

Proximate Cause

Market Share Liability

Toxic Harms

Why is the tort system such a poor fit?

Three frequent problems:

1. Identification of the cause: Can't be certain that the toxin was a “but for” cause.
2. Boundaries of the harm: Can't be certain of the extent of the harm.
3. Source of the cause: Can't be certain who in particular is responsible.

Mass Torts

A procedural story in two parts:

1. The Supreme Court killed the mass tort class action
2. Multidistrict litigation (MDL) took over

Factual Cause Exercises

Exercise 1

Back-to-back car accidents: Waters was negligently hit by Meyer, then negligently hit by Morales. In one collision or the other, Waters sustained an injury to her neck. She doesn't know which of the two accidents caused the injury. The doctors that treated her injury cannot determine whether it was the first or second impact that caused it.

Waters visits your office as a prospective client. She wants to know if she has a viable negligence claim against Meyer or Morales, who she should sue, and if she will win. Please advise her.

Exercise 2

Same initial fact pattern as the first exercise. Except now, in addition to being hit by Meyer and Morales, Waters was also hit by two other drivers who fled the scene. In one of the four collisions, Waters sustained an injury to her neck. She doesn't know which of the four accidents caused the injury. The doctors that treated her injury cannot determine which of the four impacts caused it.

Waters visits your office as a prospective client. She wants to know if she has a viable negligence claim against Meyer or Morales, who she should sue, and if she will win. Please advise her.

Exercise 3

A labor activist, Ayla Ross, comes to visit you in your office. She has been organizing workers at a slaughterhouse in the region. She's learned that the slaughterhouse had been euthanizing chickens with a particular gas, BirdBeGone, for the many years. but stopped using the gas when it was taken off the market six months ago. The gas was banned by state authorities after emerging research indicated that human beings exposed to the gas could develop skin cancer and that the gas could induce miscarriages and result in severe birth defects.

Ross wants to talk with these workers about the possibility of suing the slaughterhouse for negligence. She is particularly interested in the possibility of a class action lawsuit so that the workers don't need to litigate individual cases, but she knows that issues of causation can be challenging in toxic harm lawsuits. For this question, assume that duty and breach can be proven. Please advise her on the most pertinent remaining issues.

Exercise 3

Class action?

Three frequent problems with toxic harm litigation:

1. Identification of the cause: Can't be certain that the toxin was a "but for" cause.
2. Boundaries of the harm: Can't be certain of the extent of the harm.
3. Source of the cause: Can't be certain who in particular is responsible.

Proximate Cause!

But first...

Where are we?

What are we doing?

Torts

~~I. Introduction~~

~~II. Remedies~~

~~III. Negligence~~

~~---A. Introduction~~

~~---B. Duty & Breach~~

~~---C. Causation~~

~~----- -Factual Cause~~

----- - Proximate Cause

--- D. Defenses

IV. Strict Liability

V. Intentional Torts

VI. Alternatives to Tort

Elements of a Negligence Cause of Action

1.

2.

3.

4.

Elements of a Negligence Cause of Action

1. Duty

2. Breach

3. *Causation*

4. Harm

Two parts to causation

- 1.

- 2.

Two parts to causation

1. Factual cause

2. Proximate cause

Proximate Cause

In re Polemis

“The Plank that Made a Ship Explode”

Wagner v. International Railway Co.

“The Injured Rescuer”

Danger invites rescue



Benn v. Thomas

“The Time-Delayed Heart Attack”

Steinhauser v. Hertz Corp.

“Sudden Schizophrenia”

Gibson v. Garcia

“The Rotten Telephone Pole that Fell on the Person”

Intervening cause will cut off proximate cause

“a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.”

- Prosser & Keaton, Law of Torts

Berry v. Borough of Sugar Notch

“The Rotten Tree that Fell on the Speeding Car”

Palsgraf v. Long Island Railroad Co.

“Fireworks on the Train Platform”

How would you rule in *Palsgraf*?

Majority opinion (Cardozo)

and

Dissenting opinion (Andrews)

“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”

- Andrews dissent in *Palsgraf*