



Some Review Material

Torts
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***All the slides in
this deck have
been shown
previously.***

**How do we
determine
actual
causation?**

but for

the but for

~~**the**~~ **but for**

the but for

**You don't have
to pick one
defendant.**

**You can sue
everybody who's
a but-for cause.**



Normal

Multiple necessary causes

Multiple sufficient causes

Infrequent

(at least in the
real world 😊)

Multiple necessary causes

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careless acts is a necessary
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But you
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But you don't need this "rule"!

Just apply the but-for test.

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk, but the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.



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Result: *The heaver and the lobber are both liable. The actions of both are but-for causes. Pointing to the other as an additional but-for cause does not release either from liability.*

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Again ...

You don't need the "rule"!

Just apply the but-for test.

Multiple sufficient causes

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test.

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Remember, in the real world, this is ...

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multiple actors would, by itself, have
caused the injury that resulted from
the confluence of those acts. Each act
is deemed an actual cause of the injury,
though neither satisfies the "but-for"
test.

Infrequent

You can think
of this as the
"twin fires"
doctrine.

Water Well
Contamination
Problems

Tests for Proximate Causation

- Direct Test
- Foreseeability Test
- Harm-within-the-Risk Test

Tests for Proximate Causation

- Direct Test

- Fores

- Harm

WARNING: The direct test is not good law. (But it's worth knowing because it helps make sense of older cases and provides context for understanding the other tests.)

Foreseeability Test

- Asks if π 's injury was foreseeable at the time of Δ 's breach.
 - Take an imaginary trip back in time to moment of Δ 's breach:
 - Ask, "What might go wrong here?"
 - If π 's injury is the kind of thing you think of, the test is satisfied.
- This is objective. It doesn't help Δ that Δ didn't actually foresee the harm.
- This is probably the most common articulation of proximate causation.

Objects of Foreseeability

- Unforeseeable plaintiff
 - Test failed, Δ wins
- Unforeseeable type of harm
 - Case-by-case; no hard and fast rule
- Unforeseeable manner of harm
 - Test usually satisfied; π usually wins proximate causation issue
- Unforeseeable extent of harm
 - Test almost always satisfied; π generally wins proximate causation issue
 - a/k/a "eggshell plaintiff rule"

Objects of Foreseeability

- Unforeseeable plaintiff

- Test failed. Δ wins

To simplify:

- If the plaintiff is unforeseeable, Δ wins.
- If it's just the amount of damage that's unforeseeable, then the Δ is generally out of luck.
- If something else about what went wrong can be characterized as unforeseeable, the Δ might possibly have a chance of winning proximate causation but shouldn't get too excited.

- wins proximate causation issue

- a/k/a "eggshell plaintiff rule"

Harm-within-the-Risk Test

- Similar to the foreseeability test, this can be thought of as a re-articulation of the foreseeability concept.
- Ask: "Is the harm suffered by the π the kind of thing that makes the Δ 's conduct a breach of its duty?"
 - If so, the test is satisfied

Superseding Causes

- A "superseding" cause results in a failure of proximate causation, even under foreseeability or harm-within-the-risk analysis.
- A superseding cause is an intervening cause that cuts off the chain of causation.
- It's a conclusory term.
 - I.e., to say an intervening cause is "superseding" is to say you're letting the Δ off the hook.
- There's no hard or fast rule about what constitutes a superseding cause.
 - Criminal intervenors are usually superseding, unless the Δ had some particular duty vis-à-vis criminals.

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- With the doctrine of superseding causes, we have a remnant of the direct test - existing in today's law.
- There's not much underlying logic to the doctrine. You just have to reason analogically from particular precedent.
- This is a major reason we went over the direct test. To the extent you want some deeper explanation for the doctrine of superseding causes, probably the best you can do is think of it as a remnant of the direct test that survives to this day.



Land owner/occupier
duties for conditions
of the land

Land owner/occupier duties of care

	Conditions on the land	Activities on the land
Unanticipated / undiscovered trespassers	No duty	Reasonable person
Anticipated / discovered trespassers	Warn of or fix seriously dangerous, known, artificial, concealed hazards	Reasonable person
Anticipated / discovered child trespassers	Fix seriously dangerous, known, artificial hazards, so long as cost-benefit justified	Reasonable person
Licensees	Warn of or fix known, concealed hazards	Reasonable person
Invitees	Warn of or fix known and reasonably knowable, concealed hazards	Reasonable person

Note: "Seriously dangerous" means capable of causing death or serious bodily harm.

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Note that for activities on the land, the standard's just normal old reasonable person. (But that's not to say you couldn't also use negligence per se where appropriate.)

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Landowner/occupier duties of care

These standards actually *replace* the reasonable person standard. If they don't work to prove breach, the plaintiff can't fall back on reasonable person to prove breach.

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But can a plaintiff use negligence per se with regard to conditions of the land? **Yes, this will work in many courts.**

Note: "seriously dangerous" means a hazard that creates a high risk of serious bodily harm.

Anticipated/Discovered vs. Unanticipated/Undiscovered Trespassers

- The default category of trespasser is undiscovered/unanticipated. This category applies if there's nothing suggesting the trespasser is anticipated or discovered.
- Whether a trespasser counts as discovered/anticipated is ultimately a factual issue. But here are some examples:
 - The landowner/occupier sees a beaten path, evidencing trespassers.
 - The landowner/occupier has seen school kids cutting across the yard on their way to school.
 - The landowner/occupier has seen trespassers previously walking over the land to access a public beach.
 - Some trespassers are actually observed in real-time.

Anticipated/Discovered Child Trespassers

- This category adds a duty to fix (as opposed to a duty to *warn of or fix* for adult anticipated/discovered trespassers) and embraces non-concealed hazards (as opposed to just concealed hazards for adults).
- The doctrine is sometimes called “attractive nuisance,” although that’s a confusing name, because there’s no requirement that the artificial hazard be attractive or that it counts as a nuisance.
- The doctrine sprang from and is associated with the “turntable cases,” where railroads were sued for injuries and deaths sustained by children playing on and with railroad turntables.





Turntable photos by Bernard Spragg

Problems