

THE STRUCTURE OF TORTS

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“In the particular is contained the universal.”—James Joyce¹

ABSTRACT

Tort law consists of a number of different causes of action which are seemingly unrelated except that all involve civil wrongs, other than mere breaches of contract. The various torts have different elements; some, like the nominate or intentional torts, very specific; others, like negligence, more general and vague. There is no apparent, coherent, or consistent structure applicable to all torts. This Article articulates just such a unified structure for all torts: one that arises out of and is based upon the elements of negligence. All torts involve the judicial delineation of the defendant’s duty or legal obligation. All torts require the factfinder to decide if the defendant satisfied or breached that legal obligation. All torts involve a question of factual cause, or cause-in-fact, and, there is always an actual, or muted, consideration of legal cause. Finally, the factfinder considers and, if appropriate, awards damages—unless the plaintiff seeks some alternative remedy, in which case the judge may decide the remedial question. After articulating the structure, this Article applies it to a number of torts—products liability, absolute liability, defamation, and battery. Through the process of articulating and applying the structure, it becomes clear that there are legal questions involving the precise scope and extent of the defendant’s duty or legal obligation within all of the various elements. This Article makes those issues plain and emphasizes that they are really questions of the defendant’s duty.

I. THE LABYRINTH, THE MINOTAUR, AND TORTS	486
II. CONSIDERING STRUCTURAL OPTIONS.....	490
A. <i>The Civil Law of Torts</i>	492
B. <i>Moving Towards a More Detailed Structure: Negligence</i>	493
III. RESTATING AND AFFIRMING THE STRUCTURE BEFORE APPLYING IT.....	496
A. <i>Duty</i>	496
B. <i>Breach</i>	505
C. <i>Cause-In-Fact</i>	505
D. <i>Legal Cause</i>	509
E. <i>The Damages</i>	510
F. <i>Recap</i>	512
IV. PRODUCTS LIABILITY	513
A. <i>Mismanufacture</i>	513
B. <i>Design</i>	515
V. ULTRAHAZARDOUS OR ABNORMALLY DANGEROUS ACTIVITIES.....	516
VI. DEFAMATION	519
A. <i>Public Officials and Public Figures</i>	519
B. <i>Private Figures/Speech Which is a Matter of Public Concern</i>	521
C. <i>Private Figure/Private Speech</i>	522
VII. INTENTIONAL TORTS	522
VIII. CONCLUSION	525

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1. Fintan O’Toole, *Modern Ireland in 100 Artworks: 1922 – Ulysses, by James Joyce*, IRISH TIMES (Dec. 24, 2014, 10:00 AM), <https://www.irishtimes.com/culture/modern-ireland-in-100-artworks-1922-ulysses-by-james-joyce-1.2044029> [<https://perma.cc/S7QS-YL4Q>].

I. THE LABYRINTH, THE MINOTAUR, AND TORTS

Minos was involved in a struggle with his brothers to become the sole ruler of the Island of Crete. He prayed to Poseidon for assistance and, sympathetically, the Sea God sent Minos a beautiful Cretan bull to help Minos in his struggles. After successfully claiming the throne, rather than sacrificing the bull, Minos kept it. Enraged, Poseidon caused Minos' wife, Pasiphae, to fall in love with the bull. Their union resulted in the birth of the minotaur, Asterion. The minotaur had the head of a bull and the body of a human, and it ate only humans. After consulting the oracle at Delphi, Minos had the famous architect and inventor, Daedalus, construct a labyrinth to serve as the home of the monster.

Later, after the accidental death of his son during a competition in Athens, Minos attacked the Athenians. The price of peace was an agreement that each year Athens would send fourteen young men and women to Crete to be sacrificed to the minotaur. One year, in order to rid the Athenians of the curse, Theseus, the son of King Aegeus, volunteered to be one of the fourteen in order to confront and kill the minotaur. With assistance from Minos' daughter, Ariadne; a ball of thread; and his sword, Theseus slew the minotaur and escaped Crete, saving Athens from Minos and the minotaur.²

The stories in torts, like the narratives in many Greek myths, are compelling—the facts of the cases draw the reader into legal and human dramas. There is *Mrs. Palsgraf*;³ there are *Summers and Tice*;⁴ there are people tragically killed or injured by exposure to asbestos and other dangerous products;⁵ there is the fettered mule in *Davies v. Mann*;⁶ there are *Sullivan, the ministers, and the New York Times*;⁷ there is *Larry Flynt thumbing his nose at the late Reverend Falwell*.⁸ The stories are fabulous. In the law, they attain almost mythic proportion, like the story of Theseus defeating the minotaur. In many instances, the stories⁹ drive the law.

While the stories are compelling, as one digs into the law of torts, one finds a confusing, less compelling, combination of elements and

2. The story has more bends and tragedy than provided in this short summary. *Minotaur*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Minotaur> [<https://perma.cc/W278-XFWF>].

3. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

4. *Summers v. Tice*, 199 P.2d 1, 1-2 (Cal. 1948).

5. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

6. *Moseley v. Motteux* (1842) 152 Eng. Rep. 588, 588.

7. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

8. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 47 (1988).

9. The stories are what lawyers call the "facts."

inconsistencies. One confronts what the law student may conceive of as a labyrinth of rules and concepts. There are nominate¹⁰ torts—those with names like assault,¹¹ battery,¹² false imprisonment,¹³ and trespass.¹⁴ These nominate torts have what appear to be relatively precise elements. Then, there is negligence, which provides that one must act reasonably, and this tort has four or five rather broad elements.¹⁵ Things get more complex and varied with products liability, absolute liability for engaging in abnormally dangerous or ultrahazardous activities, defamation,¹⁶ and others. As the lawyer¹⁷ steps back, she may wonder if all the torts are related, other than merely all being civil wrongs rather than pure breaches of contract. She may wonder if there is a way to tie all the branches of tort law together in a more coherent manner.

In fact, the subject of torts resembles the Cretan labyrinth with neither apparent order nor consistent analytical path. Adding to the confused nature of the subject, the role of the judge and of the jury in tort cases is not always clear. In negligence, it is often said that the judge decides duty and the jury decides breach, causation, and damages, but is that accurate?¹⁸ Is there no law or role for the judge besides deciding duty? In fact, there is a key role for the judge beyond the traditional duty analysis because much of what the law of torts treats under the subjects of breach, causation, and damages are actually legal matters. These legal matters and decisions are important statements about the scope of the defendant's legal obligation to the plaintiff. By treating

10. *Nominate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

11. PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER AND KEETON].

12. *Id.* § 9, at 39.

13. *Id.* § 11, at 47.

14. *Id.* §§ 13-14, at 67, 85.

15. There are four elements if one considers them to be duty, breach, causation—broken down into two sub-elements, cause-in-fact and proximate cause—and damages. There are five if each of the causation sub-elements is treated as separate elements. *Compare id.* § 30, at 164 (listing four elements of negligence, coupling cause-in-fact with proximate or legal cause), with DAN B. DOBBS ET AL., THE LAW OF TORTS § 124 (2018) (ebook) (listing five elements of negligence, with cause-in-fact and proximate or legal cause listed as independent elements).

16. Defamation is a nominate tort; i.e., it has a name but did not arise out of the writ of trespass, and the constitutional overlay discussed below makes it different altogether. *See DOBBS ET AL.*, *supra* note 15, § 37.2, at 938.

17. The statement in text may be particularly apt for the law student, especially the first-year law student.

18. *See* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 73 (1956); *see also* PROSSER AND KEETON, *supra* note 11, § 37, at 235 (stating that “the court must decide questions of law, and the jury questions of fact”); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 6 (AM. LAW INST. 2005) (“An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.” (emphasis added)). *Id.* § 7.

them as issues of breach or causation or damages, the law obscures both their true nature as law and the role of the judge in articulating and developing that law. These questions are really part of the defendant's duty to the plaintiff. A duty defines conduct or behavior that exposes someone to liability.¹⁹ Duty also defines the scope of liability; or in other words, it asks how far does the obligation extend and to what types of injuries? In essence, anything that goes into formulating a jury instruction explaining an element is law. Jury instructions are judicial statements of law or legal obligations.

A unified, analytical structure would help to clarify the overall law of torts—as well as make it more consistent and understandable. Is there a structure to the law of torts that ties all torts together and that would logically unify the subject? Is there an analytical and thematic method of organization? To be truly helpful, such a structure would also need to help clarify the proper role for judge and jury. Is there a metaphorical Theseus willing to kill the monstrous part of the subject?

Identifying, articulating, and applying an overall structure for and to tort law would help it all make sense. It would help the citizenry see, understand, and comment on this most important private law subject. After all, torts is one of those critical places in the law where society determines appropriate levels of acceptable risk. It is where deterrence, compensation, punishment, efficiency, risk spreading, and fairness all merge to generate social policy.²⁰

This Article establishes that there is indeed a structure of tort law with the power to clarify and explain the substance of the law of torts, as well as the appropriate roles of the judge and jury. The structure is my Theseus; it is an overarching analytical structure stretching across all torts. The structure tames, rather than kills, the monster and provides a comprehensive, consistent basis for understanding all torts. Such structure is based on the elements of negligence—duty, breach, causation (actual and proximate or legal), and damages (or remedy), and it presents a clear model for decisionmaking in torts cases. The main analytic elements of negligence reify the basic structure of all tort law. Thus, the structure set forth in this Article has application to, and provides a consistent analytical approach for, all torts. For each “separate” family of torts—intentional torts, negligence, products liability, etc.—there is a question of duty, a question of breach, a question of causation,²¹ and a question of damages or remedy. If the plaintiff seeks alternative or additional relief, such as an injunction, the issue

19. See *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003).

20. See *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1161 (La. 1988); see also PROSSER AND KEETON, *supra* note 11, § 4, at 20.

21. There is always a question of cause-in-fact; the extent to which there are questions of legal or proximate cause may vary a bit as discussed below. See *infra* Part III.C-III.D.

would include the appropriateness of that remedy. More commonly, though, the plaintiff seeks damages, thus this Article will focus on damages as the fifth element of the structure of torts.

The description of the model also makes clear that while it is often said that the judge decides duty and the jury decides breach, causation, and damages, in fact every tort, regardless of its categorization, involves multiple questions of law. These legal questions are for the judge to determine. The judge's legal determinations touch on each element in the structure. Many "legal" aspects of breach, causation, and damages are actually questions or subsidiary questions of the scope of the obligation or the scope of the duty.²² This Article makes clear that law is infused in every element of every tort as currently conceived and that the law is articulated and developed by judges.²³ Critically, even if courts articulate the applicable legal rule as part of the discussion of breach, causation, or damages, the law is still essentially a part of the court's definition of the extent of the defendant's legal obligation to the plaintiff.²⁴

The structure of torts set forth herein makes clear that almost all categorical decisions beyond the purely case-specific level are policy questions for the judge. They are questions of the scope of the obligation or duty. When unveiled as legal questions, the allocation of decisionmaking responsibility between judge and jury becomes clearer and very basic—judges articulate the law; jurors apply that law to the facts.

In summary, this Article contends that there is a broad, overarching structure for all tort law; that structure is based on the elements of negligence. For every tort, there is a duty issue: what is the legal obligation owed? There is a decision about breach: did the defendant

22. For instance, whether someone is liable for medical-monitoring damages is often analyzed as a damages issue; but in reality, it is an issue of the scope of the defendant's duty. See, e.g., *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233, 240-42 (N.D.N.Y. 2017); see also *infra* Part III.E.

23. The factfinders apply the facts to the principles; they do not create the principles.

24. Thus, the structure makes clear that much of tort law is grounded in the concept of duty or legal obligation, where duty is the basic legal question which the judge decides. The judge decides it because it is a legal question. See *supra* note 18 and accompanying text. Articulating and developing law is for the judge's finding of facts and whether the governing legal standards are breached is for the jury.

Put differently, the key inquiry in any tort case is defining the obligation which one person owes to another, whether the case involves what we think of as an intentional tort, negligence, defamation, strict liability, and others. Of course, defining the obligation is a legal question. It is, in the parlance of negligence, a question of duty. Thus, it is clear that the judges' law-making function is triggered and pervasive throughout all of the elements of negligence and torts in general. The Legal Realists, led by Leon Greene and Wex Malone, taught twentieth century American tort lawyers that virtually all questions of proximate or legal cause were really policy questions directly related to the underlying duty inquiry. As such, legal cause decisions were policy decisions. See Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1033-45 (1928).

comply with the applicable legal obligation? There is a question of causation-in-fact: did the defendant bring about a proscribed result? There is an issue of legal causation: is it fair to hold the defendant liable for the injury which occurred and the manner in which it occurred? And finally, there is a damages issue: what damages can the plaintiff recover in this case?²⁵ In addition to supplying comprehensive clarity, the structure makes something else clear—there is law at every element. Many things we study or teach as issues of breach, cause-in-fact, legal causation, or damages are really legal decisions about the scope of the defendant's duty or legal obligation.

Section II will consider possible options for torts structures and set forth the proposed overarching structural model, which mirrors the elements of negligence. Section III will restate the proposed structure and explain it in the context from which it arose—negligence. Section IV will apply the structure to products liability. Section V will show how the structure applies to cases involving ultrahazardous and abnormally dangerous activities. Section VI will show how the structure applies to defamation cases. Section VII will show how it also applies to and explains defamation cases. Throughout, it will be apparent that there are legal questions relating to the defendant's duty or obligation to the plaintiff that arise as subparts of other elements and thereby potentially confuse the law—or at least the allocation of decisionmaking authority. Finally, Section VIII will offer a brief conclusion.

II. CONSIDERING STRUCTURAL OPTIONS

There are multiple ways to go about articulating an organizational or explanatory structure for torts. At the most modest level, one could separate the nominate torts from the rest. Such an exercise is more taxonomical and historical than anything else, and it does not move the law forward but mires it in its roots. One could certainly argue that the development of torts and its organization, or lack thereof, is historical. That is, at common law, most of the nominative torts grew out of the writ of trespass, and negligence grew out of the writ of trespass on the case.²⁶ This evolutionary view provides a possible explanation for some of the differences we see in torts, and some might be satisfied to conclude that legal habits styled in the Middle Ages simply stuck. One accepting this historical explanation might shrug off further organizational effort to explain torts on some structural basis. Under this historical view, torts that did not arise out of the alluvial soils of

25. More broadly, one might ask what remedy is appropriate in this case, as plaintiffs in tort cases sometimes seek injunctive relief in the form of restitution, but damages are far more common.

26. PROSSER AND KEETON, *supra* note 11, § 6, at 28-29. See also *supra* note 16 and accompanying text.

the common law represent societal responses to changing circumstances and new needs—even if they all but developed free from any torts metastructure.²⁷ Courts may create new torts in response to twentieth or twenty-first century policy needs, but in doing so they contribute to torts' seemingly incoherent complexity. The problem with the historical view of torts is that first, it largely ignores the civil law's influence or approach to torts; and second, it does not provide a coherent organizational structure for a most important area of private law.

Alternatively, one could offer a “big” theory, like efficiency for the legal economists;²⁸ strict liability based on history and cause;²⁹ feminism;³⁰ communitarianism;³¹ or risk spreading.³² While these are useful and even brilliant theories, they are theories. They are not analytical or organizational structures.³³ These theories purport to explain or justify results. They are also normative and push courts in theoretically result-oriented directions. For instance, law and economics scholars urge courts to reach conclusions that foster economic efficiency.³⁴ A feminist scholar might explain results in cases based on societal discrimination against women and justly urge courts to take feminist perspectives into account when deciding cases.³⁵ A communitarian might urge the adoption of community values.³⁶ The risk spreader would impose liability or responsibility on the cheapest cost

27. The reins on unlimited growth is the nature of the common law process and the policies supposedly underlying all of tort law: deterrence of undesirable conduct, avoiding overdeterrence of socially desirable activity, compensation, risk spreading, society's sense of fairness, deference to legislative will, and a healthy respect for precedent. *See supra* note 19 and accompanying text.

28. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Richard A. Posner, *The Economic Approach to Law*, 53 *TEX. L. REV.* 757, 763-64 (1975) (“[T]he legal system itself . . . has been strongly influenced by a concern . . . with promoting economic efficiency.”); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7 (3d ed. 2003).

29. *See generally* Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151 (1973).

30. *See generally* MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (1999).

31. *See generally* Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 *WAKE FOREST L. REV.* 649 (1995).

32. *See generally* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Mark A. Geistfeld, *Risk Distribution and the Law of Torts: Carrying Calabresi Further*, 77 *LAW & CONTEMP. PROBS.* 165 (2014).

33. Certainly, some of these theories offer clear guides for decisionmaking. Posner urges decisions based on economic efficiency. Posner, *supra* note 28. Epstein urges a return to a type of trespass based strict liability. Epstein, *supra* note 29. In that regard, they counsel how to decide. What I am striving to do is focus on what is being decided and how it involves a judge articulating law rather than how she should decide.

34. *See supra* note 28 and accompanying text.

35. *C.f.* CHAMALLAS, *supra* note 30, at 171-73.

36. *See* Ackerman, *supra* note 31, at 683-84.

avoider or the one best able to spread the risk across a broader group.³⁷ The structure described herein is not normative. It does not push results in any particular direction; instead, it provides a comprehensive model for the steps involved in deciding tort cases of all types and for who makes which decisions at which step. It seeks to clarify and explain the process of decisionmaking, not the result.

The proposed model articulates what is common to all tort claims, and it sets forth a unifying structure. The goal is to identify one structure that fits all torts. A good place to begin is the modern civil law of torts. The next subsection will briefly describe the civil law approach to torts. The civil law is comprehensive and systematic. The model exemplifies those traits while also building upon and incorporating the common law of torts.

A. *The Civil Law of Torts*

It is an initial principle of the civil law that today's civil law judge or scholar looks first to the civil code when dealing with private law; she does not consult the cases first but the Code itself.³⁸ The most recent version of the French Civil Code, in its general articles on torts or délits,³⁹ provides in part:

Art. 1240. – Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.

Art. 1241. – Everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care.⁴⁰

Article 1240 provides a broad statement of the legal obligation⁴¹ not to injure another.⁴² Everyone who is at fault and causes injury must repair

37. See Calabresi, *supra* note 32, at 517-19.

38. LA. CIV. CODE ANN. art. 1 (1998) (“The sources of law are legislation and custom.”). See also *id.* cmt. b (stating that jurisprudence is a secondary source of law).

39. The French translation for torts is délits. GOVERNMENT OF ONTARIO, ONTARIO ENGLISH-FRENCH LEGAL LEXICON 263 (1987).

40. JOHN CARTWRIGHT ET AL., THE LAW OF CONTRACT, THE GENERAL REGIME OF OBLIGATIONS, AND PROOF OF OBLIGATIONS 27 (2016), http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf [<https://perma.cc/KZP2-U3ZC>]. The Louisiana Civil Code has a similarly broad article. Article 2315 of the Louisiana Civil Code, derived from the 1804 version of the Code Napoleon authored, also states in part: “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” LA. CIV. CODE ANN. art. 2315(A) (2001).

41. Of course, the French and civil law of contracts is called obligations. SAUL LITVINOFF, 5 LOUISIANA CIVIL LAW TREATISE: THE LAW OF OBLIGATIONS § 1.1, at 1 (2d ed. 2001). Tort law “obligations” are still obligations in the colloquial sense, but they are not voluntarily entered into as are contracts. See *generally* Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971); P. Olivier & Sons, Inc. v. Bd. of Comm’rs of Lake Charles Harbor and Terminal Dist., 160 So. 419 (La. 1935).

42. It is true that the French Civil Code currently has a number of articles after the general statement of liability for fault, which are more specific. CARTWRIGHT ET AL., *supra*

it. Article 1241 makes clear that negligence or the lack of care is a type of fault.⁴³

The late Tulane torts professor and scholar, Ferdinand Stone, wrote that the civil law of torts had three core elements: fault, cause, and damage.⁴⁴ But the three concepts of fault, cause, and damage provide a rather stark skeleton upon which to build a comprehensive torts structure. Fault, cause, and damage do not, standing alone, adequately take account of and encapsulate all the elements of all American torts. Nor do the words fault, cause, and damage provide sufficient specificity or direction to American lawyers and judges who would wonder exactly what fault means and what type of causation is required. Damages are somewhat less troublesome, but Professor Stone's basic model also fails to adequately explain who decides what.

B. *Moving Towards a More Detailed Structure: Negligence*

Something slightly more detailed and perhaps more robust than Professor Stone's civil law three-headed model is desirable and possible. The model proposed herein combines the simple elegance of Stone's model and practically links his civil law model with the American, common law tradition. The model is comprehensive, like the civil law, and, simultaneously, works from and adopts a structure with which American jurisprudence is already familiar. In doing so, it practically explains who—between judge and jury—ought to be deciding what.

The most descriptive, prescriptive, and familiar structure for all of torts is the analytical structure for negligence. Negligence consists of four or five elements: duty, breach, causation, and damages. Negligence consists of four elements if we say that causation has two sub-elements: cause-in-fact and legal cause. Negligence consists of five el-

note 40, at 27 (articles 1241-1244). In that regard, the Code tends, in a way, to mirror the common law with its separate categories of tort liability. Louisiana follows suit. However, the initial overarching article and its message—one at fault who causes damages is liable to fix it—provides one big principal from which the more specific articles follow. LA. CIV. CODE ANN. arts. 2315-2324.2 (2018). In that way, it seems to provide the beginning of some universal structure for analysis of torts cases.

43. Suzanne Galand-Carval, *Fault Under French Law*, in UNIFICATION OF TORT LAW: FAULT 89 (Pierre Widmer ed., 2005); Olivier Moréteau, *Basic Questions of Tort Law from a French Perspective*, in BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE 59, 72 (Helmut Koziol ed., 2015); DALLOZ, RÉFORME DU DROIT DES OBLIGATIONS: UN SUPPLÉMENT AU CODE CIVIL 2016, at 30 (2016) ("Le sous-titre II intitulé « La responsabilité extracontractuelle » reproduit *in extenso* des articles 1382 à 1386-18 du code civil" This means that art. 1240 is identical to old art. 1382 and 1241 identical to old 1383).

44. FERDINAND F. STONE, 12 LOUISIANA CIVIL LAW TREATISE: TORT DOCTRINE § 10, at 19 (1977). See also André Tunc, *A Codified Law of Tort—The French Experience*, 39 LA. L. REV. 1051, 1056 (1979) ("No less remarkable is the fact that the common law has never formulated a general principle of civil liability.").

ements if we say that cause-in-fact and legal cause are not sub-elements, but rather that they stand alone. The model will present them separately but will note that for some torts, such as the intentional torts and defamation, the legal cause element may not always be express. Negligence is the most common of all torts.⁴⁵ In addition, other areas of tort law incorporate or build upon negligence concepts—examples include products liability (particularly design and warning cases),⁴⁶ defamation cases involving private party plaintiffs suing over speech which is a matter of public concern, negligent misrepresentation,⁴⁷ and, naturally, the employer's vicarious liability for negligent acts of employees.⁴⁸ Thus, it is both a convenient and familiar foundation upon which to build the structure of torts.

It is also a sound foundation upon which to build because all torts can be broken down into duty, breach, cause-in-fact, legal cause, and damage. The most important element is duty because duty is the element or place at which the court sets forth and defines the relevant legal obligation. Thus, the definition and scope of the duty or legal obligation owed is a legal question for the court to decide whether a duty is owed to the plaintiff.⁴⁹ Breach asks whether the defendant complied with his legal obligation.⁵⁰ Breach is a question of applying the articulated obligation to the facts of the case.⁵¹ It is a mixed question of fact and law for the jury or judge as factfinder.⁵² Cause-in-fact involves factual causation: did the defendant's breach of duty (the legal obligation) factually cause the plaintiff's injuries?⁵³ Most commonly, the issue is

45. DOBBS ET AL., HORNBOOK ON TORTS, § 9.1, at 187 (2d ed. 2000) [hereinafter DOBBS ET AL., HORNBOOK] ("Negligence claims represent the great majority of tort claims presented, brought, or tried today.")

46. See, e.g., Louisiana Products Liability Act, LA. STAT. ANN. §§ 9:2800.51-2800.59 (2009); see also *id.* § 9:2800.56 (unreasonably dangerous design claims); *id.* § 9:2800.57 (inadequate warning claims).

47. PROSSER AND KEETON, *supra* note 11, § 107, at 745 ("[M]isrepresentation frequently occurs in ordinary negligence actions . . . and the courts have not found it necessary to distinguish it in any way from any other negligence.")

48. *Id.* § 69, at 499 ("[Vicarious liability] is still an action for negligence, and the ordinary rules of negligence liability are still applied to it.")

49. More precisely, we might say the issue is whether the defendant owes a duty to the class of persons to which the plaintiff belongs for the type of injury which occurred. Thus, some courts decide the scope of liability or duty as a matter of law. The general discussion of the propriety of that duty/risk approach is beyond the scope of this piece. See *Dixie Drive It Yourself Sys. New Orleans Co. v. Am. Beverage Co.*, 137 So. 2d 298, 304 (La. 1962).

50. DOBBS ET AL., HORNBOOK, *supra* note 45, § 10.2, at 206 ("[D]uty is whether the defendant is under an obligation to use care to avoid injury to others. Breach, in contrast, is whether the defendant did in fact use appropriate care.")

51. RESTATEMENT (SECOND) OF TORTS §§ 328(B)-328(C) (AM. LAW INST. 1965); *id.* § 328(C) cmt. b ("[I]t is the function of the jury to apply to the facts in evidence the standard of conduct required by the law in the performance of the defendant's legal duty.")

52. *Id.* §§ 328(B)-328(C). And assuming of course that reasonable minds could differ.

53. DOBBS ET AL., *supra* note 15, § 183.

whether it is more probable than not that but-for the defendant's alleged tort the plaintiff would not have suffered the injuries for which she seeks recovery.⁵⁴ Legal cause is a more intuitive inquiry where one decides whether it is fair, under the particular facts of the case, to hold the defendant responsible for the particular injuries the plaintiff suffered as a result of the defendant's breach of his legal obligation.⁵⁵ Because the legal cause question asks whether it is fair under the particular facts of the particular case to hold the defendant responsible, the factfinder usually decides legal cause after receiving proper instructions on the law or duty from the judge.⁵⁶

Inevitably, because fairness and justice are related to the policies judges consider when deciding whether to impose a duty, there can be some understandable overlap between the duty question and the legal cause question. This overlap is most helpfully avoided by making duty a question of what the rule generally ought to be for similar types of cases⁵⁷ and limiting the legal cause question to the peculiar facts of the particular case. The duty question should be broad and apply to classes of plaintiffs and classes of injuries; it should not be case specific. Legal cause asks whether on *these* particular facts the defendant, whose breach of a legal obligation factually caused injuries to the plaintiff, should be liable. It asks: is it too unfair, unjust, or bizarre to hold the defendant liable in this particular case? The particularized nature of the question—tailored to the very case before the court and not some other case—makes it appropriate for the factfinder to determine legal cause. In some cases, particularly intentional tort cases, there may not be a discussion of legal cause because the court might essentially decide legal cause in intentional tort cases as a matter of law based on the policy of punishing the intentional wrongdoer and the tendency to extend the scope of responsibility. But the legal cause issue is there, albeit behind the scenes.⁵⁸

Before applying the structure, it is important to note that aspects of modern tort law are befogged, if not deceptive, because matters that are

54. *Id.* § 14.4, at 317.

55. See *Snyder v. LTG Lufttechnische GmbH*, 955 S.W.2d 252, 256 n.6 (Tenn. 1997) (“Proximate or legal cause is a *policy* decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, precedent and ‘our more or less inadequately expressed ideas of what *justice demands . . .*’” (emphasis added) (quoting *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997))); see also PROSSER AND KEETON, *supra* note 11, § 41, at 263.

56. PROSSER AND KEETON, *supra* note 11, § 45, at 321 (“[I]f reasonable persons could differ . . . the issue of ‘proximate cause’ is submitted to the jury with appropriate instructions on the law.”).

57. I.e., negligent infliction of emotional distress, cases involving the failure to act, cases involving unborn plaintiffs, etc.

58. See *infra* Part VII.

actually questions of legal obligation are lurking in the other elements.⁵⁹ Authors organize their torts casebooks in this confusing fashion;⁶⁰ lawyers then organize their thinking the same way authors organize torts casebooks. Torts teachers confuse our students and the waters become muddy. Recognizing the reality that many issues we analyze as part of breach, cause-in-fact, legal cause, or damages are really legal questions about the scope of the defendant's duty clarifies who ought to be deciding what.⁶¹

For instance, when we talk about breach, we say one breaches her duty to another when she does not act reasonably. Of course, the "duty to act reasonably" is a statement of duty. It is not a breach question. Whether there is a breach depends on a comparison of the facts to common sense notions of what is reasonable, but the *duty* is to use reasonable care. However, most torts books⁶² treat the obligation to exercise reasonable care in chapters named "standard of care" or "negligence." The name of the chapter is not "duty." Indeed, the obligation to exercise reasonable care is perhaps the most basic of all statements of duty. This is not mere semantics because it is the judge who decides or articulates duty and the jury who decides breach. Keeping their roles separate is essential. The next Section will articulate the model in the context in which it arose—negligence.

III. RESTATING AND AFFIRMING THE STRUCTURE BEFORE APPLYING IT

A. Duty

Duty is a crucial and, as just noted, sometimes confusing element. It is also the most important. It is where the legal action is and, as noted, oft times things that are categorized questions of breach, causation, or damages⁶³ are really questions about the existence or extent of the defendant's legal obligation or duty. They are legal questions

59. See *infra* Part III.

60. See, e.g., FRANK L. MARAIST ET AL., TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES i-vii (3d rev. ed. 2017). I am a responsible co-author of this casebook. *Mea culpa*.

61. WILLIAM E. CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE, TORT LAW § 4.2 (2d ed. 2009) ("Questions of law are for the court; questions of fact are for the jury."). See also *infra* Part III. Another way to say it is that anything in a jury instruction that explains an element (or the law relating to an element) is a legal decision that the court has made. And as such, it is a judicial statement about the legal obligation that the defendant owes.

62. ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 91-93 (2003); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 143-45 (8th ed. 2004); MARAIST ET AL., *supra* note 60, at ii; VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 129-30 (10th ed. 2000); AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 109-10 (2003).

63. See *infra* Part III.B-E.

and when courts decide them, judges are making law. They are deciding upon the legal obligation or scope of the duty. Duty is thus a much more complex and wider ranging topic than currently suggested in our organization of the law of torts.⁶⁴

What then does it mean to say a person has a duty? The conclusion that the defendant owes a duty to the plaintiff is a recognition or statement of a legal obligation one person, the defendant, owes to another person, the plaintiff. At its most basic, with negligence, a defendant has a legal obligation to the plaintiff to exercise reasonable care under the circumstances.⁶⁵ Why? Because society has determined this, based on morality, ethics, deterrence, the desire to compensate the injured, and more that people should not expose others to an unreasonable risk of harm. The societal actor who made this determination is the court. The first judge who uttered the statement that a person had a duty to exercise reasonable care under the circumstances to prevent risk to another made a monumental legal statement about responsibility.⁶⁶ Importantly, if obviously, the court articulates the obligation—reasonable care under the circumstances. Perhaps because it is generally such an obvious statement, one sometimes forgets that it is a basic rule of law; but the duty to exercise reasonable care is the most basic duty or law in negligence.

How much care must the defendant sued for negligence exercise? Reasonable care under the circumstances. He or she must behave as a reasonable person of common or ordinary prudence.⁶⁷ Of course, there is no such person;⁶⁸ it is a legal hypothetical—a guideline for the factfinder. Whether the defendant has broken or breached that duty requires an analysis of the surrounding circumstances, which is a very focused, fact specific inquiry. That is why the factfinder makes the breach determination. The fact-based determination of breach is

64. See DOBBS ET AL., *supra* note 15, § 125, (explaining the current, more narrow discussion of the duty element).

65. See, e.g., *Hocking v. Dodgeville*, 768 N.W.2d 552 (Wis. 2009); see also DOBBS ET AL., *supra* note 445, § 10.5, at 213 (“[T]he standard of conduct to which the defendant must conform is typically the standard of a reasonable person under the circumstances . . .”). Similarly, one might say that the duty to comply with a contract to which one is a party is a statement of legal obligation. The contract (and applicable law) define the obligation for the particular case. The factfinder decides whether the parties have complied with their legal obligations. *Hometown Fin., Inc. v. U.S.*, 409 F.3d 1360 (Fed. Cir. 2005).

66. A search in LexisNexis reveals that the first reported American decision in which the phrase is used is *Masterton v. Village of Mount Vernon*, 58 N.Y. 391, 394 (1874). For an early statement of the “prudent” person standard, which is substantially similar, see *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490, 492.

67. *Masterton*, 58 N.Y. 391; *Vaughan* (1837) 132 Eng. Rep. 490; see also PROSSER AND KEETON, *supra* note 11, § 32, at 174.

68. A. P. HERBERT, UNCOMMON LAW 1-2 (7th ed. 1952). See also LOUIS R. FRUMER & MELVIN I. FRIEDMAN, 21 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 101.01(2)(b) (2019).

whether the defendant has violated the legal standard of reasonable care, which the court has delineated.⁶⁹

Legally, the duty owed may change for certain people; let us call them atypical people even though in doing so we recognize no one is typical.⁷⁰ For instance, the law takes account of physical differences in articulating and applying the duty to exercise reasonable care. The vision-impaired or blind person is not typical, but the law does not say: "The reasonable (typical) person is not blind so the vision-impaired person must act as a reasonable person who is not vision-impaired." Instead, the law provides that the vision-impaired person is held to the standard of care of the reasonable person who is vision-impaired.⁷¹ That is a statement of law; it is a statement of the vision-impaired person's legal obligation; it is a statement of duty. A jury is neither free to disregard it nor decide that in a particular case it will hold a vision-impaired person to the standard of care of a reasonable person who can see. Why does the law provide for that standard of care or duty? Because an alternative rule, holding the vision-impaired person to the standard of care of the person who can see, would arguably confine risk averse vision-impaired people to their homes.⁷² They would be scared to go out or they would have to always be accompanied by another, which would be expensive and potentially demeaning and offensive. At the same time, holding the vision-impaired person to the standard of a reasonable person who is vision-impaired is a determination that allowing vision-impaired individuals to more fully participate in society is worth the arguably slightly increased risk they may pose to others. These are policy matters appropriately addressed to the court, and when the court resolves them, it does so for all vision-impaired persons, not just the one before the court.

Of course, the duty of the vision-impaired person to behave as a reasonable person who is vision-impaired has its limits. Vision-impaired people are not permitted to drive cars; they would pose too great

69. At the end of the day, a factfinder's decision that there has been a breach does not constitute law; it constitutes the application of law (the duty to exercise reasonable care) to a particular case.

70. DOBBS ET AL., *supra* note 15, § 129.

71. Another way to say the same thing is to ask, what circumstances does the law mandate be taken into account when deciding what obligation is owed to others? *See id.* § 10.9, at 223 ("[O]ne with physical illness or other physical disability is held to the standard of a reasonable person having such a disability, not to a standard of some ideal or average physical capacity."); PROSSER AND KEETON, *supra* note 11, § 32, at 175 ("As to his physical characteristics, the reasonable person may be said to be identical with the actor.")

72. PROSSER AND KEETON, *supra* note 11, § 32, at 175-76 ("The person who is blind . . . is entitled to live in the world and to have allowance made by others for his disability, and the person cannot be required to do the impossible by conforming to physical standards which he cannot meet." (footnotes omitted)); DOBBS ET AL., HORNBOOK, *supra* note 45, § 10.9, at 224 ("[A]n unsighted person is not to be considered negligent merely by going out into the world.")

a risk if they did so.⁷³ But if a vision-impaired person is driving a car and has an accident, the law holds him to the standard of care of the reasonable person, not the reasonable person who is vision-impaired and driving.⁷⁴ That too is a statement of duty or law. It is a modification of the rights of vision-impaired persons with the risks that their engaging in a dangerous behavior like driving would cause to them and others. A factfinder is not free to ignore that rule in a particular case. Again, the important point is the articulation of the standard of care is a statement of duty, law, and legal obligation.

Another example involves children. In negligence cases, the law does not hold the child to the standard of care of a reasonably prudent person under the circumstances. Instead, it holds the child to the standard of care of a child of like age, intelligence, and experience—that is a statement of the duty or legal obligation the child owes.⁷⁵ The child standard of care recognizes that children cannot be expected to function as reasonably and logically as adults.⁷⁶ It is also a recognition of the fact that children need to grow and mature, and for them to grow and mature they must be allowed to participate in the life of the community.⁷⁷ Finally, every one of us was once a child, so there is an experiential and intuitive understanding of the growth process.

In some ways, the child standard of care ignores the supposedly objective reasonable person standard while at the same time it somewhat incorporates it. For instance, the standard is not the reasonable eight-year-old or ten-year-old but the reasonable child (like the defendant) of like age, intelligence, and experience. The child standard is perilously close to being subjective, but it uses the word reasonable. Nevertheless, it is a legal recognition that children do not grow and mature at the same rate, so age itself can be misleading. The creation of the child standard of care was a policy decision applicable to all children, and, as such, it was a legal decision, properly made by judges. The factfinder determines if the child complied; the factfinder does not decide the legal standard.

Not unlike the vision-impaired person, there are limits to the tailored standard of care for children. If a child engages in an adult activ-

73. DOBBS ET AL., HORNBOOK, *supra* note 45, §10.9, at 224-25 (“To the extent that a reasonable person with similar limitations would do so, a disabled person must adjust for limitations by using other senses or by altering conduct to minimize the risks created by the disability. . . . A person with failing vision may be expected . . . to avoid altogether an activity like driving” (footnotes omitted)).

74. *See id.*

75. DOBBS ET AL., *supra* note 15, § 134.

76. *Id.*

77. *See id.*

ity, the law holds her to the standard of care of a reasonable adult under the circumstances.⁷⁸ The ten-year-old stepping away from a car accident in which she was driving does not exculpate herself by saying: “I did okay for a ten-year-old of my abilities.” A child engaging in an adult activity loses the protection of the standard of care for children. The law decides that although it can tolerate some extra risk associated with growing children, it cannot tolerate that risk when the activity in which the child is engaging is an adult activity. Typically, adult activities are more dangerous to others than children’s activities. The decision to hold the child engaged in a dangerous activity to the adult standard of care is a legal one. Naturally, some jurisdictions may consider something an adult activity and another may consider it a childhood activity;⁷⁹ but that difference is merely the result of different community values in different jurisdictions. In such cases, it is accurate to say that the *law* is different in those jurisdictions.

Likewise, the court articulates duty in professional negligence cases differently than “reasonable care under the circumstances.” For instance, in medical malpractice cases the law does not mandate that a doctor must exercise the level of care of an ordinarily prudent person under the circumstances. Imagine a layperson performing heart surgery exiting the operating room and happily proclaiming: “God knows whether he’ll live or not, but I did a darn good job for someone who has no medical training.” Instead, the law holds the doctor to the standard of care of the reasonable doctor either in the same or similar⁸⁰ locality or, in the case of specialists, in the nation (which is the rule in a case involving a heart surgeon).⁸¹ Again, this is a legal statement of duty—the legal obligation owed. The factfinder cannot ignore it and decide that a trained doctor did as well or better than a reasonable person who was not a doctor so she should not be negligent. In deciding whether to hold the doctor to the standard of care of a doctor in the same locality or a similar locality or to a national standard, the court is also making a legal determination—it is deciding the scope of the legal obligation for that jurisdiction. Of course, different

78. PROSSER AND KEETON, *supra* note 11, § 32, at 181 (“[W]henever a child, whether as plaintiff or as defendant, engages in an activity which is normally one for adults only, such as driving an automobile or flying an airplane, the public interest and the public safety require that any consequences due to the child’s own incapacity shall fall upon him rather than the innocent victim, and that the child must be held to the adult standard, without any allowance for his age.” (citations omitted)).

79. *Compare* Neumann v. Shlansky, 294 N.Y.S.2d 628 (Westchester Cty. Ct. 1968) (holding an 11-year-old golfer who hit plaintiff with a golf ball to the adult standard of care), *with* Hudson-Connor v. Putney, 86 P.3d 106, 111 (Or. Ct. App. 2004) (holding that entrustment and operation of a golf cart are not considered “adult activit[ies]”).

80. PROSSER AND KEETON, *supra* note 11, § 32, at 187-88, 188 nn.46-47.

81. Jenkins v. Parrish, 627 P.2d 533, 537 (Utah 1981); PROSSER AND KEETON, *supra* note 11, § 32, at 188, 188 n.48.

types of doctors may be held to different standards in the same jurisdiction.⁸² That too is law. It is not something factfinders are free to ignore as they choose.⁸³ We could undertake a similar analysis for all other professionals.⁸⁴

People engaged in certain other occupations are often said to owe higher duties of care or utmost care to protect others. The law purportedly holds them to a stricter standard than reasonable care under the circumstances. Some examples include common carriers who owe a duty of “utmost” care to their passengers⁸⁵ or innkeepers who also owe a “high” duty of care to their guests.⁸⁶ Some of the reasons for these heightened duties are no doubt historical.⁸⁷ One intuitively feels that the same results might be reached in most cases involving common carriers and innkeepers by holding the common carrier or innkeeper to a standard of reasonable care of a similarly situated individual, noting the particular dependency of the passenger upon the common carrier and the guest upon the innkeeper as important circumstances in determining breach. Be that as it may, the higher standards of care applicable to these certain defendants are rules of law. They are an articulation of the legal obligation owed; a factfinder assesses the particular facts against that standard, but the factfinder is not free to ignore it. The statement that a common carrier or innkeeper owes passengers and guests a heightened duty of care is a statement of the defendants’ duties.

There are also instances where the law may lower the standard of care. The most noteworthy example is the “emergency doctrine.”⁸⁸ This doctrine provides that a person confronted with an emergency, not of their own making, does not have to exercise the level of care that a reasonable person would exercise in a non-emergency situation.⁸⁹ She must only exercise that level of care that a reasonable person would

82. See PROSSER AND KEETON, *supra* note 11, § 32, at 188, 188 n.48 (comparing a general practitioner to a specialist).

83. And the standard of care in most cases requires the plaintiff to present expert testimony. While one might say that is a rule of evidence, it also goes to the legal standard. The professional is held to the standard of care of a reasonable member of that profession, and the law requires expert testimony to articulate that standard. See, e.g., *Hassebrock v. Bernhoft*, 815 F.3d 334, 341-42 (7th Cir. 2016) (applying Illinois law).

84. PROSSER AND KEETON, *supra* note 11, § 32, at 185-86 (“Most of the decided cases have dealt with surgeons and other doctors, but the same is undoubtedly true of dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades.” (footnotes omitted)).

85. E.g., CAL. CIV. CODE § 2100 (West 2019).

86. E.g., *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 434-35 (Va. 2006).

87. See LOUIS R. FRUMER & MELVIN I. FRIEDMAN, 7 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 23.03(2)(a) (2019); see also RESTATEMENT (SECOND) OF TORTS § 314(A) cmts B & C (AM. LAW INST. 1965).

88. PROSSER AND KEETON, *supra* note 11, § 33, at 196-97.

89. *Id.*

exercise in an emergency.⁹⁰ From a policy perspective, the emergency doctrine is a recognition that people (reasonable people) do not always think as clearly in an emergency. Once articulated by the courts as a matter of first impression, the doctrine is a rule of the legal obligation—a duty rule. Of course, one might wonder whether the emergency is really just one of the circumstances the reasonable person sometimes encounters and there is no need to separately mention it; but many courts do, and when they do, the emergency becomes part of the law which factfinders must follow in deciding individual cases.

To sum up the previous few paragraphs, within the general duty to exercise reasonable care under the circumstances in negligence cases there can be additional, more focused legal statements of the defendant's legal obligation. These legal "rules" are judicial recognitions that balancing of rights and risks justifies the alteration of the duty of reasonable care in certain relatively broad types of cases. While reasonable care is always determined in light of foreseeable risks, policies relating to accommodation, expertise, deterrence, or psychological reality (in the case of children and emergencies) lead to refinements of the general duty to exercise reasonable care. There are other cases where even though the defendant's conduct posed a foreseeable risk of harm, other policies and historical considerations led courts to alter or limit the duty owed.

Historically, there were several significant fact situations where the court did not impose a duty to exercise reasonable care upon a defendant, even though the defendant's conduct posed a foreseeable risk of harm to others. Today it is more common in these situations for the court to conclude that a duty is, or may be, owed, but the court will couch the duty with conditions; the court will not simply recognize a general duty to exercise reasonable care. The torts luminary, Dean William L. Prosser, called these situations: "Limited Duties."⁹¹ To name a few, at common law, a defendant had no duty to affirmatively act to help another person;⁹² a defendant formerly had no duty to exercise reasonable care to protect against negligently inflicted emotional distress;⁹³ a defendant had no duty to protect against third party criminal misconduct;⁹⁴ and there were and are more.⁹⁵ All of these old

90. *Id.*

91. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 324-27 (Jesse H. Choper et al. eds., 4th ed. 1971).

92. DOBBS ET AL., HORNBOOK, *supra* note 45, § 25.1, at 615.

93. *Id.* § 29.9, at 713.

94. *See id.* § 26.1, at 633-34.

95. *See generally id.* §§ 25-26.

rules were based upon policy analyses prevalent at the time courts articulated them. A no-duty rule, as much as a rule recognizing a duty, is a statement about the legal obligation or lack thereof.

Interestingly, the exceptions to those old no-duty rules that courts have developed fit this Article's structural model. For instance, as noted, at common law there was no duty to act to help another. Courts (and legislatures)⁹⁶ have eroded the rule, but they have not done so across the board.⁹⁷ Instead, they have created exceptions to the no-duty-to-act rule. One exception provides that there is a duty to act if there is a special relationship between the defendant and the plaintiff.⁹⁸ For instance, a parent has a duty to act to help his or her minor child.⁹⁹ Stated affirmatively, there is a duty to act to help another if the defendant has a special relationship with the person in need of aid. The duty statement recognizes the existence of a legal obligation. Critically, in order to trigger the duty in a particular case, there is an underlying factual question that needs to be answered: was there a special relationship between the defendant and the plaintiff? That factual question is for the jury, but the statement that one with a special relationship to the victim must act to aid the victim is a legal statement from the court—it is law.

Additionally, determining which relationships the law considers special and duty triggering are legal questions. Under the analytical approach proposed herein, making those decisions is for the court. Likewise, under my structural analysis/proposal if reasonable minds could differ on whether the duty triggering special relationship exists in a particular case is for the jury—it is purely a question of fact.

Similarly, some jurisdictions have held that there is no duty to protect against third party criminal acts.¹⁰⁰ However, there may be a duty, under one test, if the criminal act that occurred was substantially similar to criminal acts which had occurred in the past.¹⁰¹ This statement of duty is a statement about the existence of a legal obligation to exercise reasonable care. And again, there is a factual issue—were the crimes substantially similar? Just how substantially similar those prior crimes must be to trigger a duty, however, is a

96. *E.g.*, *Soldano v. O'Daniels*, 190 Cal. Rptr. 310, 316-18 (Cal. Ct. App. 1983); MINN. STAT. § 604A.01(1) (2018).

97. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 37, at 3 (AM. LAW INST. 2005).

98. DOBBS ET AL., *supra* note 15, § 415.

99. DOBBS ET AL., HORNBOOK, *supra* note 45, § 25.4, at 621 (“The relationship of a parent to a minor child likewise almost certainly imposes an affirmative duty upon the parent to use reasonable care to rescue the child from a known danger.”).

100. DOBBS ET AL., *supra* note 15, § 416.

101. *Id.*

legal question. Once the relevant court¹⁰² determines the applicable test for substantial similarity, and reasonable minds could differ, the substantial similarity of the crimes at issue to the prior crimes is a fact question.¹⁰³

Sometimes the plaintiff relies upon the violation of a statute to establish the standard of care. If the court accepts the statute as the standard of reasonable care under the circumstances—a duty decision—then the statute sets forth the legal obligation.¹⁰⁴ The court decides whether to adopt a statute as the standard of care of the reasonable person under the circumstances. It does so by asking whether the plaintiff is a member of the class of persons the legislature enacted the statute to protect¹⁰⁵ and whether the risk is one of the risks legislature enacted the statute to guard against.¹⁰⁶ The answers to those questions are matters of law for the judge to decide.¹⁰⁷

The decision of whether or not a duty exists is a decision about the legal existence of an obligation to exercise reasonable care. It is a question of law, and thus it is for the court to decide. Of course, whether a duty ultimately exists in a particular case may depend upon the resolution of underlying factual issues—in other words, was there a special relationship between the defendant and plaintiff? Were the crimes substantially similar? Did the defendant commit affirmative acts? But the duty statement is a statement of law. Different courts have analyzed the duty issue with more or less factual specificity, and that fact

102. Probably an appellate court.

103. Other courts, like the Louisiana Supreme Court in *Posecai v. Wal-Mart Stores*, 752 So. 2d 762, 768 (La. 1999), impose a duty to protect against criminal misconduct if the burden of preventing the crime is less than the probability of the crime occurring times the anticipated loss if the crime does occur. While the court's conclusion in any particular case is a statement of a legal obligation to exercise reasonable care or the lack thereof and so fits the structural model, the nature of the test poses the intellectual and structural risk that the judge in deciding duty will potentially overlap the jury function in deciding breach, but I am getting ahead of myself.

104. DOBBS ET AL., *supra* note 15, §§ 148-58. The analysis in the text is somewhat oversimplified because it ignores the fact that the procedural effect of violating a statute in a negligence case may be: negligence per se (in which case the statute adopted as the standard of care in the negligence case sets forth the duty or legal obligation and the defendant is negligent unless he establishes a judicially recognized excuse); a presumption of negligence (in which case the statute adopted as the standard of care in the negligence case sets forth the duty or legal obligation and the defendant is negligent unless he establishes that despite the statutory violation he exercised reasonable care under the circumstances); or some evidence of negligence (in which case the violation does not necessarily establish the standard of care but is some evidence of it for the jury to consider and the plaintiff maintains the burden of proof).

105. *Id.* § 153.

106. *Id.* § 152.

107. DOBBS ET AL., HORNBOOK, *supra* note 45, § 13.1, at 292 (“Judges rather than juries determine whether the defendant was under a duty of care at all and if so what standard of care applied. . . . If the judge determines that the defendant owed a duty of care, the judge will instruct the jury as to the proper standard.”).

has fueled substantial debate,¹⁰⁸ but it is beyond the discussion here. After the court articulates the applicable duty or legal obligation, the factfinder considers whether or not the defendant breached that duty.

B. Breach

Breach is the stage at which the factfinder decides if the defendant lived up to his legal obligation. In negligence, if there is a duty, the duty is to exercise reasonable care and so, when deciding breach, the jury asks itself whether the defendant exercised reasonable care under the circumstances. When torts professors teach breach, they dwell upon which circumstances the factfinder may consider. If there is a sudden emergency, how much care is reasonable? If the defendant is a professional, what is the standard of care? If one really thinks about it, the answers to these questions are legal conclusions, and are therefore part of the duty decision. If the statement about what circumstances the jury should consider goes into the jury instruction, it is a legal determination and is part of the duty owed by the defendant. The breach question then is: did the defendant comply with the applicable standard? Thus, the court states the duty, narrowing or specifying if the law so provides, and the jury applies the particular facts to that statement of duty to determine if there was a breach. The comparison of the facts to the articulated standard of care is the breach analysis. The jury makes that comparison.

In a case where the court has, as a matter of law, adopted a statute as the standard of care of a reasonable person under the circumstances, breach can be a very simple matter;¹⁰⁹ the jury only needs to decide whether the defendant violated the statute. To reiterate whatever the standard of care is or how it is established by the court—breach involves deciding if the defendant lived up to his legal obligation as defined by the court.

C. Cause-In-Fact

After duty and breach, the next element of negligence is cause-in-fact, which, like breach, is a supposedly factual determination for the

108. See, e.g., Thomas C. Galligan, Jr., *Cats or Gardens: Which Metaphor Explains Negligence? Or, Is Simplicity Simpler than Flexibility?*, 58 LA. L. REV. 35 (1997) [hereinafter Galligan, *Cats or Gardens*]; Thomas C. Galligan, Jr., *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*, 57 LA. L. REV. 1119 (1997) [hereinafter Galligan, *Revisiting*]; David W. Robertson, *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 LA. L. REV. 1079, 1092 (1997) [hereinafter Robertson, *Allocating Authority*]; David W. Robertson, *The Vocabulary of Negligence Law: Continuing Causation Confusion*, 58 LA. L. REV. 1 (1997) [hereinafter Robertson, *Vocabulary of Negligence*].

109. See *supra* note 103.

jury.¹¹⁰ But there are questions of legal obligation lurking behind the cause-in-fact inquiry. The court's legal hand is ubiquitous; there are legal determinations involved in cause-in-fact which ultimately shape the nature and extent of the total legal obligation. The basic articulation of the "but for" test for cause-in-fact is a legal statement. When the court uses an alternative test for cause-in-fact in cases where the plaintiff cannot prove "but for" causation, it is expanding the defendant's liability—it is expanding the defendant's duty or obligation.

The traditional test for determining cause-in-fact is the "but for" test.¹¹¹ When the factfinder can say that it is more likely than not that "but for" the defendant's particular alleged act of negligence the plaintiff would not have suffered the particular injuries for which she sues, the defendant's act was a cause-in-fact of the plaintiff's injuries. The "but for test" itself is a legal statement. The law provides that a "but for" cause is sufficient to establish cause-in-fact. The law could be different. Any cause that had "something to do with"¹¹² the plaintiff's injury could be sufficient. Or, any act of defendant that enhanced the chance plaintiff would be injured could be sufficient.¹¹³ Generally, courts do not use such language and adhere to the "but for" test. The plaintiff must prove "but for" causation because the law—the court—says so. The defendant's responsibility in negligence encompasses injuries that would not have occurred but for her negligence.

There are some cases where the "but for" test does not establish cause-in-fact; however, the court allows the case to proceed anyway; in other words, the court relaxes or adjusts the cause-in-fact test. In essence, the court extends the defendant's legal obligation by relaxing the plaintiff's burden of proving cause-in-fact. The law decides that even though the plaintiff cannot establish the defendant was a "but for" cause of its injuries, the law expands the defendant's legal obligation to protect the plaintiff from the injuries she suffered. The court might allow the plaintiff to resort to the substantial factor test,¹¹⁴ to use alternative liability,¹¹⁵ to recover for a lost chance of survival,¹¹⁶ to rely on market share liability,¹¹⁷ or to use another course of action.

When the court does so, it is changing the law; it is making a decision about the defendant's legal obligation. It is saying that even though plaintiff cannot prove cause-in-fact under the traditional "but

110. Or judge as factfinder.

111. DOBBS ET AL., *supra* note 15, § 185.

112. *E.g.*, Hill v. Lundin & Assocs., Inc., 256 So. 2d 620 (La. 1972).

113. Roberts v. Benoit, 605 So. 2d 1032, 1042 (La. 1991).

114. DOBBS ET AL., *supra* note 15, § 189.

115. *Id.* § 193.

116. *Id.* § 196.

117. *Id.* § 194.

for” test, the law will still allow the plaintiff to establish liability based on an alternative causation theory. When the court extends the defendant’s liability in that manner, it does so because of some overarching policy reason. That decision to allow recovery is not really about causation at all but is about reframing the legal obligation; which, as I have used the idea, is about duty. And, the decision to allow a plaintiff to use one of those alternative causation theories is always a question for the court. Again, think of the jury instruction; if it goes into the jury instruction, it is law. Thus, the court continues to shape the legal obligation or duty, albeit as part of the cause-in-fact inquiry.

One example arises where two forces combine to bring about damage to the plaintiff. The classic example is two fires, either of which alone would have burned down the plaintiff’s home, but which combine to do so.¹¹⁸ Neither fire is a “but for” cause of the resulting injury because either fire alone would have caused the damage. Without fire A, the building would have still burnt down because fire B would have consumed it. Without fire B, the building would have still burnt down because fire A would have consumed it. The courts have found both fires to be causes-in-fact of the injury. How so? By changing the legal test for cause-in-fact. Rather than requiring the plaintiff to establish “but for” causation, the courts instead require the plaintiff to establish that the relevant defendant’s fire was a “substantial factor” in causing the injury.¹¹⁹ By changing the causation test, the court changed the law. This is a legal matter. The court’s announced legal rule is a statement of the scope of the defendant’s legal obligation.

A clear example of the shaping of the legal obligation or duty related, on its face, to cause-in-fact¹²⁰ occurs in lost chance of survival cases.¹²¹ In those cases, courts that adopt the theory do not change the “but for” cause-in-fact test; instead, they legally redefine recoverable damages. In essence, the court concludes that the duty (to exercise reasonable care) includes the risk that a breach of the duty will deprive the plaintiff of a chance of surviving.¹²²

In a lost chance of survival medical malpractice claim, a health care provider deprives a plaintiff with less than a fifty percent chance of

118. *Anderson v. St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 48 (Minn. 1920).

119. *See id.*

120. And included in torts casebooks in the chapters on cause-in-fact. *See supra* note 62 and accompanying text.

121. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n (AM. LAW INST. 2005).

122. *See, e.g., Pipe v. Hamilton*, 56 P.3d 823, 829 (Kan. 2002) (holding that a five percent to ten percent chance of survival was actionable and not de minimis). The same may be said if the defendant has increased the risk of the plaintiff suffering some adverse condition or disease in the future. Joseph H. King, Jr., “Reduction of Likelihood” Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine, 28 U. MEM. L. REV. 491, 502 (1998).

survival of that chance when the health care provider commits malpractice in treating that underlying condition.¹²³ After the patient dies from the condition, it cannot be said that but for the defendant's negligence the patient would not have died, because statistically the decedent would have died from the condition anyway. Thus, if the patient's beneficiaries sue for wrongful death arising from the defendant's negligence, the case would be unsuccessful because the wrongful death plaintiffs cannot establish cause-in-fact under the "but for" test. However, if the court allows the plaintiff to restate the damages as the loss of the chance of survival¹²⁴ rather than death, the "but for" test works, and the plaintiff can recover. The "but for" test works because one can say that but for the malpractice, the decedent would not have lost the less than fifty percent chance of survival.¹²⁵ By restating the allowable recoverable damages—to allow recovery for the lost chance damages—the court has made it so the plaintiff can establish "but for" causation. That decision is not factual—it is a legal, policy-based decision. Such a decision is to say that the health care provider's legal obligation or duty to the patient includes the obligation to prevent the loss of a chance of survival. And, if the defendant health care provider deprives the plaintiff of a chance of survival, those damages are recoverable. Again, the court is defining the duty or obligation.

In *Summers v. Tice*, two hunters fired their shotguns at a bird, and a pellet from one of their guns struck the plaintiff in the eye.¹²⁶ The plaintiff could not prove "but for" causation because the available forensics could not determine from which hunter's gun the blinding pellet had come.¹²⁷ The court still allowed the case to proceed by switching the burden of proof to the defendants.¹²⁸ This switch was a legal decision—it was a decision about responsibility and obligation. Of course, neither defendant could prove he was not the source of the blinding shot, resulting in what some call "alternative liability."¹²⁹ The court

123. See, e.g., *Smith v. State of La., Dep't of Health and Hosp.*, 676 So. 2d 543, 547 (La. 1996).

124. Whether separately valued as a lump sum or valued as the percentage of survival lost times what would have been recoverable in a wrongful death suit. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. n (AM. LAW INST. 2005).

125. If the chance of survival was greater than fifty percent, say eighty-five percent, the plaintiffs should succeed on the wrongful death action, although the defendant might wonder why he is not liable for the loss of an eighty-five percent chance of survival rather than the entire wrongful death.

126. *Summers v. Tice*, 199 P.2d 1, 2 (Cal. 1948).

127. *Id.*

128. *Id.* at 4.

129. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 28(b).

here essentially redefined cause-in-fact under the mantle of a shift in the burden of proof.¹³⁰

In the products liability context, some courts have adopted the theory of market-share liability, where challenges arise for plaintiffs in determining exactly which of several manufacturers' identical, or nearly identical, products injured them.¹³¹ In market-share liability cases, the plaintiff cannot identify the source of the particular drug or substance which caused her damage, but courts which adopt the theory of market-share liability allow the plaintiff to prove causation and responsibility based on the defendant's production of the generic product and their participation in the market.¹³² In essence, the court is extending a defendant's duty to a plaintiff for whom there is only a statistical possibility—often less than fifty percent—that they were affected by a particular defendant's product.

D. Legal Cause

The next element for negligence is legal or proximate cause. It is the element where the jury decides, based on the common sense of the community, whether, given all they have seen and heard, the defendant should be liable to the plaintiff. The jury decides if it is just and fair under the circumstances to impose liability and whether the way in which the damage ultimately occurred was so bizarre or out of the ordinary that it would be unfair to hold the defendant responsible. In asking the jury to decide legal or proximate cause, we are asking the jurors to decide based on what Justice Andrews called "practical politics."¹³³ We are not asking them to decide based on legal policy, but rather, we are, or should be, asking them to apply the common sense of the community.

Traditionally, with proximate cause courts instructed juries to inquire about whether the injury and the way it occurred was foreseeable, natural, probable, direct, or remote.¹³⁴ Judges also instructed juries about intervening and superseding causes.¹³⁵ The legal realists

130. DOBBS ET AL., HORNBOOK, *supra* note 45, § 14.9, at 328. In market share liability cases the plaintiff cannot identify the source of the particular drug or substance which caused her damage but courts which adopt the theory of market share liability allow the plaintiff to prove causation and responsibility based on the defendant's production of the generic product and their participation in the market. *Id.* § 14.10, at 330.

131. *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980).

132. *See id.*

133. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

134. D.E. Buckner, *Comment Note—Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2D 942, 945 (1965).

135. *See* DOBBS ET AL., HORNBOOK, *supra* note 45, §§ 15.14-15.19, at 361-75.

thought such words obscured the matter.¹³⁶ As such, they made significant contributions by pointing out that much of what the law called proximate cause was not about causation at all but was a question of legal policy.¹³⁷ And legal policy is for the judge to decide. The Realists created the duty/risk¹³⁸ method of determining what the common law traditionally called proximate cause. It recognizes that the common law proximate cause element was often really a decision regarding the scope of the defendant's duty. The duty/risk method conflates the duty and proximate cause question into one question: does the defendant's duty protect against the risk which occurred in this case and the manner in which it occurred?¹³⁹ The authors of the Restatement (Third) of Torts seem to agree with this duty/risk or scope of the duty method of analysis and replace legal cause with a risk analysis under which one is responsible for those risks which made one negligent in the first place.¹⁴⁰ The specificity with which the court asks the duty/risk or scope of the risk question, vis-à-vis the particular facts before the court, as opposed to the general type of risk and general manner of occurrence, is a subject of some significant debate.¹⁴¹ That subject is generally beyond the scope of this Article. Although, because this Article claims that legal cause calls for the common sense of the community in the particular case before the court, it necessarily leans towards more general analyses of duty and scope of duty.¹⁴²

E. *The Damages*

Damages is the element where the jury evaluates, measures, and quantifies the plaintiff's injuries.¹⁴³ That is it. The jury never gets to damages if it does not conclude that the defendant's act breached the applicable legal obligation and caused harm. For damages, the jury

136. See e.g., Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961).

137. LEON GREEN, JUDGE AND JURY 74-152 (1930).

138. See Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

139. Malone, *supra* note 18, at 79, 98-99.

140. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 29 cmts a & b (AM. LAW INST. 2005).

141. See Galligan, *Cats or Gardens*, *supra* note 108; Galligan, *Revisiting*, *supra* note 108; David W. Robertson, *Allocating Authority*, *supra* note 108; Robertson, *Vocabulary of Negligence*, *supra* note 108.

142. Arguably making the legal cause question part of the basic duty question would make the structure of torts cleaner because all torts do not seem to include this ultimate fairness inquiry in their elements. I will discuss this reality below.

143. This Article says damages throughout because damages are what plaintiffs usually seek in torts cases. The paper could just as easily have said remedy because there are occasions where plaintiffs seek injunctions or restitution in torts cases. In a case where a plaintiff sought damages or injunction, the structure is still applicable albeit with slightly different remedies.

adds up the harm the defendant's breach caused. Evaluating, measuring, and deciding quantum is the extent of the damages analysis. The jury certainly must make difficult decisions in quantifying the plaintiff's harm, but the doctrine should not overstate the legal aspect of damages.

Everything else—other than evaluation, measuring, and quantifying—that people say about damages in books and cases are really statements of duty or law. For instance, scholars and courts ask: what types of damages are recoverable?¹⁴⁴ Should the jury take the non-taxability of personal injuries into account when awarding damages?¹⁴⁵ Should the jury reduce to present value?¹⁴⁶ Are medical monitoring damages recoverable?¹⁴⁷ All of these are legal questions about the scope of the defendant's obligation or responsibility. While torts books generally treat these subjects as damage issues, they are, in essence, decisions about the legal obligation owed; they are duty questions. Three examples explicate this point: negligent infliction of emotional distress, wrongful death, and loss of consortium.

Whether, and when, the law recognizes recovery for negligently inflicted emotional distress is an issue of the defendant's legal obligation, not an issue of adding up damages. It is a duty issue—the extent of the recognized legal obligation. It is not an issue of whether the plaintiff proved she suffered this alleged damage and how much. It is a matter of the law determining whether or not it will allow that type of recovery at all. Does the duty (to exercise reasonable care) include the risk that the plaintiff will suffer emotional distress? Naturally, a jurisdiction may determine that only certain people—those in the zone of danger,¹⁴⁸ those impacted,¹⁴⁹ those exposed to a hazardous substance,¹⁵⁰ those close family members who view an injury-causing event¹⁵¹—are allowed to recover, but that is a determination of duty or obligation; it is not merely a determination of the extent of injury.

Additionally, casebook authors formerly included wrongful death discussions in the chapter on damages, or at least near it.¹⁵² Again, who can recover damages they suffer as the result of the death of another and what those recoverable damages are is a duty question.

144. DOBBS ET AL., HORNBOOK, *supra* note 45, §§ 34.1-34.2, 34.4, at 851-59.

145. DOBBS ET AL., *supra* note 15, § 482.

146. *Id.* § 482.

147. *Id.* § 479.

148. *See* *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 555 (1994).

149. *See id.*

150. DOBBS ET AL., *supra* note 15, § 394.

151. *Id.* § 391.

152. *E.g.*, SCHWARTZ ET AL., *supra* note 62, at xv (including wrongful death in a separate chapter immediately following a chapter on damages); TWERSKI & JAMES, *supra* note 62, at xviii-xix; DOMINICK VETRI ET AL., TORT LAW AND PRACTICE xxi-xxii (2d ed. 2002).

Recognition of a beneficiary's right to recover for the death of another is a legal conclusion that the tortfeasor's duty not to injure the decedent includes a duty to someone else—usually a close relative—who suffered no injury at all but the loss of a loved one. The value of those damages is a jury question. Does it go in the jury instruction? If it does, it is coming from the judge and it is law—it is part of the legal obligation.

The same is true for loss of consortium damages. Casebooks¹⁵³ sometimes discuss the subject under damages; however, whether the loved one¹⁵⁴ of a physical-injury victim may recover for his or her loss of support, society, service, and intimacy with someone whom the defendant physically injured is an issue of the defendant's legal obligation. When a court recognizes the loss of consortium claim, it is extending the duty not to physically injure the direct victim to a third person and saying the duty not to physically injure A includes a duty not to damage B's relationship with A.¹⁵⁵

F. Recap

Recapping before applying the structure to other torts, the grand structure of tort law based on the elements of negligence is as follows:

- 1) Duty—What is the legal obligation? Most significantly, here one sees that many issues included under discussions of breach, cause-in-fact, legal cause, or damages are really legal questions. They are really determinations about the scope of the legal obligation which the defendant owes to the plaintiff. Courts decide duty.
- 2) Breach—Did the defendant comply with the legal obligation or not?
- 3) Cause-in-Fact—Was the breach a cause of the plaintiff's injuries under the legally applicable test (as defined by the court, which is essentially a duty question)?
- 4) Legal or Ultimate Cause—Should society impose liability for the breach or would doing so be unfair, given the common sense of the community?
- 5) Damages—Did the plaintiff prove damage and, if so, how much?

The following sections will apply the structure to other torts; in other words, beyond the realm of negligence itself, beginning with products liability.¹⁵⁶

153. *E.g.*, EPSTEIN, *supra* note 62, at xviii-xix; SCHWARTZ ET AL., *supra* note 62, at 542; VETRI ET AL., *supra* note 152, at 592.

154. The loved one has suffered no physical injury at all.

155. This Article mentioned earlier the recoverability of medical monitoring as a question of legal obligation, not damages, *per se*. See *supra* note 22 and accompanying text.

156. Of course, I might begin by claiming easy victories, such as pointing out that negli-

IV. PRODUCTS LIABILITY

This Section applies the structure to several types of products liability cases. The claims fit the model, which helps to make clear the similarities of the products claims to negligence claims, rather than the differences.

A. *Mismanufacture*

The structure of torts set forth herein, based on the elements of negligence, applies to products liability claims. Beginning with a garden-variety mismanufacture case—a case where the manufacturer allegedly manufactured and sold a product that was defective in composition or construction—the elements fit within the model. Imagine a car which has a missing screw in the brake assembly. When the driver pushes on the brake pedal the car does not stop, resulting in a collision and injury. Driver sues manufacturer. Is manufacturer liable? What must the plaintiff prove?

In most United States' jurisdictions today, the plaintiff must prove that the defendant's product (1) had a construction or composition defect in that it deviated from the manufacturer's plans, specs, and/or design for the product; (2) the deviation rendered the product unreasonably dangerous; and (3) the deviation caused the plaintiff injury.¹⁵⁷ The defendant cannot exculpate himself by proving that it exercised reasonable care in manufacturing the product or even that it exercised extraordinary care. That is why courts¹⁵⁸ and commentators¹⁵⁹ say that strict liability is appropriate.

Applying the proposed structure of torts and beginning with duty, the manufacturer has a duty to make a product that is not unreasonably dangerous due to a manufacturing flaw (or defect), no matter how much care the manufacturer exercised in manufacturing the product. That is a statement of law—it is a statement of duty. The legal obligation specifies what the law requires of the manufacturer; it requires a defect-free product. It does not require the plaintiff to prove that the manufacturer failed to exercise reasonable care. The result is a policy-based conclusion that the risk of injury from manufacturing or construction flaws should fall on the manufacturer. The manufacturer made the product; the manufacturer sold the product; the manufacturer profited from the sale; the manufacturer is in a better position

gent misrepresentation fits the model or that a nuisance arising from the defendant's negligence fits the model. These are easy victories because, in essence, negligent misrepresentation and negligently caused nuisances are essentially plain old negligence claims.

157. DAVID G. OWEN, PRODUCTS LIABILITY LAW §1.3, at 34 (2d ed. 2008).

158. *E.g.*, *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (Cal. 1963); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fla. 1976).

159. OWEN, *supra* note 157, § 5.1, at 254.

than the injured victim to guard against the occurrence of the injury; and the manufacturer is in the superior position to spread the cost of the injury among a broader population through its pricing mechanism and insurance.¹⁶⁰

The next element in the proposed structure is breach. As, with negligence, the breach question asks whether the defendant manufacturer complied with its legal obligation: was the product unreasonably dangerous because of a construction defect? Did the manufacturer comply with its legal obligation? That's the question of breach. With negligence, the issue is compliance with the legal obligation. Unlike negligence, in a mismanufacture case, due care or the lack thereof is irrelevant, but the jury still must decide if the product was unreasonably dangerous, as defined by the court.

Turning next to cause-in-fact, plaintiffs in products liability cases must prove that the unreasonably dangerous aspect of the relevant product was a cause-in-fact of their injuries. It is as simple as that. Everything discussed in the negligence section about cause-in-fact would also apply in a products case. Courts commonly use the "but for" test in products liability cases.¹⁶¹ Courts also rely upon the "substantial factor" test where appropriate,¹⁶² and market-share liability arose in products liability cases.¹⁶³ There is essentially no difference here between negligence and products liability. Again, the court determines the appropriate cause-in-fact test (which is really part of the legal obligation determination), and the jury applies it.¹⁶⁴

The structure next considers legal or proximate cause, which is an element in a products liability case, as it is in a negligence case.¹⁶⁵ Sometimes the proximate cause question involves whether the plaintiff's use of the product was a misuse,¹⁶⁶ as opposed to a reasonably

160. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring). Cf. JANE STAPLETON, *PRODUCT LIABILITY* 103-17 (1994).

161. OWEN, *supra* note 157, § 1.3, at 39-40.

162. *Id.* § 1.3, at 40.

163. *Id.* § 1.3, at 40-41. See also *supra* Part III.C.

164. Normally, in a construction defect products liability case, the cause-in-fact test will be "but for." The question there is, can the jury say by a preponderance of the evidence that "but for" the mismanufacture the plaintiff's injuries would not have occurred? OWEN, *supra* note 157, § 11.2, at 769.

165. *Id.* §§ 12.1-12.3, at 802.

166. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. m (AM. LAW INST. 2005). The Restatement states as follows:

Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put Once the plaintiff establishes that the product was put to a reasonably foreseeable use, physical risks of injury are generally known or reasonably knowable by experts in the field. It is not unfair to charge a manufacturer with knowledge of such generally known or knowable risks.

anticipated use.¹⁶⁷ Determining whether the defendant has a legal obligation to build a product that does not injure the plaintiff who misuses it, or who uses it in a way that the manufacturer should not have foreseen, is a duty question. If reasonable minds could differ on the outcome in a particular case, it is a jury question.

The damages analysis in a products liability case is no different than it is in a negligence case. The same types of damages and concerns raised in the discussion on damages in negligence applies in a products liability case.

B. Design

The structural model is even more clearly applicable in modern design cases, which, in many jurisdictions, are essentially negligence cases. That said, the statement of legal obligation or duty can be a bit confusing when one considers matters such as whether the plaintiff must establish the existence of a reasonably available alternative design and the effect of state of the art evidence, but those are mere incidents of challenging difficulty.¹⁶⁸ They do not alter the basic point that the five-pronged structure derived from the elements of negligence works in products liability cases. For instance, the Restatement (Third) of Torts—Products Liability, Section 2(b) provides, in part: “A product is defective in design when foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”¹⁶⁹ That is a statement of law. It is a statement of duty. How safe does the manufacturer’s design of its product have to be? The law provides that decision is made vis-à-vis a reasonable alternative design and the resulting failure to adopt that alternative design. Thus, the legal obligation provides that a product is unreasonably dangerous in design when

Id.

167. Some states require that the plaintiff’s product use is reasonably anticipated, and that the product was the proximate cause of the injury as separate elements. *See, e.g.*, Louisiana Products Liability Act, LA. STAT. ANN. §§ 9:2800.51-59 (1988). Be that as it may, they are clearly related. Additionally, one could argue that the issue of product misuse is a matter for comparative fault, rather than a bar to recover, but that is beyond the current discussion.

168. *See* OWEN, *supra* note 157, §§ 8.5, at 520 (discussing reasonable alternative design); *id.* § 10.4, at 706 (detailing an overview of the state-of-the-art defense in product liability cases).

169. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 cmt. d. Several states have adopted this requirement either legislatively or through the courts. For example, Louisiana codified the requirement of a reasonable alternative design in section 9:2800.56 of the Louisiana Products Liability Act. Maryland also adopted this approach in *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976) and *Volkswagen of America v. Young*, 321 A.2d 737 (Md. 1974).

there was a reasonable alternative design;¹⁷⁰ the adoption of that reasonable alternative design could have reduced the foreseeable risks of harm posed by the product, as designed; and the failure to adopt the alternative design rendered the product, as designed, “not reasonably safe.”¹⁷¹ That is the legal obligation.

The breach question then involves the factfinder deciding whether the plaintiff has presented evidence of a reasonable alternative design¹⁷² and whether the adoption of that reasonable alternative design could have reduced or avoided the risk of harm. Those decisions are mixed questions of fact and law based upon the particular case, and the jury would decide them.

Cause-in-fact is no different than it is in a negligence case, although, as noted, the issue of market-share liability generally arises in products liability cases¹⁷³ rather than garden-variety negligence cases. As noted above, the decision to adopt an alternative test for cause-in-fact is not a causation decision but a legal decision affecting the scope of the legal obligation; in other words, duty.

Legal or proximate cause and damages decisions are the same in design cases as negligence and mismanufacture cases.

V. ULTRAHAZARDOUS OR ABNORMALLY DANGEROUS ACTIVITIES

The structure set forth herein also enlightens and applies to liability for engaging in abnormally dangerous or ultrahazardous activities. This area of the law is sometimes referred to as absolute liability,¹⁷⁴ because one is “responsible” for simply engaging in certain activities when they cause damage, even though one is exercising the utmost care and is doing the activity exactly as the activity is supposed to be done. Supposedly, you do it; you are liable. Under the structure, what

170. How different can the alternative design be before it is a different product? Does a substantially different product constitute an alternative design? These and other questions go to narrow or refine the duty analysis in a design case.

171. The feasibility of adopting the alternative design from an economic and technological perspective is relevant to determining if the failure to adopt the alternative design rendered the product as designed not *reasonably* safe. See OWEN, *supra* note 157, § 8.4, at 511-12.

172. The issues of how different the alternative design can be or whether a different product might count as a reasonable alternative design might technically arise at the breach “stage,” where a defendant objects to the introduction of the plaintiff’s alternative design or does so through a motion in limine (a motion filed outside the presence of the jury to exclude certain evidence). Even in this context, if the judge decides on admissibility, she is essentially making both an evidentiary decision on relevance and/or prejudice, but she is also making a statement about the legal obligation owed. See *supra* note 141 and accompanying text.

173. See also DOBBS ET AL., HORNBOOK, *supra* note 45, § 14.10, at 330 (describing the creation of market share liability to respond to product liability issues). *But see* OWEN, *supra* note 157, § 11.3, at 786.

174. See *Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014) (describing absolute liability as liability based on causation alone).

is the duty or legal obligation? The legal obligation provides that if one chooses to engage in an ultrahazardous activity, one assumes or accepts liability for the damage caused. As in the mismanufacture case, the fact that the defendant exercised reasonable or even utmost care is irrelevant.¹⁷⁵

Determining which activities are subject to this type of absolute liability is an issue for the court—a duty question. Whatever test the court employs—ultrahazardous¹⁷⁶ or abnormally dangerous¹⁷⁷—it is up to the court to decide, as a matter of law, whether the activity in which the defendant is engaged is one for which the law imposes absolute liability. The Restatements so provide.¹⁷⁸ Activities which typically expose an actor to absolute liability simply for engaging in them are blasting,¹⁷⁹ crop dusting,¹⁸⁰ and pile driving.¹⁸¹ Deciding whether engaging in a certain activity exposes the defendant to absolute liability is a duty determination.

Breach is remarkably simple in these absolute liability cases. If the court has decided that the activity is one of the activities for which the law imposes absolute liability, the breach question is: did the defendant engage in the activity? That is it. In fact, in most absolute liability cases, breach should not be an issue at all—there would be no question whether the defendant engaged in the activity, and the parties would either stipulate to that fact or the court would direct a verdict.

Although duty and breach in absolute liability cases are plaintiff friendly, the plaintiff must still establish cause-in-fact.¹⁸² Suppose Tatiana was admiring her rare Faberge egg that her Great, Great Aunt Pavlova left her, and she dropped it. Tatiana wailed as she saw the shattered pieces on the floor. Then, twenty minutes later, her

175. *See, e.g.*, *O'Neal v. Int'l Paper Co.*, 715 F.2d 199, 202 (5th Cir. 1983).

176. RESTATEMENT (FIRST) OF TORTS § 520 cmt. h. (AM. LAW INST. 1938).

177. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. 1 (AM. LAW INST. 2005); RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (AM. LAW INST. 1965).

178. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. 1 (“Whether the activity is abnormally dangerous is determined by the court . . .”); RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (“Whether the activity is an abnormally dangerous one is to be determined by the court . . .”); RESTATEMENT (FIRST) OF TORTS § 520 cmt. h (“What facts are necessary to make an activity ultrahazardous under the rule stated in this Section is a matter for the judgment of the court.”).

179. *E.g.*, *M. W. Worley Constr. Co. v. Hungerford, Inc.*, 210 S.E.2d 161, 163-64 (Va. 1974); *see also Spano v. Perini Corp.*, 250 N.E.2d 31, 33 (N.Y. 1969); *Whitman Hotel Corp. v. Elliott & Watrous Eng'g Co.*, 79 A.2d 591, 595 (Conn. 1951).

180. *See, e.g.*, *Young v. Darter*, 363 P.2d 829, 833-34 (Okla. 1961); *see also Loe v. Lenhardt*, 362 P.2d 312, 316-17 (Or. 1961); *Gotreaux v. Gary*, 94 So. 2d 293, 295 (La. 1957).

181. *See, e.g.*, *Vern J. Oja & Assocs. v. Wash. Park Towers, Inc.*, 569 P.2d 1141, 1143 (Wash. 1977); *see also Sachs v. Chiat*, 162 N.W.2d 243, 246 (Minn. 1968); *Caporale v. C. W. Blakeslee & Sons, Inc.*, 175 A.2d 561, 564 (Conn. 1961).

182. DOBBS ET AL., *supra* note 15, § 445.

neighbor, Vladimir, suddenly and with no warning began pile driving to construct his new dock; Tatiana's house shook and shook. Quickly, she brightened up, called her lawyer, and sued Vladimir for engaging in an ultrahazardous activity and breaking the egg! Alas, Tatiana should not count the proceeds of that lawsuit until the eggs are hatched, because even though Vladimir engaged in an ultrahazardous activity, that activity was not the cause-in-fact of the broken egg. Ergo, cause-in-fact is essential to recovery for damages in "activity" strict liability cases.

Legal cause is as essential in an absolute liability case as it is in a negligence or products liability case. Courts¹⁸³ and commentators¹⁸⁴ sometimes say that one is absolutely or strictly liable for everything that happens once one engages in the defined ultrahazardous activity. However, even if one engages in an ultrahazardous activity, there are common sense limits to liability. As with negligence, it is at the legal or proximate cause stage that the court asks the jury whether it is fair in the common sense of the community to hold the defendant liable for the particular injuries which occurred in the particular manner in which they occurred.¹⁸⁵

For instance, a commonly cited case exemplifying the applicability of legal cause concepts to absolute liability is the filicide case involving blasting and minks.¹⁸⁶ The case arose during whelping season—the time when mother minks give birth.¹⁸⁷ The defendant was engaged in blasting for construction purposes; presumably, the defendant was exercising due care.¹⁸⁸ Minks are skittish to begin with, and when the mother minks on plaintiff's mink farm experienced the vibrations from the blasting, their nervousness increased, and they killed their young.¹⁸⁹ As sad, tragic, and disturbing as the events may be in themselves from both a psychological and emotional perspective, it also meant that the farmer lost his mink crop—fewer minks, fewer furs, fewer coats, and lower profits for those concerned. The farmer sued the blaster.¹⁹⁰ In his suit against the blaster to recover for the lost mink herd, the court refused to allow recovery.¹⁹¹ It was just too bizarre. Holding the defendant liable was beyond what common sense would allow.

183. See, e.g., *Spano*, 250 N.E.2d at 35; *Caporale*, 175 A.2d at 563.

184. See, e.g., PROSSER AND KEETON, *supra* note 11, § 79, at 560.

185. PRODUCT LIABILITY § 7.04 (LexisNexis).

186. See generally *Madsen v. E. Jordan Irrigation Co.*, 125 P.2d 794 (Utah 1942).

187. WHELP, <https://www.thefreedictionary.com/whelping> [<https://perma.cc/FA36-5BMP>].

188. *Madsen*, 125 P.2d at 794.

189. *Id.*

190. *Id.*

191. *Id.* at 195.

Damages are once again damages. The plaintiff must suffer damages and the plaintiff must prove them. The structure applies; the structure works.

VI. DEFAMATION

In defamation cases, the structural model must incorporate the U.S. Supreme Court's First Amendment jurisprudence limiting and defining tort recovery in state (common) defamation cases.¹⁹² It is beyond the scope of this Article to exhaustively analyze the interplay of constitutional and state law that is the law of defamation today.¹⁹³ For present purposes, it is sufficient to state that the right to recover in a defamation suit depends upon whether the plaintiff is a public official,¹⁹⁴ a public figure,¹⁹⁵ or a private figure, and whether the subject of the statement is a matter of public concern.¹⁹⁶ Also, under state law, the plaintiff must prove the publication¹⁹⁷ of a false statement of fact¹⁹⁸ of and concerning¹⁹⁹ the plaintiff,²⁰⁰ and that harms the plaintiff's reputation.²⁰¹ The duty of the speaker ultimately turns on both the constitutional categorizations and the state law. The next three subsections will analyze the various constitutional combinations (status of plaintiff and type of speech) under the proffered structure. The analysis will proceed from the most intrusive incursions on state power to the least.

A. *Public Officials and Public Figures*

If the plaintiff who is the subject of the defamatory publication is a public official or a public figure then, constitutionally, the plaintiff cannot recover for defamation under state law unless the plaintiff proves that the speaker made the statement with actual malice—knowledge

192. See DOBBS ET AL., *supra* note 15, § 558.

193. See ROBERT D. SACK, SACK ON DEFAMATION § 1:1-1:12 (5th ed. 2017); see also DOBBS ET AL., *supra* note 15, § 517; PROSSER AND KEETON, *supra* note 11, § 111, at 771. In addition, for the sake of brevity, I will treat both libel and slander together as defamation. But it should be noted that the differences between the two involve different legal obligations which are part of the duty analysis.

194. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

195. See generally *Associated Press v. Walker*, 389 U.S. 28 (1967); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

196. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figures); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (private figure, and not a matter of public concern).

197. DOBBS ET AL., *supra* note 15, § 520.

198. Thus, opinion is not actionable. *Id.* § 37.19, at 996. That is a legal statement, but it may be up to the factfinder to determine whether the statement was opinion or fact or implied the existence of underlying facts.

199. It would be simpler to say "about" the plaintiff, but the law is not always simple.

200. DOBBS ET AL., *supra* note 15, § 519.

201. SACK, *supra* note 193, §2.1.

of falsity or reckless disregard for the truth.²⁰² To state the obvious, that is a statement of the duty or legal obligation. It is a duty shaped by the U.S. Supreme Court's First Amendment defamation jurisprudence, but it is a statement of duty nevertheless.

After the court defines the legal obligation, the factfinder will decide, based on the facts at issue in the particular case, various factual/breach questions. Did the defendant make the statement? Was it published? Was it defamatory (was it a statement that would harm one's reputation in the community)? Did the defendant make the statement with knowledge of its falsity or reckless disregard for the truth? These are factual questions for the factfinder.

With the cause-in-fact inquiry, the factfinder decides whether the statement did cause harm to the plaintiff's reputation. That is, was there actual injury? The jury decides if, assuming there was harm to plaintiff's reputation, publishing the defamatory statement brought about that harm.

With defamation and intentional torts, the legal cause analysis is not always overt. The decision of whether it is fair to impose liability, based on the common sense of the community, has been shifted to the constitutional analysis briefly set forth above—the plaintiff must prove actual malice. The scope of liability or case specific legal cause question is generally simple—if the defendant published the statement and the plaintiff satisfies the other elements of her burden of proof, there is little room for the potentially liability-relieving role of a proximate cause analysis. Perhaps this fact is also because, at common law, liability for defamation was strict and harsh.²⁰³ Defamation was a strict liability tort. The law decided the scope of liability for defamation, and it was broad. With the constitutional developments described above, U.S. law is much more speech friendly, and protection from liability comes from the constitution rather than individual jury determinations about proximate cause.

Finally, at the damages stage, if the plaintiff has established actual malice, the factfinder places a value upon that injury. Additionally, punitive damages are constitutionally available, and the precise circumstances in which a jury can award them in a public official/public figure defamation case depends upon state law, once again assuming the defendant acted with actual malice.

202. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

203. *DOBBS ET AL., HORNBOOK*, *supra* note 45, § 37.2, at 937 (“Truth was no defense; even to laugh at a libel was a crime.”); *PROSSER AND KEETON*, *supra* note 11, § 111, at 771-73.

B. Private Figures/Speech Which is a Matter of Public Concern

Alternatively, if the plaintiff is not a public official or public figure but the speech involves a matter of public concern, the plaintiff can recover for defamation if she establishes negligent publication of a defamatory statement about the plaintiff that causes actual harm²⁰⁴ to her reputation. The private plaintiff who sues for defamation in a case involving a statement of public concern must prove the same things as the public official/public figure, except the private plaintiff need not prove that the defendant acted with actual malice. Rather, the private plaintiff in a case involving speech that is a matter of public concern must prove that the defendant was at least negligent in making the statement.²⁰⁵ Additionally, the U.S. Supreme Court has said that the private plaintiff in a case involving speech that is a matter of public concern must prove actual injury,²⁰⁶ unless the plaintiff establishes the defendant did, in fact, make the statement with actual malice.²⁰⁷ Then the court may award presumed damages, a throwback to the days of strict liability for defamation. That is, the defendant is liable even though the plaintiff has not established actual injury. Thus, the defendant's duty not to defame a private figure plaintiff, relating to speech that is a matter of public concern, requires the plaintiff to prove at least negligence and actual injury. If the plaintiff goes further and proves actual malice, then the defendant's legal obligation may, depending upon state law, include responsibility for presumed and punitive damages.

At breach, the factfinder determines whether the defendant made the allegedly defamatory statement; whether the statement was about the plaintiff; whether the defendant communicated the statement to a third person; whether the statement tended to harm the plaintiff's reputation; and whether the defendant made the statement negligently or with actual malice.

At the cause-in-fact stage the factfinder will decide, once again, if the plaintiff suffered actual injury or whether the defendant made the statements at issue with actual malice, in which case the plaintiff does not have to prove actual injury—the state may choose to presume injury occurred.²⁰⁸ Presuming an injury occurred presumes the statement caused the injury.

There is little activity at the legal cause stage in a private plaintiff/speech of public concern case for the reasons set forth in the public

204. PROSSER AND KEETON, *supra* note 11, § 37.15, at 990.

205. *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974).

206. *Id.* at 349.

207. *Id.*

208. At common law, damages in defamation cases were presumed. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964).

official/public figure subsection. Finally, at damages, the factfinder values actual injury if it occurred or awards presumed and possible punitive damages if the plaintiff established the defendant acted with actual malice.

C. *Private Figure/Private Speech*

If alternatively, the plaintiff is not a public official/public figure and the speech is not about a matter of public concern, the state has the maximum power to articulate its own law of defamation, free of constitutional restriction. In this type of case, with a private-figure plaintiff and speech which is not a matter of public concern, the plaintiff may recover, depending upon state law, if the defendant made the statement; the statement was about the plaintiff; the defendant communicated the statement to a third person; and the statement was defamatory. Arguably, in such a case, the state may be free to impose liability without fault. And it is clear that the state may award presumed and even punitive damages. The matters discussed in this paragraph define the relevant duty. At breach in this type of case, the factfinder makes the key factual determinations.

Cause-in-fact, depending upon state law, may be perfunctory if the plaintiff chooses not to prove actual injury but instead seeks to recover only presumed damages. Legal cause is no different in the private/private case than in the other cases; it is resolved as a legal matter and thus more behind the scenes. The law has once again cast a broad net of liability once the plaintiff establishes the necessary elements from a constitutional perspective and state tort law. Finally, the factfinder values actual injury if the plaintiff proves it and/or awards presumed damages.

VII. INTENTIONAL TORTS

Moving from defamation to the other nominate or intentional torts, the structure still applies. At common law, most of what we call intentional torts²⁰⁹ arose out of the writ of trespass, with its emphasis on direct causation.²¹⁰ Negligence arose later out of the writ of trespass on the case.²¹¹ Historically, then, the development of many, indeed, most of the intentional torts one studies in law school predate the modern development of negligence, which is the basis for the articulated structure. To that extent, applying the model to intentional torts may be somewhat artificial. However, the trespass versus case historical reality in common law is not present in the civil law. Consequently, if the

209. Conversion is the exception. See PROSSER AND KEETON, *supra* note 11, §§ 6, 15, at 30, 89 (“[C]onversion had its real genesis in the old common law action of trover.”).

210. *Id.* § 6, at 29.

211. *Id.*

model is truly comprehensive, it should apply to intentional torts. In this Section, the application of the structure to intentional torts is shown through its application to battery, although the structure would apply to all intentional torts.

Battery is the intentional infliction of “[a] harmful or offensive contact” with the person of another.²¹² What is the duty? What is the legal obligation or rule? It is to *not* intentionally inflict a contact with the person of another which is harmful or offensive to a reasonable person. The definition of battery is the law. It is the duty. It is a legal obligation just as much as the duty to exercise reasonable care, the duty not to make unreasonably dangerous products, or the duty not to engage in an ultrahazardous activity are legal obligations. What is intent, and how does the law define it? Again, that is a legal definition of a part of the duty or obligation, so it is a question for the court. What is a harmful or offensive contact? Again, defining harmful or offensive is part of a duty question for the court. It is a statement of law. Of course, if the contact would not be harmful or offensive to a reasonable person but is harmful or offensive to the plaintiff because of some peculiar sensibilities of which the defendant is aware, then the law holds the defendant liable. This too is a statement of law about the legal obligation owed. The law is recognizing the particular sensibilities of the plaintiff in defining the extent of the obligation owed.

In deciding if the defendant breached his duty not to batter, as defined above, the factfinder determines whether the defendant did or did not comply with the applicable legal obligation. That decision would turn on the answers to several factual questions: did the defendant have intent? Was the contact with the person of another? Was the contact harmful or offensive? These are compliance questions, and, as such, they are breach questions. Cause-in-fact is often quite simple. Did the intended contact occur? Did the defendant with intent to cause a contact that is harmful and offensive bring about that contact?

As in defamation, there seems to be a muted, or more behind-the-scenes role, for case-specific proximate cause decisions. This may be because with the common law of intentional torts arising from the writ of trespass, the writ required direct cause, so there was less need for an additional cause analysis. Notably, some of the rules dealing with transferred intent resemble legal cause or duty issues. If Z intends to hit A, but hits B, Z has battered B; the duty extends to her.²¹³ Since transferred intent applies in such cases as a matter of law, the doctrine

212. *Id.* § 9, at 39. One might be more precise and say that it is the intentional infliction of a contact with the person of another which is harmful or offensive to a reasonable person, but either way we are okay. For purposes of this analysis, I am treating consent as a defense—which defendant must prove—instead of treating lack of consent as an element, which the plaintiff must prove.

213. *See, e.g.,* *Morrow v. Flores*, 225 S.W.2d 621, 624 (Tex. Civ. App. 1949).

is truly a duty doctrine. The duty not to batter one person extends to an unintended battery on another,²¹⁴ or put differently, the scope of liability extends to protect the unintended victim if there is an intended victim. It is often said that the scope of liability resulting from an intentional wrong is broader or more far-reaching because of the defendant's scienter.²¹⁵ The extended liability of a trespasser for what the law calls continuing trespass is another example.²¹⁶ Whenever the liability is cut off in a particular case, as it sometimes is because of bizarreness, that is a legal cause decision.

Another aspect of the liability extending principle which applies in intentional tort cases and also applies in all personal injury cases is the thin skull rule. The victim with peculiar sensibilities recovers all of her damages, even if unforeseeable, if what the defendant did would have been an actionable tort for the reasonable person.²¹⁷ This is a matter of the extent of the legal obligation or duty. The duty extends to protect the thin skull plaintiff against what were unforeseeable injuries caused by the physical impact for which the defendant is responsible. Of course, the thin skull rule applies in all tort cases.

Damages are often presumed in intentional tort cases. Most torts teachers begin their discussion of negligence, after having started off the torts course with intentional torts, and say, "now in negligence the plaintiff has to prove damage and that makes negligence different than the intentional torts." That is an overstatement. It is true that with negligence the plaintiff must prove an injury to a protected interest. Is that to say that with intentional torts the plaintiff does not have to prove an injury to a protected interest or that the plaintiff does not suffer an injury to a legally protected interest? Not necessarily.

If Popeye intentionally hits Bluto in the face,²¹⁸ and Bluto suffers a broken nose, a broken jaw, cannot work for two months, and suffers terrible pain, Bluto has suffered injury to his legal interests, and he may recover. Alternatively, if Popeye hits Bluto and he suffers no injury *other than* just being hit, the law still allows him to recover. Thus, there is a difference between negligence and intentional torts. If Popeye negligently impacts Bluto's person and causes absolutely no injury to Bluto, he cannot recover.

However, the absence of physical injury or property damage in the Bluto battery example does not mean that Bluto suffered no injury. In

214. Indeed, intent transfers amongst all of the intentional torts which arose out of the writ of trespass. Intent thus transfers from one person to another, one tort to another, and one tort to one person to a different tort to another. *Id.* § 8, at 37.

215. See generally *Caudle v. Betts*, 512 So. 2d 389, 392 (La. 1987).

216. PROSSER AND KEETON, *supra* note 11, § 13, at 83.

217. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1161 (La. 1988); *Caudle*, 512 So. 2d at 392; *Bartolone v. Jeckovich*, 481 N.Y.S.2d 545, 547 (N.Y. App. Div. 1984).

218. Assume Popeye has no defenses.

battery cases, the law presumes that an intentionally inflicted harmful or offensive contact with the person of another always causes some injury and the plaintiff just does not have to prove it. It is an injury to honor; it is an injury to the plaintiff's dignity. The existence of damage, if not the amount, is conclusively presumed. That presumption is really a statement of the legal obligation or duty. Historically, allowing recovery of presumed damages in battery cases provided an incentive to plaintiffs to seek legal redress rather than take the law into their own hands and escalate matters. Given the volatile times in which we live, it seems the historical justification may still justify the rule.

Interestingly, the damages discussion above raises some salient observations regarding cause-in-fact. Outside the area of intentional torts (and some remaining pockets of defamation), the plaintiff must show on a case-by-case basis that but for the defendant's noncompliance with the applicable legal obligation, the plaintiff would not have suffered the particular damages for which it seeks recovery. With battery and other intentional torts, when only a dignitary injury is involved the damage is presumed. Thus, but for causation is conclusively presumed.²¹⁹ The contact caused injury as a matter of law, so there is no need for further discussion or to confuse the jury by instructing on it, assuming there is no question that the contact occurred.

However, the analysis is different if the plaintiff seeks to recover damages beyond dignitary injury resulting from the battery, other than the contact itself. That is, in my previous example with the broken nose, the broken jaw, the lost work, and the pain, the plaintiff should have to prove that the intentional contact brought about those injuries.

VIII. CONCLUSION

The previous several sections have applied the proposed structure to a variety of tort claims, other than negligence. They have established that the structure applies to and helps bring an analytical consistency to the torts discussed. In some areas, like defamation and intentional torts, the legal cause analysis may be less extensive or apparent than in other torts, but all of the elements of the structure apply to every tort. Moreover, applying the structure makes manifest that many issues that the law and scholars treat under breach, cause-in-fact, legal cause, and damages are legal questions, not factual questions. For instance, the definition of the standard of care, the definition of an unreasonably dangerous product, or the obligation a speaker

219. The same is true in a defamation case where the Constitution allows a state to award presumed damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

owes to a public official are not breach questions; they are legal questions. Moreover, by way of example, allowing recovery of lost chance of survival is not a causation decision; it is a redefinition of recoverable damages, and hence a legal question. As the Legal Realists pointed out, many so-called proximate cause questions are really legal and policy questions about the scope of the defendant's legal obligation. Not unlike lost chance of survival in cause-in-fact, recovery for wrongful death or for loss of consortium are not about damages per se; they are about whether the defendant's legal obligation makes it responsible for those losses to those plaintiffs. Because they are legal matters about the defendant's legal obligation, they are ultimately duty questions.

In conclusion, there is a unified structural model of torts which essentially mirrors the elements of negligence—duty, breach, cause-in-fact, legal cause, and damages. The model, if clearly understood and articulated by courts and commentators, would bring clarity to the law. It would bring greater coherence and would go a long way in aiding lawyers and judges to consistently allocate decisionmaking responsibility between judges and juries. Finally, the proposed structural model brings unity to an area of the law in which many judges, lawyers, law professors, and students view as a potpourri of history, common law development, and social policy. The structural unity the model brings would force courts, lawyers, scholars, and reformers to focus on the real social and legal issues that underlie tort suits, rather than miring themselves in what may now appear to be a mishmash of claims whose commonality is that they all fall under the rubric of what we call torts. Finally, the model might help those trying to learn and understand the law to focus on what really matters—the core substance—instead of a twisting, turning labyrinth of confused concepts controlled by mythic beasts.