to the defendant, are certainly not metaphysical causation judgments. They are policy judgments about the limits of liability.¹⁹ We will therefore put these questions to the side as we address causation question. Policy limits are policy limits. (But even policy requires principled arguments that are not masked as metaphysics.)

Moreover, recently, Michael Moore’s extensive study of the metaphysics of causation has sought to replace proximate causation with a more nuanced understanding of causation itself.²⁰

¹⁹ See Kimberly D. Kessler, “The Role of Luck in the Criminal Law,” 142 *U. Pa. L. Rev.* 2183 (1994), 2187-88.

²⁰ Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (2009), 371.

He parses what we think of as causation into counterfactual dependence and true causation. He argues that both of these concepts are scalar. He dispenses with foreseeability (as it crucially depends on the description of the harm, and there is no principled method for selecting that **description**)²¹ and harm within the risk (as all harms that do or might occur are within the risk, a point to which we will return below). Moore then recasts the only remaining usage for proximate causation—for when truly culpable actors (intentional, knowing, or reckless actors) cause harm in a manner that they did not foresee—as questions of culpability, not causation. Notably, this final arbiter of responsibility (a view we call below the “mechanism within the plan”) is unavailable in cases of negligence and strict liability, and therefore outside the arsenal of tort theory, because in those cases there is no plan.

Before leaving the policy decision masked as causation, it is worth making one final observation about a rather odd discontinuity in tort law. If John rear-ends Jerry’s car, and Jerry is an “eggshell skull” plaintiff, then as discussed in the previous section, despite the lack of foreseeability and so forth, John is on the hook for the full scope of Jerry’s damages. But if John drives negligently, but the way that Jerry’s harms occur is as unforeseeable (whatever that may mean) as Jerry’s eggshell status, then John is not responsible for those harms. We fail to see a principled argument for distinguishing the two; and importantly for our purposes here, if there is such an argument, it cannot be grounded in the metaphysics of causation. It has to come from elsewhere.

C. Counterfactual Dependence

The standard test for whether defendant’s conduct caused plaintiff’s injury is the so-called “but for” test: If plaintiff would not have suffered injury “but for” defendant’s conduct,

²¹ See Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (1997), ch. 8.

defendant's conduct is the "cause" of plaintiff's injuries.²² This test, which Michael Moore labels counterfactual dependence (CD),²³ seems quite intuitive as what we ordinarily mean when we claim that X "caused" Y's injuries. Moore doesn't believe that CD is real causation, but he does believe that CD is sufficient to make defendant responsible for plaintiff's injuries.²⁴ (Moore needs CD to supplement "real" causation as a basis for responsibility because, for example, "real" causation cannot account for harm resulting from omissions or preventions.)²⁵

CD as the linkage between defendant's conduct (or omission, prevention, etc.) and plaintiff's injuries is, however, beset by several difficulties. We shall leave aside cases of overdetermination—cases in which there are two or more independently sufficient causes of plaintiff's injuries, as when two independently set fires join to burn down plaintiff's house, and each would have done so to the same extent at the same time had it been the only fire. There are, in the literature, ingenious amendments to CD to handle overdetermination cases (though one might justifiably regard these as ad hoc attempts to save CD from a devastating counterexample, attempts that in essence concede the inadequacy of CD.)²⁶

We shall also put aside those cases in which defendant's conduct results in plaintiff's death but also results in prolonging his life. (Defendant doctor maliciously gives plaintiff a dose of radiation that will cause him to die of cancer in 20 years; however, though it does kill plaintiff in 20 years, it also cures an undetected cancer that would have killed plaintiff in one year. Or prospector B fills prospector C's canteen with sand, resulting in C's dying of thirst.

Unbeknownst to prospector B, prospector A had filled C's canteen with poison, which would

²² Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010).

²³ Moore, *Causation and Responsibility*, 371.

²⁴ Moore, *Causation and Responsibility*, 391–425.

²⁵ Moore, *Causation and Responsibility*, 435–69.

²⁶ Moore, *Causation and Responsibility*, 87; Richard Wright, "Causation in Tort Law," 73 *Calif. L. Rev.* 1775 (1985).

have killed C much sooner.) The CD test is met: But for defendant's conduct, plaintiff would not have died when and how he did. But it is also the case that but for defendant's conduct, plaintiff would have died differently but sooner.

One big problem for the CD test is illustrated by cases such as *Berry v. Village of Sugar Notch*²⁷. In *Berry*, recall, the question was whether driving the trolley over the posted speed limit caused the injury that resulted from a dead tree falling on the plaintiff. The claim was that, "but for" the speeding, the plaintiff would not have been under the tree at the moment it fell. The court gave this claim a swift back of the hand. But why?

It might be supposed that one reason for rejecting the claim is that had the motorman's conduct been even worse than it was—had he been speeding even more—the tree would not have fallen on the plaintiff. It would have fallen behind him, just as, had there been no speeding, it would have fallen in front of him. The problem with this response, however, is that it is often the case that if defendant's conduct had been worse than it was, the plaintiff would not have suffered harm. Had defendant speeded down the residential street at 60 mph and not 50 mph, the infant whom he struck when the infant crawled into the road from behind a parked car would have been behind rather than in front of defendant's car. Such examples are legion.

The other possible defense of *Berry* is to claim that the speed of the trolley does not affect the risk of being hit by a falling dead tree. One is just as likely to be struck when the trolley is traveling at or below the speed limit as when it is traveling above the limit. But this reply, too, is incorrect in any case, such as *Berry*, in which plaintiff is hit by a falling tree.

This latter "harm within the risk" (HWR) approach to limiting CD is misconceived for various reasons. First, risk is an epistemic notion. It is someone's estimate from some perspective of the probability of some event's occurrence given a certain act. "Actual risks" are

²⁷ 43 A. 240 (Pa. 1899).

either one or zero, depending on what happens. In tort law, the actual risk is always one: for plaintiff has been injured as a CD result of defendant's act.

Second, the risks that are relevant to culpable actors are the basket of all the various harms with their various probabilities that the actor ex ante would estimate. If one takes each discrete risk separately and is sufficiently fine-grained in describing it, each will be sufficiently improbable so as to render the defendant's contemplated act justifiable were it the only risk. The risk that defendant's act will cause "bodily injury" or "property damage" may be so high that defendant would be culpable in imposing that risk. However, the risk that his act will break plaintiff's arm exactly three inches above the wrist and cause plaintiff's car to suffer a precise amount of damage to the left side passenger door may be tiny from an ex ante perspective (even though those risks are one ex **post**).²⁸ All potential harms go into the risk basket that determines whether defendant was culpable for acting. If defendant has a duty to pen livestock on board his ship in order to prevent the spread of disease, and if his failure to pen the livestock increases, however slightly, the chance that the livestock will be swept overboard in a storm, the latter risk is part of the basket of risks that make defendant culpable. And the same can be said for negligence; as Moore observes, "once one appreciates that *all* risks created by a defendant count in an assessment of negligence, it would appear that *any* and *all* harms that materialize from the defendant's conduct are within the category of risks that makes such conduct negligent."²⁹

Suppose one were to respond to the preceding argument by pointing out that if one compares the reference class "speeding trolleys" with the reference class "non-speeding trolleys," the per mile incidence of injuries caused by falling rotting trees is exactly the same for both reference classes. On the other hand, if one compares those reference classes in terms other

²⁸ Moore, *Causation and Responsibility*, 194–95.

²⁹ Moore, *Causation and Responsibility*, 185.

types of injuries and losses, one will find that speeding trolleys result in more of them per mile than do non-speeding trolleys. Likewise, no matter how improbable, the incidence of livestock washed overboard will turn out to be higher if they are unpenned than if they are penned. Thus, on this reference class interpretation of HWR, *Berry* is different from the other examples we gave, and the harm there was *not* within the risk.

The problem with the reference class approach to HWR is that the selection of the reference classes is completely arbitrary. If the reference classes are not “speeding trolleys” and “non-speeding trolleys” but instead are “trolleys travelling at exactly the same speed as *Berry*’s at exactly the same place and time, etc.,” and “all other trolley trips,” one would find the incidence of loss in the former reference class—100%— is much higher than it is in the latter. And the use of these reference classes is no more arbitrary than the use of “speeding trolleys” and “non-speeding trolleys.” Remember, we are already assuming the actor is culpable based on the risks he foresaw. And we are not using reference classes for insurance purposes, which require, for actuarial data, reference classes defined rather generally. HWR is neither a culpability measure nor an insurance program.

A second big problem with CD as the linkage between defendant’s conduct and plaintiff’s injuries is CD’s unlimited scope, its “for want of a nail . . .” aspect. If defendant acts culpably, the culpable act’s consequences can radiate over space and time without limits. If defendant culpably threatens plaintiff with a gun, and plaintiff, fearful and anxious to get out of town, buys a ticket on an airplane that then crashes, plaintiff’s death is linked to defendant’s conduct by CD. The same is true if defendant culpably drops a brick on plaintiff’s toe, causing plaintiff to go to the medical clinic, where he is stabbed by a deranged patient. The stabbing is linked by CD to defendant’s act. And the linkage can be much more remote than that involved in these examples.

One possible rejoinder here is to claim that CD can be **scalar**.³⁰ Defendant's conduct can be linked by CD to plaintiff's injuries in a "more of less" fashion.

It is difficult to see how CD can be scalar, however. Something either is or is not a "but for" cause. If there are to be limitations on CD, they will have to come from something other than scalarity.

Moore argues that CD's scalarity is a function of how close are the possible worlds in which "but for" the defendant's act, the plaintiff escapes or does not escape **injury**.³¹ If there are only very nearby possible worlds where defendant acts as he actually did and plaintiff is injured, then defendant is only a little CD responsible for plaintiff's injuries. On the other hand, if there are more remote possible worlds in which defendant acts as he actually did and plaintiff is injured, defendant's CD responsibility for the injuries is large.

As we said in an earlier article, we find the possible worlds account of CD scalarity **curious**.³² Moreover, in order to save CD from affirming recovery in *Berry*, he has to swallow an equally unappetizing result in cases of omission liability. For Moore, because he rejects the possibility of omissions "causing" harm, omitters can only be responsible for harms through CD. But if CD can be scalar, and that is why the speeding in *Berry* is not responsible for the harm,

³⁰ Moore argues that CD can be scalar. See Moore, *Causation and Responsibility*, 468.

³¹ See Michael S. Moore, "Causation Revisited", 42 *Rutgers L. J.* 451 (2011), 454.

³² We noted, moreover, that there are an indefinite number of possible worlds in which the tree injures the plaintiff in *Berry*:

Moreover, why are the nearest possible worlds those in which we hold everything constant except the motorman's speed? Change the color of the motorman's shirt and he still gets hit by the tree. Change the number of birds singing and he still gets hit. Change his speed a tiny bit, his time of departure a tiny bit, and he still gets hit. Indeed, one can change an infinite number of things without altering the result. If there are an infinite number of nearby possible worlds in which the same result occurs, then even if there are an infinite number in which it does not, infinity over infinity does not lead to a "small CD" conclusion.

Larry Alexander and Kimberly Kessler Ferzan, "Moore or Less' Causation and Responsibility," 6 *Crim. L. & Phil.* 81 (2012), 85-86.

Indeed, we can have an infinite number of possible worlds that are quite remote from the actual world but in which the same result occurs. All we need are the time of the falling tree, the time of departure of the trolley, the distance from the departure point to the tree, and the speed.

then parents who omit to feed their child are only a wee bit responsible for the child's death through starvation when Aunt Emma would have arrived with food had she not been riding on the Sugar Notch trolley and knocked unconscious by the falling tree.

If CD is nonscalar, as we believe it must be, then, because it will be present in all cases of Moore's true causation—other than the very rare cases of overdetermination of exactly the same harm at exactly the same time—we will be left with counterintuitive assignments of responsibility for all harms resulting from culpable acts no matter how remote. The death of the person who flees the defendant's beatings by buying a ticket on a plane that crashes will be the defendant's responsibility, for CD is present.

D. True Causation

If liability for harms resulting from culpable acts cannot be limited in cases of CD, can it be limited in cases of true metaphysical (non-CD) causation?

Moore claims not only that CD is scalar but also that "real" causation is scalar as well. He analogizes "real" causal chains to the ripples in a pond caused by tossing a pebble into it. The ripples gradually peter out, and so too does causation.

The idea that the causal linkage between a culpable act and its injurious effects is one of gradual diminishment seems to work for physical causation. It works less well, if at all, for culpable acts that cause harm by giving the victims or intermediaries reasons for acting. If the defendant lures his victim into harm's way, solicits a hit man to break the victim's legs, or gives a letter bomb to the mail carrier with instructions to deliver it to the victim, it is hard to see how scalarity gets into the picture.

Take a case of luring. Suppose Defendant wants to kill Victim and knows that the Bridge of San Luis Rey will collapse under Victim's weight. Victim is planning to walk to town. One route takes him across the Bridge. It is longer but more scenic. The other route is shorter and less scenic. It is a close choice, but ultimately Victim decides to take the shorter route. At this point, Defendant calls Victim and urges him to take the longer route over the Bridge, offering, as an inducement, companionship on the walk once Victim crosses the Bridge. That tips the balance of reasons for Victim in favor of the longer route, and he subsequently plummets to his death.

Just how much, on a scalar view of causation, is Defendant causally responsible for Victim's death? He offered Victim a reason to cross the Bridge, a reason which perhaps was not terribly weighty but was just weighty enough to shift the balance of reasons in favor of crossing the Bridge. Is Defendant, therefore, only a small cause of Victim's death and only minimally causally responsible for it? How does causation's scalarity work here?

Or take the letter bomb case. If Unabomber 1, who hatches the plot and builds the bomb, gives it to his confederate, Unabomber 2, who delivers it to Victim, it would seem to us that Unabomber 1 is as responsible for Victim's death or injury as is Unabomber 2. Moore says that accomplices are less responsible causally than are principals, which would imply that Unabomber 1 would be less responsible than Unabomber 2.³³ And if there were a third confederate, Unabomber 3, to whom Unabomber 2 delivers the better bomb, Unabomber 1 would be even less responsible for the harms suffered by Victim.

All of this is wildly counterintuitive. To see why, assume Unabomber 1 is the only culpable actor. He merely gives his letter bomb to an unsuspecting mail carrier, who in turn hands it over to equally unsuspecting personnel at the local post office, who in turn hand it over

³³ See Moore, *Causation and Responsibility*, 319–23.

to other unsuspecting postal workers, one of whom ultimately gives it to the Victim. There may be many innocent actors in the causal chain. We would assume that in such a case—the real one that occurred—Unabomber 1 would be fully responsible for Victim’s death or injuries. Yet the causal chain from Unabomber 1’s culpable act to Victim’s injuries is just as attenuated (or not so) as it is when the intermediaries are in on the plot. Scalarity does not appear to be in play here.

E. Recasting Proximate Causation as Culpability

If intervening human acts do not break causal chains—and we agree with Moore that they do **not**;³⁴ if scalarity does not work as a limitation on responsibility; and, moreover, if nonscalar CD is omnipresent, then there are no obvious limitations on culpable acts that reduce or eliminate responsibility for resulting harms. In this final section, we turn to Moore’s last method for cabining causation by viewing it as culpability.

At the outset, it is worth noting that Moore specifically denies that this approach works for negligence.³⁵ There is no safe harbor for tort theorists. They will need to come up with a way to limit causation that neither depends upon metaphysics nor fault.

Back to Moore. We return to an example we have used elsewhere of two Pierres.³⁶ One Pierre intends to kill Monique with a bullet but misses, with the result that a frightened Monique runs outside and is killed by lightning. The other Pierre intends to miss Monique with a bullet and frighten her into running outside in a dangerous thunderstorm, a plan that succeeds. At one point Moore acknowledges that both Pierres are equally causes of Monique’s death, but are only “small” causes.

Treating the second Pierre, whose plan succeeded precisely as he intended, as only a small cause of Monique’s death, and therefore only minimally responsible, seems perverse. And

³⁴ Moore, *Causation and Responsibility*, 278–79.

³⁵ Moore, *Causation and Responsibility*, 102 n. 69.

³⁶ Alexander and Ferzan, *Crime and Culpability*, 184–85.

indeed Moore introduces a new concept—the “mechanism within the plan” (MWP)—to distinguish the Pierres in terms of their causal responsibility.³⁷ The second Pierre’s causal chain satisfies MWP, whereas the first Pierre’s does not.

(Of course, there could be a third Pierre, one who, like the first Pierre, was trying to kill Monique with the bullet, but who also, like the second Pierre, contemplated the possibility that the bullet might miss but frighten Monique into running outside and getting struck by lightning. Would MWP be satisfied with this Pierre? If so, should this slight difference between the first Pierre and the third in terms of what they contemplated result in a greater causal responsibility for the latter?)

The problems with MWP as a limitation on either causal or CD responsibility are fatal, however. First, it is difficult to understand why the content of defendant’s plan, *which has already been factored into his culpability*, should then reappear as a limit on *causal* responsibility. Why does the first Pierre, who at first seems quite culpable *because he intends to kill*, somehow become less culpable when he says, “I intended to kill her and she died, but it didn’t happen the way I planned.” What is *culpability diminishing* about that? In addition, Moore admits, as he should, that defendant’s mental states themselves do not produce effects in the world beyond their effects on how he acts. There is no telekinesis, says Moore, and we agree. But if defendant’s mental states themselves are not causes, why are they limitations on *causal* responsibility?

Second, for those torts that are based on recklessness, negligence, and strict liability, defendant’s plan is immaterial. For inadvertent negligence and strict liability, defendant’s mental state at the time he acts is not material. Recklessness does turn on defendant’s mental state, but

³⁷ MWP is our term, not Moore’s. What Moore is asking is how closely does the actual causal (or CD) path from defendant’s culpable act to the victim’s injuries match the path that defendant envisioned when he acted. (In all cases of true culpability, defendant will be aware that his conduct risks harm.)

the reckless defendant merely adverts to the basket of risks his act creates and does not involve any “plan” or specific conception of the many ways those risks might be realized. Recklessness culpability is awareness based but not plan based.

As we said elsewhere regarding a MWP limitation on recklessness:

Consider *People v. Acosta*.³⁸ Acosta, driving fast to escape pursuing police cars and police helicopters, was aware that he was acting in an unjustifiably risky manner and thus recklessly. Moore would ask whether Acosta was reckless as to the actual harm he caused (the helicopter crash). Suppose Acosta considered each risk he was creating in a fine-grained manner, including the risk of the helicopter crash. And suppose none of those risks taken individually would render Acosta reckless. Only those risks in the aggregate would. It would be counterintuitive to say that Acosta was not reckless with regard to the helicopter crash (or any other harm) even though that perceived risk, taken in isolation, would not have made him reckless. And the analysis should not change if Acosta did not individuate the risks in this fine-grained way but considered his conduct “very risky” in light of the aggregated various dangers of pursuing helicopters or of the risk they might crash any more than it would matter that he would have been unaware of the particular pedestrian whom he might have hit while recklessly speeding.³⁹

We conclude that the quest for principled limitations on causal or CD responsibility has come up empty. It is not for lack of trying by many able minds. Rather, we think the quest is doomed to fail. We can assess the defendant’s culpability. And perhaps we can assess whether defendant’s culpable act was a CD “cause”—though we believe that the CD inquiry may rest on shaky metaphysical grounds. But if culpability plus CD seems too capacious an ambit of tort liability, we see no tenable way to limit it.

Conclusion

If there is no fault in not adverting, if there is no principled distinction between negligence and strict liability, and if there is no principled limit on causation, then nothing cabins the reach

³⁸ 284 Cal. Rptr. 117 (Cal. Ct. App. 1991).

³⁹ Larry Alexander and Kimberly Kessler Ferzan, “Ferzander’s Surrebuttal,” 6 *Crim. L. & Phil.* 463 (2012).

of tort law. An ad hoc and unprincipled system is simply not the way to run a railroad. It isn't even the way to run a trolley system in the Borough of Sugar Notch.