

# TORT LAW'S TEMPORALITY IMPASSE

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*It has long been said that the common law "works itself pure." But not always in the law of torts. This Article reveals and analyzes the inconsistencies among a set of tort doctrines whose relationship to each other has gone unrecognized for over a century-and-a-half. These are what we call the "temporality" doctrines. Temporality occurs when wrongdoing by more than one party, whether two or more defendants or a defendant (or defendants) and a plaintiff, occurs sequentially rather than simultaneously. At least half-a-dozen seemingly unrelated tort law doctrines deal directly with temporality issues. These include avoidable consequences, anticipatory failure to mitigate damages, negligent enablement of subsequent tortious conduct, negligent aggravation of harm caused by prior tortious conduct, liability to rescuers, last clear chance, and comparative negligence.*

*In different ways, these doctrines are often in serious conflict with respect to their treatment of temporality. For example, under some of the doctrines, both the first and the second wrongdoer are responsible for the injuries at issue. That is true under enablement and aggravation. Under some of the others, however, only one of the wrongdoers is responsible. That is true under avoidable consequences. Other blatant conflicts also exist. There are seemingly rational reasons for each doctrine and for the treatments of different forms of sequential wrongdoing they address, but at least some of those reasons would also apply to other doctrines that adopt the opposite approach. There is what amounts to an intellectual separation among the doctrines. Because each doctrine occupies its own conceptual silo, neither the courts nor torts scholars have recognized that each of the temporality doctrines is related to the others.*

*That is tort law's temporality impasse. Our analysis identifies the previously unrecognized connections among these doctrines and teases out the fundamental contradictions among them; contradictions that are not going away and—for a series of reasons we describe in detail—probably cannot go away. The common law in this area is not working itself pure and has no prospect of doing so.*

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## INTRODUCTION

Does the common law work itself pure?<sup>1</sup> Not always in the law of torts. This Article reveals and analyzes the striking inconsistencies among a set of doctrines whose relationship to each other has gone unrecognized for over a century and a half in tort law. These are what we call the “temporality” doctrines. The phenomenon of temporality occurs when wrongdoing by more than one party, whether two or more defendants or a defendant (or defendants) and a plaintiff, occurs sequentially rather than simultaneously. At least half a dozen seemingly unrelated tort law doctrines, mostly but not entirely within the law of negligence, deal directly with temporality issues.

Neither the courts nor torts scholars have recognized the close relationship among the temporality doctrines. Our analysis identifies the previously unrecognized connections among those doctrines and teases out the fundamental contradictions among them; contradictions that are not going away and—for reasons we will describe in detail—

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<sup>1</sup> The origin of this aphorism is shrouded in the mists of time. We can trace it as far back at Henfield's Case, Whart. St. Tr. 49, 11 F. Cas. 1099 (1793) (unpaginated).

probably cannot go away. The common law in this area is not working itself pure and has no prospect of doing so.

Take the doctrine of “avoidable consequences.” Under this doctrine, a plaintiff who negligently fails to avoid some or all of the harm caused by the prior negligence of a defendant is barred from recovering damages for those avoidable consequences.<sup>2</sup> A classic example is the failure of a plaintiff to follow the advice of a physician treating an injury caused by the negligence of a defendant.<sup>3</sup> The plaintiff is barred from recovering damages that result from avoidable consequences, though the plaintiff still can recover damages for harm that would have occurred even if the plaintiff had exercised reasonable care to avoid the consequences in question.

In 2020, the Reporters for the American Law Institute (ALI) project, *Restatement of Torts (Third): Remedies* proposed adopting the avoidable consequences doctrine,<sup>4</sup> essentially carrying it over with some changes from the *Restatement of Torts (Second)*.<sup>5</sup> As nearly as we can tell from the record, the Reporters initially were unaware that, more than twenty years earlier, the *Restatement of Torts (Third): Apportionment of Liability* had adopted a provision applying comparative negligence to avoidable consequences, thus eliminating the complete bar accomplished by the avoidable consequences doctrine, and folding it into the apportionment scheme of that *Restatement*.<sup>6</sup> A multi-year debate over this inconsistency ensued, culminating in the defeat of a motion (by a vote of 33 to 36) made by the former co-Reporter of the *Apportionment* Restatement at the 2022 Annual Meeting of the ALI to follow the comparative negligence approach of the *Torts: Apportionment* Restatement in the *Torts: Remedies* Restatement.<sup>7</sup>

The whole episode is a rare example of recognition that different doctrines addressing aspects of the temporality problem in tort law may have a relationship to, or be based on, principles that have implications for each other. And even that recognition occurred only after one of ALI's experts brought the matter to the attention of two other ALI experts.

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<sup>2</sup> See RESTATEMENT (SECOND) OF TORTS § 918 (Am. L. Inst. 1979); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 (Am. L. Inst., Tentative Draft No. 1, 2022).

<sup>3</sup> RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 cmt. b (Am. L. Inst., Tentative Draft No. 1, 2022).

<sup>4</sup> See RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 (Am. L. Inst., Tentative Draft No. 1, 2022).

<sup>5</sup> See RESTATEMENT (SECOND) OF TORTS § 918 (Am. L. Inst. 1979).

<sup>6</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b (Am. L. Inst. 1999).

<sup>7</sup> American Law Institute, *2022 Annual Meeting Proceedings*, Am. L. Inst. 1, 345-53 (2022).

The avoidable consequences debate, however, revealed only the tip of the iceberg. At least half a dozen tort doctrines are responses to problems of temporality. These include not only avoidable consequences, but also anticipatory failure to mitigate damages,<sup>8</sup> negligent enablement of subsequent tortious conduct,<sup>9</sup> negligent aggravation of harm caused by prior tortious conduct,<sup>10</sup> liability to rescuers,<sup>11</sup> last clear chance,<sup>12</sup> and comparative negligence.<sup>13</sup>

But these doctrines are not at all consistent in their treatment of temporality. Under some of the doctrines, both the first and the second wrongdoer are responsible for the harm or harms in question. That is true under aggravation and enablement. Under some of the others, only one of the wrongdoers is responsible. That is true under avoidable consequences. It is also true under last clear chance, to the extent that this doctrine still applies at all. And under other doctrines, through their interaction with comparative negligence, the defendant wrongdoer or wrongdoers are only partially responsible, because the plaintiff is partially responsible. That is true under conventional comparative negligence when avoidable consequences and anticipatory mitigation do not apply.<sup>14</sup>

There are seemingly rational reasons for each doctrine and the treatments of different forms of sequential wrongdoing they address, but at least some of those reasons would also apply to other doctrines that adopt the opposite approach. And most of the time a doctrine is applied with little or no recognition that it is connected, related, or analogous to any of the other doctrines. There is what amounts to a conceptual separation between the doctrines. Each doctrine occupies its own "silo" and is not recognized to be related to the others. This is tort law's temporality impasse.

We wish we could say that this Article makes sense out of the seeming inconsistency of the temporality doctrines. But we are unable to make even nearly complete sense of their inconsistency. We also wish that we could propose a way to reconcile the conflicts among the doctrines. Sometimes, however, legal problems are intractable, and understanding the way things are, and why they are that way, is the contribution that legal scholarship has to make. Our contribution is to explain how and why the doctrines came to exist, and how and why they became, and have remained, inconsistent. To do this, Part I recounts the history and development of each doctrine and the issues the doctrines were designed to resolve. Part II explains how the development of the law of negligence, after abolition of the forms of

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<sup>8</sup> See DAN B. DOBBS, *THE LAW OF TORTS* 510 (2000).

<sup>9</sup> See *id.* at 476-79.

<sup>10</sup> See *id.* at 481.

<sup>11</sup> *Id.* at 456.

<sup>12</sup> *Id.* at 522.

<sup>13</sup> *Id.* at 503-06.

<sup>14</sup> DOBBS, *supra* note 8 at 512-14.

action, led to the emergence of conceptual separation among seemingly related doctrines—what we call "doctrinal silos." That Part teases out the ways in which those doctrinal silos permitted conflicting approaches to analogous, and sometimes closely analogous, situations. Because there is nothing about the phenomenon of temporality in tort law that intrinsically demands consistent treatment of this phenomenon, Part II also explores whether there are any persuasive arguments supporting the differences in, and contradictions among, the doctrines. We conclude that there are no such persuasive arguments.

Finally, Part III addresses the future of the temporality impasse, predicting that it will not be resolved. The conceptual separation of the doctrines into their own silos, we conclude, is an almost inevitable byproduct of a system in which appellate decisions are designed mainly to address legal errors made at trial. On appeal, the parties and their counsel are concerned mainly with protecting or reversing trial outcomes, rather than assisting appellate courts in harmonizing what happens in each case with decisions in other cases that are perceived as having no direct bearing on the outcome of the case at hand.

At bottom, that is why the doctrines are inconsistent with each other, although, as we shall see, the absence of any general principle underlying the application or non-application of comparative negligence also contributes to these inconsistencies. As a result, tort law's response to the problem of temporality does not and, as a practical matter, probably cannot work itself pure. The insights we develop about the temporality doctrines, however, are not merely about those doctrines. The insights apply more broadly to the development of the common law in general, because the obstacles to achieving consistency among doctrines existing in discrete doctrinal silos are not confined to torts cases.

## I. THE HISTORICAL DEVELOPMENT OF THE TEMPORALITY DOCTRINES: CHAOS WITH AN INDEX

Is there evidence that the temporality doctrines are working themselves pure over time, or does their collective condition more resemble "chaos with a full index," as Holmes suggested some nineteenth-century lawyers regarded the whole common law?<sup>15</sup> The answer lies closer to the chaotic end of the continuum. There is consistency among a subset of the doctrines, but overall, there is considerable inconsistency and outright conflict. Importantly, there is

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<sup>15</sup> *Book Notices*, 5 Am. L. Rev. 110, 114 (1870) ("[T]he old-fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index.").

also virtually no recognition by the courts or torts scholars that the doctrines are related to each other and in substantial conflict. In this Part, we introduce and analyze the history of each of the doctrines, showing how the rationales supporting them evolved over time and varied across doctrines. The analysis reveals how, from their beginnings, the doctrines tended to develop within their own silos, hardening in place over time, even as they were all addressing the phenomenon of temporality.

### A. Enablement

A common accident scenario, both over the centuries and today, involves a wrongdoer whose conduct is negligent because, in whole or in part, that conduct increases the risk that a second party (the second, or “last” wrongdoer) will be negligent. In a variation on this theme often termed “negligent entrustment,” sometimes what makes the entrustment negligent is the risk that the second party will be negligent, although sometimes what makes the entrustment negligent is the risk that the second party will behave in a risky, but non-negligent fashion.<sup>16</sup> The second party’s conduct then injures the plaintiff. In enablement generally and entrustment, in particular, the first-party’s negligence has “enabled” the second party’s negligence. For example, a school board whose employee negligently leaves a child behind after a sixth-grade fair is liable when a second wrongdoer then assaults her.<sup>17</sup> And an individual who negligently loans a car to someone who is visibly drunk is liable to the victim of the borrower’s negligent driving.

#### 1. The Last Wrongdoer Rule

The history of negligence law’s treatment of those forms of sequential injury starts with the “last wrongdoer” rule. That doctrine appears to have originated in the 1806 case of *Vicars v. Wilcocks*,<sup>18</sup> in which the defendant falsely accused the plaintiff, who was employed to work on the property of a landowner, of cutting cords of the landowner’s wood for his own use. The landowner, on hearing the accusation, wrongly fired the plaintiff, who then sued the defendant. The court held that the defendant was not liable.

The case was understood as resting on the proposition that when two persons wrongfully contribute to a plaintiff’s injury, only the “last wrongdoer” (in *Vicars*, the landowner who had wrongfully discharged the plaintiff) is liable. The basis for the rule seems to have been that in situations where multiple parties had contributed to a

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<sup>16</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 34 (Am. L. Inst. 2010).

<sup>17</sup> See *Bell v. Bd. of Educ.*, 687 N.E. 2d 1325 (N.Y. 1997).

<sup>18</sup> 8 East 1 (K.B. 1806).

single injury, greater certainty would be achieved if the law made only one party liable.<sup>19</sup> In Francis Wharton's 1874 Treatise on Negligence, the first American work on that subject, *Vicars* was cited approvingly for the proposition that if "[a]nother person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person . . . the person so intervening . . . insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces."<sup>20</sup>

Although Wharton adhered to the last wrongdoer rule, he had subtly shifted its rationale from an emphasis on certainty of result and ease of administration to causation: "if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff . . ."<sup>21</sup> Although this modified rationale for the last wrongdoer would not be sufficient to assure the rule's survival, the rationale itself would turn out to underlie both avoidable consequences and anticipatory mitigation.<sup>22</sup>

## 2. Replacement of the Rule by the Enablement Doctrine

There were some nineteenth-century English decisions inconsistent with the last wrongdoer rule,<sup>23</sup> and Frederick Pollock's 1886 treatise declared it to be "contrary to principle" and "disapproved by so much and such weighty authority that we may say it is not law."<sup>24</sup> American commentators and other cases around the same time also were applying the causation rationale to the issue and rejecting the last wrongdoer rule on that basis.<sup>25</sup> Two years before the publication of Wharton's treatise, the Supreme Judicial Court of Massachusetts,

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<sup>19</sup> See Laurence H. Eldredge, *Culpable Intervention as Superseding Cause*, 86 U. PA. L. REV. 121, 124 (1937).

<sup>20</sup> FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 130 (1st ed. 1874).

<sup>21</sup> *Id.*

<sup>22</sup> See discussion *infra* Parts I.D and I.E.

<sup>23</sup> In *Burrows v. March Gas & Coke Co.*, L.R. 7 Ex. 96 (1872), for example, an individual carried a lighted candle into a shop filled with gas because of the March company's negligent operation of a gas main. The court held that the negligence of the person carrying the candle did not relieve the company from liability to the plaintiff, who was injured in a consequent explosion. See also *Clark v. Chambers*, L. R. 3 Q.B.D. 327 (1878), where the defendant placed a barrier across a highway carriages and wagons from reaching his grounds, where sports were being carried on, and a third person removed a portion of the barrier and placed it on a nearby footpath. The plaintiff, traveling on the footpath in the dark, ran into the barrier and was injured. In a suit against the defendant, the court held that the intervening negligence of the third party in placing the barrier on the footpath did not relieve the defendant from liability.

<sup>24</sup> FREDERICK POLLOCK, THE LAW OF TORTS 161-62 (1st ed. 1887).

<sup>25</sup> See, e.g., WHARTON, *supra* note 20, §§ 103, 142 at 884.

in *Lane v. Atlantic Waterworks*, had declined to follow the last wrongdoer rule.<sup>26</sup> The decision in *Lane* could not be squared with Wharton's understanding of *Vicars* as supporting the last wrongdoer rule.<sup>27</sup> And, with some exceptions, the last wrongdoer rule was by then rejected by American jurisdictions.<sup>28</sup>

Thus, a necessary step in the rejection of the last wrongdoer rule was the conversion of the rule into one based on causation. The question was stated to be whether an independent tortious act taking place *after* the negligence of a party that endangered another, and contributing to that other's injuries, should be regarded as a "superseding cause" relieving the first tortfeasor from liability.<sup>29</sup> Having stated the issue in causal terms, American courts, and commentators then generally announced that the test for determining whether a superseding cause existed was whether the second tortfeasor's negligence was a foreseeable consequence of the first tortfeasor's negligence, eviscerating the last wrongdoer rule in most cases.<sup>30</sup>

In short, a rule that had originally been designed to minimize legal uncertainty and promote administrative convenience in the face of temporality problems was reconceptualized in the language of causation. Then, through this reconceptualization, the rule was abolished. And what replaced it was a rule dealing with enablement and foreseeability. The result was that a whole series of enablement actions that were previously foreclosed by the last wrongdoer rule could now be brought.

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<sup>26</sup> 111 Mass. 136, 139 (1872). The court stated that "[i]n actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission" and "[t]he act of a third person, intervening and contributing a condition necessary to the injurious effect or the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen." *Id.* at 139-40.

<sup>27</sup> Wharton cited *Vicars* on three occasions in which he endorsed the last wrongdoer rule on proximate causation grounds. *See supra*, note 20.

<sup>28</sup> *See* the commentary on American cases reviewed in Eldredge, *supra* note 19, at 125-26.

<sup>29</sup> *See, e.g.,* *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 12 N.E. 451, 460 (Ohio 1887) ("[I]s the defendant any the less liable to him because the wrong of [a second party] combined with the defendant's negligence to cause the injury he has suffered? We apprehend not.") (citing *Lane*, 111 Mass. at 136); *See also Lane*, 111 Mass. at 140 ("Whether in any given case the act charged was negligent, an whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury.").

<sup>30</sup> *See* Eldredge, *supra* note 19, at 125.

### 3. *Negligent Entrustment*

Among those actions were what came to be called negligent entrustment cases.<sup>31</sup> In most of those cases not only the first (entrusting) defendant but also the second (entrusted) defendant was negligent, making them simply a subcategory of the broader category of liability for enablement. Early twentieth-century negligent entrustment cases in America tended to involve cars, which in their infancy were considered highly dangerous instrumentalities in some jurisdictions.<sup>32</sup> The cases initially emphasized the immaturity of the person entrusted with the car, which permitted courts to characterize the entrustment as a bailment that served as evidence of a close relationship between the parties involved.

Later cases, however, extended negligent entrustment to situations where the driver of a car was not underage but was known by the car's owner to have risky tendencies, and to cases where no close relationship between the parties preceded the entrustment.<sup>33</sup> Eventually the known "incompetence" of the driver, such as a tendency toward drunkenness, came to be emphasized.<sup>34</sup> More recently,

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<sup>31</sup> To the best of our knowledge, the association of negligent entrustment cases with other cases in which a defendant's conduct "foreseeably combines with or permits the improper conduct of the plaintiff or a third party" was first made by Robert L. Rabin in *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999). The quoted language, endorsing Rabin's analysis, is from § 19 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010). The other cases Rabin noted involved persons leaving keys in the ignition of unlocked cars, social hosts giving intoxicated guests access to alcohol, and manufacturers of guns failing to prevent unauthorized individuals access to them.

<sup>32</sup> See the cases, spanning an interval between 1912 and 1934, collected in Daniel S. Whitebrook, *Who's Driving, Anyway? The Status of Negligent Entrustment in Florida*, 12 NOVA L. REV. 939, 951-52 (1988).

<sup>33</sup> For a survey of American cases extending into the 1980s, see *id.* at 955-57. For an investigation of U.S. and Canadian cases up to 2012, see David Zarek & Kate M. MacLoud, *The Sleeper—Negligent Entrustment as an Additional Source of Liability in Canada*, <https://ztgh.com/the-sleeper-negligent-entrustment-as-an-Additional-Source-of-Liability.pdf>.

<sup>34</sup> See, e.g., *Crowell v. Duncan*, 134 S.E. 576 (Va. 1926) (alcoholic adult son); *Brady v. B. & B. Ice Co.*, 45 S.W. 2d 1051 (Ky. 1931) (intoxicated truck driver); *Greeley v. Cunningham*, 165 A. 678 (Conn. 1933) (inexperienced, incompetent driver). In 1935 the First Restatement of Torts concluded that there were a sufficient number of negligent entrustment cases to recognize a cause of action based on the tort. The drafters worded that section broadly, stating that

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others

cases have sought to extend negligent enabling to social hosts allowing minors access to alcohol,<sup>35</sup> and one commentator has proposed that negligent entrustment suits could be brought against parents who entrust computers to minors when the entrusting defendants know or should know that the minors are likely to use the computers for cyberbullying of their peers.<sup>36</sup>

The development of both the enablement doctrine and the subcategory of negligent entrustment shows how much potential those doctrines had to extend the scope of negligence liability once the inconsistent last wrongdoer rule that the doctrines replaced was discarded. In addition, as we will see below, the approach to liability for sequential wrongdoing reflected in the enablement doctrine is wholly inconsistent with two doctrines that have retained what amounts to the last wrongdoer rule: avoidable consequences and anticipatory mitigation.

### *B. Aggravation and the Original Tortfeasor*

Under the enablement doctrine a first wrongdoer's negligence does not cause any injury until a second wrongdoer's negligence combines with that earlier negligence to cause injury. In contrast, a negligent "original tortfeasor"<sup>37</sup> may be liable not only for the initial injury caused by its own conduct, but also for any foreseeable aggravation of that initial harm caused by a subsequent negligent party.<sup>38</sup>

This aggravation rule had appeared in some cases as early as the 1870s<sup>39</sup> and was well established by the 1930s, primarily in automobile accident cases<sup>40</sup> and cases involving the subsequent

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whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.

RESTATEMENT OF TORTS § 390 (Am. L. Inst. 1934). The First and Second Restatements suggested that the term "supplier" could be extended beyond bailors, lessors, and lenders to donors and sellers, but courts have not generally endorsed that position with respect to sellers and have been split on whether donors should be treated as "suppliers." See Whitebrook, *supra* note 32, at 952.

<sup>35</sup> See, e.g., Reynolds v. Hicks, 951 P. 2d. 761 (Washington, 1998).

<sup>36</sup> Benjamin Walther, *Cyberbullying: Holding Grownups Liable for Negligent Entrustment*, 49 HOUS. L. REV. 531, 558 (2012).

<sup>37</sup> The "original tortfeasor doctrine" is the label for aggravation cases in some jurisdictions, such as Tennessee. Anna Rudman-Santos, *Comparative Fault—Banks v. Elks Club Pride*, 41 U. MEMPHIS L. REV. 637, 647 (2011).

<sup>38</sup> RESTATEMENT (THIRD) OF TORTS, *supra* note 16, § 34.

<sup>39</sup> See, e.g., Sauter v. N.Y. Cent. & H.R.R.R., 66 N.Y. 50 (1876).

<sup>40</sup> See, e.g., Adams v. Parrish, 225 S.W. 467 (1920); Sawdey v. R.W. Rasmussen Co., 290 P. 684 (1930); Morrison v. Medaglia, 191 N.E. 133 (1934); Thornton v. Eneroth, 30 P.2d 951 (1934).

medical treatment of injuries.<sup>41</sup> The first *Restatement of Torts* recognized and approved the doctrine “so far as risks normally recognized as ordinarily incident to medical treatment are concerned.”<sup>42</sup> The doctrine did not preclude the injured party suing an additional person for the enhanced harm (assuming that could be determined), but it did not require such a suit to recover damages from that harm. Indeed, the doctrine operated whether or not the enhanced harm was the result of another party’s tortious conduct.<sup>43</sup>

In a situation where someone was injured in an automobile accident because of a driver’s negligence, and the injuries were aggravated by subsequent medical treatment (whether negligent or not), the doctrine functioned to make the original tortfeasor responsible for the enhanced injuries. Like enablement, the aggravation rule was typically explained on causation grounds—the conduct of the original tortfeasor being characterized as the “proximate cause” of the enhanced injuries—and justified on policy grounds, since it provided increased opportunities for injured parties to recover the entire amount of their injuries.<sup>44</sup>

The third *Restatement of Torts*, in the course of affirming the aggravation rule,<sup>45</sup> took no position on whether joint and several liability should be retained in cases with aggravated harm.<sup>46</sup> It did note, however, that shifting to several liability might create unfairness to plaintiffs in cases where a tortfeasor held exclusively responsible for aggravated harm was insolvent or otherwise unavailable for suit.<sup>47</sup> In any event there can be no question that the aggravation rule is inconsistent with both the last wrongdoer rule and any other rule that adopts what amounts to that last wrongdoer approach.

### C. Rescue

The next doctrine addressing temporality issues concerns liability for injury suffered by a party attempting to rescue an individual whom the defendant negligently risked injuring. Courts had sometimes extended liability in negligence to injury to a rescuer, but only under limited circumstances, when Judge Cardozo articulated

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<sup>41</sup> See, e.g., *Viou v. Brooks-Scanlon Lumber Co.*, 108 N.W. 891 (Minn. 1906); *Ross v. Stamford*, 91 A. 201 (Conn. 1914); *City of Covington v. Keal*, 133 S.W.2d 49 (Ky. 1939).

<sup>42</sup> *Fleming James Jr. & Roger F. Perry, Legal Cause*, 60 YALE L.J. 761, n.58 (1951).

<sup>43</sup> RESTATEMENT OF TORTS § 457 (Am. L. Inst. 1935).

<sup>44</sup> See Santos, *supra* note 37, at 648-49.

<sup>45</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 35 cmt. d (Am. L. Inst. 2010).

<sup>46</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (Am. L. Inst. 2000).

<sup>47</sup> *Id.*

a new, more general form of liability. In *Wagner v. International Railway*,<sup>48</sup> Cardozo announced the proposition that a negligent defendant who endangered one individual would also generally be liable to someone who attempted to rescue that person.<sup>49</sup> Cardozo's holding in *Wagner* was not a complete break from precedent; previous New York cases had allowed some injured rescuers to recover.<sup>50</sup> The significance of Cardozo's formulation of a "duty to rescuers" was that the extension of liability to rescuers could take place even where a chain of causation between the injury to the initial party and injury to the rescuer had arguably been broken because of a time delay between the first injury and the rescue attempt.

The rescue doctrine resonates with both the enablement and aggravation doctrines, and as such is inconsistent with the last wrongdoer rule and other doctrines that follow the same form. Instead of extending original tortfeasor liability to particular sorts of injuries—"aggravated" or "secondary" harm causally connected to original harm—the doctrine extended a negligent defendant's liability to a particular class of persons.

In so doing, the rescue doctrine employed a liberal analysis of proximate causation comparable to that employed in cases applying the original tortfeasor rule. For example, when a physician's treatment of an injured party aggravated that party's injuries, that was an independent act, and could previously have been seen as breaking a chain of causation, especially in situations where the damages caused by the aggravation were separable from those arising from the original injury. Moreover, the doctrine of "superseding cause" had served to exonerate tortfeasors in situations where their conduct exposed someone to the risk of injury but the act of another party "intervened" to produce the injury itself, arguably "breaking the chain of causation" between the original tortfeasor and the injury.<sup>51</sup>

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<sup>48</sup> 133 N.E. 437 (N.Y. 1921).

<sup>49</sup> *Id.*

<sup>50</sup> See *Gibney v. State*, 33 N.E. 142 (N.Y. 1893); *O' Brien v. Erie R. Co.*, 123 N.Y.S. 1040 (N.Y. App. Div. 1910); *Waters v. William J. Taylor Co.*, 112 N.E. 727 (N.Y. 1916); *Donnelly v. H.C. & A.I. Piercy Contracting Co.*, 118 N.E. 605 (N.Y. 1918).

<sup>51</sup> See, e.g., *McLaughlin v. Mine Safety Appliances Co.*, 181 N.E.2d 430 (N.Y.1962), in which a company negligently labeled the warning on heated blocks used by first responders to forestall hypothermia in victims exposed to extreme cold. The blocks were insulated, and the warning did not sufficiently inform users not to remove the insulation before applying them to victims. The company also provided a training course for firefighters using its blocks in which it told the firefighters not to remove the blocks' insulation before applying them. A firefighter forgot the directives of the course and unwrapped a block's insulation before applying it directly to a victim's skin, resulting in severe burns to the victim. A court held that the firefighter's negligence in applying the block "superseded" the company's negligent labeling, exonerating the company.

Courts applying the aggravation doctrine sometimes resolved the proximate cause issue by characterizing the subsequent treatment of the injury as a “natural and probable result” of the original injury. Cardozo, without saying so, engaged in the same analysis for rescuers, but in more categorical fashion. A “wrong” to a rescuer was not simply the “natural and probable result” of a wrong to an imperiled victim. It was a “wrong” to the rescuer as a matter of law. Proximate causation was established.<sup>52</sup> Just as it did not necessarily matter whether aggravated harm was produced by the negligence of a second party, it did not matter, in *Wagner*, whether the rescuer’s effort was “instinctive” or “deliberate”—only that there was “unbroken continuity between the commission of the [original] wrong and the effort to avert its consequences.”<sup>53</sup>

#### *D. Avoidable Consequences*

In contrast to the enablement, aggravation, and rescue doctrines, the avoidable consequences doctrine denies recovery for harm caused by a second wrongdoer when that wrongdoer is the plaintiff. The plaintiff may not recover any damages for the additional consequences of harm already caused by the defendant, if the plaintiff could have avoided those consequences through the exercise of reasonable care.<sup>54</sup> Avoidable consequences is not only a tort doctrine, but applies in a various forms of civil liability.<sup>55</sup> In negligence actions, a plaintiff who negligently fails to follow the treatment advice of a physician may not recover for the consequence of that failure—typically, the additional harm that following the physician’s advice would have avoided.

##### *1. Development of the Doctrine*

Early cases in which the avoidable consequences doctrine appeared tended to justify it either on the basis of proximate causation<sup>56</sup> or on the ground that “[t]he law will not permit [one] to throw a loss . . . upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by

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<sup>52</sup> See Kenneth S. Abraham & G. Edward White, *Recovering Wagner v. International Railway Co.*, 34 *Touro L. Rev.* 1, 56 (2018).

<sup>53</sup> *Wagner*, *supra* note 48, at 438.

<sup>54</sup> See DOBBS, *supra* note 8, at 510.

<sup>55</sup> See DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* 273-78, 707-10 (3d ed. 2018); *RESTATEMENT (SECOND) OF CONTRACTS* § 350 (Am. L. Inst. 1981).

<sup>56</sup> *Loker v. Damon*, 34 *Mass.* 284, 288 (Mass. 1835).

common prudence have prevented.”<sup>57</sup> If one could “protect himself from a loss . . . with reasonable exertions,” one case declared, “he fails in social duty, if he omits to do so[.]”<sup>58</sup> As Theodore Sedgwick put it in the 1880 edition of his treatise on damages, “[i]t is not only the moral but the legal duty of a party who seeks redress for another’s wrong[.]” Sedgwick maintained, “to use due diligence in preventing loss thereby.”<sup>59</sup>

By the early twentieth century the avoidable consequences doctrine appears to have been well established in tort cases, at least where the tortious conduct of the defendant was not intentional.<sup>60</sup> The first *Restatement of Torts*, published in 1935, treated the avoidable consequences rule as settled except in cases involving intentional torts. It declared in § 918 that “a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.”<sup>61</sup> The first Restatement’s treatment of avoidable consequences was followed in the second *Restatement of Torts*, again with an exception for intentional torts.<sup>62</sup>

By its terms, the avoidable consequences doctrine applies only when a defendant and a plaintiff both factually contribute to the enhanced harm suffered by the plaintiff. But for the defendant’s tortious act the plaintiff would not have been injured, and but for the plaintiff’s failure to take reasonable efforts to ameliorate the extent of damage caused by the injury, the enhanced damage would not have occurred. Therefore, apart from the fact that in avoidable consequences the second wrongdoer is the plaintiff, the doctrine is flatly in conflict with the aggravation rule.

The avoidable consequences doctrine made some logical sense when contributory negligence was a complete bar to recovery by a plaintiff. Without saying so, the doctrine applied contributory negligence to the consequences that the plaintiff had failed to avoid. Once contributory negligence was replaced by comparative negligence, however, applying the latter to avoidable consequences would have been logical. It was for that reason that the *Restatement (Third) of*

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<sup>57</sup> *Miller v. Trs. of Mariner’s Church*, 7 Me. 51, 56 (Me. 1830).

<sup>58</sup> *Id.* at 55.

<sup>59</sup> 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES; OR AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE 165 n.an.a.5 (7th ed. 1880).

<sup>60</sup> A 1920 New York case declared that “[a]s a general rule, the law requires that one who has been injured either in his person or in his property by the wrongful act of another . . . is under a duty to make reasonable effort to minimize the consequential damages, and if he does not make such reasonable effort he will be debarred from recovering the additional damages that result from such failure.” *Richmond Hill Realty Co. v. E. Richmond Hill Land Co.*, 246 A.D. 301, 305 (N.Y. App. Div. 1936).

<sup>61</sup> RESTATEMENT OF TORTS § 918 (Am. L. INST. 1939).

<sup>62</sup> RESTATEMENT (SECOND) OF TORTS § 918 (Am. L. INST. 1979).

*Torts: Apportionment of Tort Liability* proposed that the avoidable consequences doctrine be abolished as a separate doctrine.<sup>63</sup>

## 2. Retaining Avoidable Consequences

This eventually led to the recent controversy, referenced in the Introduction, over the *Restatement of Torts (Third): Remedies* project's declining to change the existing treatment of avoidable consequences. The Reporters took this position for three reasons.

First, the majority of states have retained the avoidable consequences doctrine as a complete bar to recovery of damages for avoidable consequences.<sup>64</sup> Second, the avoidable consequences doctrine is not a rule of substantive law but one of damages, appearing in fields other than tort law, and had been consistently endorsed in treatises on damages.<sup>65</sup>

The third reason was based on causation. Although the *Remedies* Reporters conceded that "both the defendant's tort and the plaintiff's subsequent failure to avoid the consequences of the tort are factual (but-for) causes of the harm that should have been avoided."<sup>66</sup> They argued that the plaintiff's negligent failure to avoid consequences occurs *after* the defendant's tort has ceased,<sup>67</sup> and that after the injury "[t]he parties are no longer interacting, plaintiff's decisions are widely separated in time and space from the original accident, and only plaintiff can influence whether plaintiff reasonably mitigates damages."<sup>68</sup> If the relationship between the defendant's conduct and the unavoids consequences were viewed in terms of proximate causation, the rule of avoidable consequences "in effect says that, within its scope, the difference in the strength of the causal connection is sufficiently great that plaintiff should bear all the responsibility for reasonably avoidable consequences . . . ."<sup>69</sup>

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<sup>63</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b (AM. L. INST. 2000).

<sup>64</sup> RESTATEMENT (THIRD) OF TORTS: REMEDIES, § 8 cmts. p and y (AM. L. INST., Tentative Draft No. 1, 2022).

<sup>65</sup> *Id.* at cmt. q.

<sup>66</sup> *Id.* at cmt. t.

<sup>67</sup> *Id.* at cmt. r. The Reporters added that "[t]he usual distinction" between comparative responsibility and avoidable consequences "offered by courts" was that "comparative responsibility applies to the plaintiff's conduct before or simultaneously with the tort, and avoidable consequences applies to plaintiff's conduct after the tort." They called the distinction "generally true," and suggested that "a distinction based simply on timing would not be arbitrary." *Id.*

<sup>68</sup> *Id.* at cmt. r.

<sup>69</sup> *Id.* at cmt. t. A comment to a draft of the third *Restatement of Torts: Remedies*,

The problem with this causation rationale for avoidable consequences is not that it fails, although that is a question of degree and judgment. It is that very nearly the same rationale could be applied, and at different times has been applied, to other temporality doctrines which subsequently rejected the rationale. But this is not the place to intervene in the debate between the two *Restatement* projects. Our point is that avoidable consequences has always been of a piece with the last wrongdoer rule, and inconsistent with the doctrines that have rejected that rule, either directly or through the application of comparative negligence. This conflict among doctrines will persist as long as, and where, avoidable consequences remains in force.

### *E. Anticipatory Mitigation*

Still another causal sequence governed by the temporality doctrine is anticipatory mitigation.<sup>70</sup> Anticipatory mitigation occurs before wrongdoing by a defendant causes any injury to the plaintiff and attempts to prevent the enhancement of injury that the defendant's negligence might otherwise subsequently cause.<sup>71</sup> Thus,

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however, identified only seven states as having folded avoidable consequences and anticipatory failure to mitigate damages into comparative fault, and the remaining states as having retained those doctrines in the manner they were applied in pre-comparative fault regimes, as complete bars to recovery. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 cmt. y (AM. L. INST., Tentative Draft No. 1, 2022). The first scholarly article advocating that avoidable consequences and mitigation be folded into comparative fault did not appear until 2013. Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIAC L. REV. 783, 819-21 (2013). In 2021, another article suggested that only twelve courts had addressed the potential contradiction between those doctrines and a comparative fault regime. Michael D. Green & James Sprague, *Rescuing Avoidable Consequences from the Clutches of Remedies and Placing It in Apportionment of Liability, Where It Belongs*, 80 MD. L. REV. 380, 386 (2021).

<sup>70</sup> We employ the phrase “anticipatory” mitigation because avoidable consequence is sometimes referred to, ambiguously, as the “mitigation of damages rule”. See DOBBS, *supra* note 8, at 514. The Remedies Reporters accurately note that “[t]here are occasional attempts to distinguish mitigation and avoidable consequences, but there is no remotely consistent or settled usage to that effect.” RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 cmt. c (AM. L. INST., Tentative Draft No. 1, 2022). But the Remedies Reporters’ emphasis on temporality in their arguments for retaining the avoidable consequences rule illustrates that the typical understanding of actions by plaintiffs eligible for characterization as avoidable consequences is that those actions occur after a defendant’s tortious conduct has come to rest.

<sup>71</sup> The Second Restatement of Torts flatly declared that mitigation must occur “after the commission of the tort.” RESTATEMENT (SECOND) OF TORTS § 918 (AM. L. INST. 1979). A 1924 Oregon case had taken the same position in an era where contributory negligence on the part of a plaintiff was a complete bar to recovery. That court emphasized “the distinction between contributory negligence as a bar to an

the plaintiff's failure to mitigate makes a difference only during or after the consequences of the defendant's wrongdoing have begun to occur.<sup>72</sup>

Beginning in the 1970s, cases appeared in which defendants sought a reduction in damages because of the failure of negligently injured plaintiffs to wear seat belts or helmets. In two early cases defendants were allowed to treat the failure of plaintiffs to wear safety devices as anticipatory failure to mitigate damages.<sup>73</sup> In the case involving a failure to wear a motorcycle helmet, the court noted that "the doctrine of avoidable consequences has been traditionally used . . . to reduce damages for injuries a plaintiff could have avoided . . . *after* he has suffered an initial injury[.]" but allowed the mitigation defense because wearing a helmet afforded a person an opportunity to minimize damages prior to an accident.<sup>74</sup> A similar analysis was made by the court in the seat belt case, reasoning that "the seat belt affords the automobile occupant an unusual . . . means by which he or she may minimize his or her damages *prior* to the accident."<sup>75</sup>

The anticipatory mitigation cases created a conceptual and doctrinal difficulty. A sole proximate cause approach to avoidable consequences stresses the fact that a plaintiff's negligent failure to avoid consequences comes after the commission of the defendant's tort. That temporal gap is arguably a signal of the great difference between the plaintiff's and defendant's ability to control the extent of the plaintiff's damages. But in anticipatory mitigation cases, the failure to mitigate damages comes *before* the defendant's tortious conduct, and yet the plaintiff arguably exercises the same degree of comparative

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action for damages and mitigation of damages arising from the plaintiff's failure to exercise reasonable care in avoiding the results of injury after same has happened." *Dippold v. Cathlamet Timber Co.*, 225 P. 202, 205 (Or. 1924).

<sup>72</sup> Noting that courts had varied considerably in their treatment of "seat belt" or "helmet" defenses, sometimes excluding evidence of a failure to employ those safety devices, sometimes treating the failure as evidence of comparative responsibility, and sometimes characterizing it as avoidable consequences, the Remedies Reporters chose to treat "safety-device cases" as "outside the scope of the avoidable-consequences rule" they were proposing. They also endorsed the Apportionment Restatement's treatment of seat belts and other safety devices as triggering comparative responsibility. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 8 cmt. j (AM. L. INST., Tentative Draft No. 1, 2022).

<sup>73</sup> *Spier v. Barker*, 323 N.E.2d 164 (N.Y. 1974) (seat belt); *Halvorson v. Voeller*, 336 N.W.2d 118 (N.D. 1983) (motorcycle helmet).

<sup>74</sup> *Halvorson*, 336 N.W.2d at 120-21 (emphasis added).

<sup>75</sup> *Spier*, 323 N.E. at 168 (emphasis in original). Pre-incident failure to mitigate has also been applied in cases involving an employee trained in workplace safety's failure to wear goggles and an employee's failure to take advance safety precautions in securing his tools, which were subsequently stolen. *See Johnson v. Farmer's Union Cent. Exch.*, 414 N.W.2d 425, 433 (Minn. Ct. App. 1987) (safety goggles); *Collins v. Boeing Co.*, 483 P. 2d 1282, 1289 (Wash. Ct. App. 1971) (tools).

control over the occurrence of harm that exists in post-tort cases. It would seem to follow that anticipatory mitigation also should apply a

last wrongdoer approach, and bar the plaintiff from recovering for any of the (enhanced) injury caused by the negligent failure to mitigate.

But in fact, three different approaches to the problem have developed for seatbelts. (1) Some courts, and some statutes, make evidence of the plaintiff's failure to wear a seat belt inadmissible at trial. The result is that there is no duty to mitigate, and the plaintiff may recover all the damages that result from the absence of a seat belt.<sup>76</sup> (2) Other courts have treated the problem in the same manner as avoidable consequences, barring the plaintiff from recovering any damages for any injury that would not have occurred but for the plaintiff's failure to wear a seat belt.<sup>77</sup> (3) Still other jurisdictions reduce the plaintiff's recovery for that portion of the damages resulting from the failure to wear a seat belt in proportion to the amount of negligence attributable to the plaintiff for that failure.<sup>78</sup>

In some jurisdictions, whatever approach is applied to seat belts is also applied to the failure of a cyclist to wear a helmet, and presumably (though there are few cases) to other situations in which the plaintiff's failure to employ some form of safety equipment results in greater injury than would have occurred if the safety equipment had been used.<sup>79</sup> But in some jurisdictions there are separate helmet statutes that address the issue.<sup>80</sup>

Approach (1) is inconsistent with any of tort law's approaches to causal temporality. It is tantamount to a "first wrongdoer only" rule that is found nowhere in any of the other temporality doctrines. The courts that follow it are in effect refusing to overrule decisions that were made in the era when seat belts were not common and it would not have been considered wholly unreasonable to fail to wear a seat belt even when it was available. Statutes that adopt this approach

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<sup>76</sup> See, e.g., *Miller v. Jeffrey*, 576 S.E.2d 520, 524 (W. Va. 2002) (holding that "evidence of a plaintiff's failure to wear a seatbelt is not admissible in a negligence action to assess plaintiff's percentage of fault or to show plaintiff's failure to mitigate damages").

<sup>77</sup> See, e.g., *Spier*, 323 N.E. at 166, 168-69.

<sup>78</sup> *Law v. Superior Ct. of Ariz.*, 755 P.2d 1135, 1145 (Ariz. 1988) (under comparative negligence statute, nonuse of seatbelt can be considered and used to reduce damages if nonuse either caused or enhanced injuries to plaintiff).

<sup>79</sup> See, e.g., *Warfel v. Cheney*, 758 P.2d 1326, 1330 (Ariz. Ct. App. 1988) ("The principles set forth in *Law II* regarding seat belts as safety devices thus apply similarly to motorcycle helmets."). But see *McKinley v. Casson*, 80 A.3d 618, 626-27 (Del. 2013) (declining to extend a negligence rule for failure to wear a seatbelt to failure to wear a helmet because no such statutory duty exists).

<sup>80</sup> See, e.g., *Ritter v. State*, 372 S.E.2d 230, 231 (Ga. 1988) (upholding motorcycle helmet statute, OCGA § 40-6-315(a)).

were enacted around the same time in an attempt to head off the other two possible approaches.<sup>81</sup>

The second approach is a version of avoidable consequences, and for the same reasons we have identified in discussing that doctrine is inconsistent with a number of the other temporality doctrines. The fact that the plaintiff's failure to wear a seat belt occurs before the initial collision makes it even more difficult to reconcile this approach with the aggravation of harm rule, because the plaintiff's conduct did not occur "after the commission of the tort" by the defendant, to use the language the *Restatement (Third): Remedies* employs to distinguish avoidable consequences from the third approach to mitigation.<sup>82</sup>

The third approach is simply to apply comparative negligence to the damages attributed to the incremental harm resulting from the failure to wear a seat belt. Obviously, these different approaches are in conflict. In addition, both the first and second approaches are in conflict with the enablement and aggravation doctrines, though in completely different ways.

#### *F. Last Clear Chance*

The last clear chance doctrine provided that, when negligent defendants had the last clear chance to avoid injuring plaintiffs and negligently failed to do so, the fact that the plaintiffs had negligently placed themselves in danger did not bar recovery if the plaintiffs could no longer extricate themselves from danger through the exercise of reasonable care.<sup>83</sup> With the advent of comparative negligence, most courts that have addressed the issue have ruled that the last clear chance doctrine no longer applies.<sup>84</sup> Juries can simply compare the amount of negligence attributable to the plaintiff to the amount of negligence attributable to the defendant that failed to employ the last clear chance to avoid harming the plaintiff or the plaintiff's property. The doctrine is obsolete and has been expressly abolished in many states.<sup>85</sup>

Nonetheless we are including a discussion of last clear chance, not because it is doctrinally significant today but because it is an

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<sup>81</sup> Many state courts deferred to recently enacted statutes regarding seatbelt use between the late 1960s and early 1980s. 1 COMPARATIVE NEGLIGENCE MANUAL § 4:3 (3d ed). A similar pattern emerged with respect to mandatory helmet use laws, which were directly incentivized by federal legislation until 1976. *Id.* at § 4:22.

<sup>82</sup> RESTATEMENT (THIRD) OF TORTS (REMEDIES) § 8 cmt. j. (Am. L. Inst., Tentative Draft No.1, 2022).

<sup>83</sup> See RESTATEMENT (SECOND) OF TORTS §§ 479-80 (Am. L. Inst. 1979); KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 176-78 (6th ed. 2022).

<sup>84</sup> ABRAHAM, *supra* note 83, at 179.

<sup>85</sup> *Id.* at 179, 186-87.

additional illustration of the way in which a doctrine concerned with temporality in one setting may rise (and then fall) without any effort by the courts to reconcile it with other, inconsistent doctrines.

The doctrine is understood to have originated in the 1842 case of *Davies v. Mann*.<sup>86</sup> Although the doctrine was not actually articulated in *Davies*, that case was subsequently taken to stand for it. In *Davies* a plaintiff who negligently left a donkey tethered as it grazed in a public highway was allowed to recover damages from a defendant whose servant drove a team of horses and a wagon into the donkey. The decision proved troublesome for later nineteenth-century treatise writers because of its inconsistency with the contributory negligence of a plaintiff's being a complete bar to recovery. By 1885 Charles Beach had recognized that *Davies* "practically repudiates the entire doctrine of contributory negligence," producing "uncertainty and confusion" for courts and leading them into "endless floundering." Beach proposed that the "pernicious and mischief-making authority" of *Davies* be "distinctly repudiated."<sup>87</sup>

Other critics followed, eventually seeking to explain the doctrine on causation grounds.<sup>88</sup> But it did not take long for commentators to recognize that the causation rationale had its own difficulties. The problem was that when the negligence of both parties had contributed to an accident, how could one sensibly assert that only one party's negligence was its "proximate cause"?

By 1908 Francis Bohlen had fashioned another explanation for the last clear chance doctrine. It was, he said, "an auxiliary rule

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<sup>86</sup> 10 M. & W. 545, 547-49 (Ex. 1842).

<sup>87</sup> CHARLES BEACH, A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 10-11 (1885).

<sup>88</sup> A year after the publication of Beach's treatise it was reviewed by William Wills. William Wills, *Book Review*, 2 L.Q. REV. 506 (1886). Wills acknowledged that the approach in *Davies v. Mann* "presented considerable difficulty," and attempted to fashion a workable "rule" for cases "where there is negligence on both sides." His rule was that the party "who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent," should be considered solely responsible for injuries arising out of the accident. *Id.* at 507. Three years later Wills would say that his rule was founded on causation: "the law . . . holds that person liable who was in the main the cause of the injury." William Wills, *Book Review*, 5 L. Q. REV. 87 (1889). Wills had previously noted that the "last opportunity" rule "will be found . . . to be true of all such cases [where both parties were negligent], whether the series [of events leading to an injury] be long or short." Wills, 2 L. Q. Rev. at 507. Wills' formulation had supposedly resolved the inconsistency between the result in *Davies* and the principle that any contributory negligence on the part of a plaintiff was an absolute bar to recovery. Causation, in the form of the last opportunity of avoiding the accident, notwithstanding the negligence of a plaintiff, had intervened to apparently resolve the inconsistency. But it did not take long for commentators to recognize that the causation rationale had its own difficulties. The problem was that when the negligence of both parties had contributed to an accident, how could one sensibly assert that only one party's negligence was its "proximate cause"?

enforcing, where there are successive acts of misconduct, an arbitrary legal conception of proximity.” The rule was “quite distinct from proximity of causation” because it bypassed the conventional understanding of “proximate” and imposed liability on one of two negligent parties, both of whose actions were the proximate cause of a plaintiff’s injury.<sup>89</sup> The rule, Bohlen, said, was designed for situations where a “plaintiff’s danger and his inability to help himself was known to the defendant,” or where “the defendant, had he been on the alert, as he should have been, could have discovered it.”<sup>90</sup> It was driven by policy considerations rather than by causation: the designation “last” was arbitrary. As another commentator, eleven years later, put it, last clear chance was “an exception to the rule of contributory negligence . . . based as much on social policy and justice as the rule itself.”<sup>91</sup>

The abolition of last clear chance that has occurred over the last half-century has reflected this recognition that it was designed to mitigate the harsh effect of contributory negligence. Once comparative negligence has been adopted, the reason for the doctrine is perceived to have disappeared, and so instead of negligent plaintiffs being allowed full recovery in “last clear chance” situations, a comparison is made between the negligence of those plaintiffs and negligent defendants, and the plaintiffs’ recovery is reduced. But the abolition of the last clear chance doctrine has occurred not only in pure comparative negligence jurisdictions, but also in modified jurisdictions in which a contributorily negligent plaintiff is still barred from recovery if that plaintiff’s negligence is greater than the defendant’s.<sup>92</sup> It is not entirely clear why the courts have taken this across-the-board approach. It may be because of the troublesome possibility that if last clear chance is still applied when the plaintiff is more negligent than the defendant, but not when the defendant is more negligent, then, paradoxically, plaintiffs who are more negligent than defendants in last clear chance cases have an opportunity of recovering more damages than plaintiffs who are less negligent than defendants.

But for our purposes there is a different, and more fundamental, contradiction. Avoidable consequences and last clear chance address mirror images of the same issue. Avoidable consequences reflects the plaintiff’s failure to take the last chance to avoid the consequences in question. Last clear chance reflects the

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<sup>89</sup> Francis Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 238 (1907-1908).

<sup>90</sup> *Id.* at 259.

<sup>91</sup> Herbert F. Goodrich, *Iowa Applications of the Last Clear Chance Doctrine*, 5 IOWA L. REV. 36, 38 (1919-1920).

<sup>92</sup> See, e.g., *Rapoza v. Parnell*, 924 P.2d 572, 577 (Haw. App. 1996), as amended (Sept. 3, 1996) (holding that last clear chance doctrine is “no longer viable” following legislature’s enactment of a modified comparative negligence statute).

defendant's failure to take the last chance to avoid injuring the plaintiff. It is true that the former bars recovery of only those damages that plaintiff could have avoided, whereas last clear chance permitted recovery of all the damages the defendant could have avoided. But in each case, by exercising reasonable care, the other party could have avoided all the damage in question.

Consequently, for the two doctrines to be treated consistently, they should rise and fall together. Either or both would need to be overruled. And that is what has occurred: last clear chance has been abolished and avoidable consequences retained, without any apparent awareness on the part of the courts that this was being accomplished.

### *G. Comparative Negligence*

Comparative negligence does not fit directly into the analysis we are undertaking in this Part. This is because the doctrine does not in itself constitute an approach to temporality. Comparative negligence is nonetheless relevant to the doctrines discussed in this Part, because the application or non-application of comparative negligence to those doctrines sometimes functions to create the inconsistencies we have identified. For example, it is the failure to apply comparative negligence to avoidable consequences and two of the three versions of anticipatory mitigation that is partly the source of the inconsistency between those doctrines and the other doctrines we have discussed.

The non-application of comparative negligence is, admittedly, not the *cause* of these inconsistencies. Rather, the avoidable consequences and anticipatory mitigation doctrines simply posit that comparative negligence does not apply when they are invoked. The non-application of comparative negligence is thus the *result* of the doctrines as they are formulated. Moreover, as we will explain in Part III, the application of comparative negligence to the temporality doctrines, even in the broadest possible form, cannot satisfactorily reconcile all the inconsistencies among these doctrines. Comparative negligence is not a universal solvent that solves tort law's temporality impasse.

## II. DOCTRINAL SILOS

We have shown that the temporality doctrines we have identified and analyzed each occupy their own separate conceptual spaces, with no apparent or explicit relationship to each. The effect of this conceptual separation is to create doctrinal silos. The aggravation doctrine, for example, can be stated, analyzed, and applied without ever mentioning, or seeming to implicate, avoidable consequences, despite the fact that each doctrine is centrally concerned with the significance of sequential—that is, temporal—causation.

This feature of the temporality doctrines does not in itself render them inconsistent with one another. But it has made it much more difficult for courts and torts scholars to recognize relationships among them, including perceiving their apparent inconsistency with one another. In this Part we first discuss how the late-nineteenth century transition from the forms of action to a general law of negligence rendered the new body of negligence law vulnerable to the temporality inconsistencies and the development of doctrinal silos that we have identified. We then analyze the ways in which a number of the temporality doctrines are in fact inconsistent, by posing some “consistency hypotheses” that could reconcile these inconsistencies. In the end, however, we reject all of those hypotheses, concluding that there is no persuasive basis for reconciling the temporality doctrines.

### A. *The Development of the Silos*

The inconsistencies and doctrinal silos reflected in the temporality doctrines have been present in negligence law from shortly after the time it came into being as a distinct field.<sup>93</sup> Here is how that came about.

The forms of action at common law were subject to their own particular requirements, with little concern on the part of the courts with the existence or non-existence of consistency between and among them.<sup>94</sup> As Frederick Maitland, the great historian of the common law, put it, “[T]o a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law. . . .”<sup>95</sup>

When the forms of action were abolished in the late nineteenth century<sup>96</sup> and a seemingly unified law of negligence emerged, it turned out that negligence law was unified and coherent only to the extent that its substantive principles explained why and when there was and was not liability for negligently-caused harm.<sup>97</sup> To the extent that such

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<sup>93</sup> For discussion of the transition from the forms of action to liability for negligence, see KENNETH S. ABRAHAM & G. EDWARD WHITE, *TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY* 58-64 (2022).

<sup>94</sup> See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 9-10 (2003).

<sup>95</sup> F.W. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW* 298 (A.H. Chaytor & W.J. Whitaker eds.) (1910).

<sup>96</sup> See ABRAHAM & WHITE, *supra* note 93, at 62-70.

<sup>97</sup> A central issue in the law of torts as it emerged as an independent common law field was the issue of *damnum absque injuria*, the recognition that not all civil injuries not arising out of contract were capable of redress through tort law. The field of torts achieved some coherence by identifying compensable civil harms and distinguishing

explanations were satisfactory, it could be said that the law of negligence was unified and coherent. To the extent that the explanations were not satisfactory, however, the common law of negligence was not working itself pure.<sup>98</sup>

Ever since the phenomenon that we have been calling temporality has been lurking, unrecognized, within the putatively unified law of negligence. This is because the move from the specific forms of action to seemingly general liability for negligence involved the evolution of liability for breach of particular duties based on existing relationships, such as those owed by landowners to some entrants on their premises and innkeepers to their patrons, to a more general duty associated with any risky conduct (subject to exceptions) to exercise reasonable care to avoid causing physical harm. The recognition of this general duty of reasonable care meant that a much larger group of individuals, injured by the actions of other individuals or organizations with whom they had no previous contact, could seek redress from those parties in the form of negligence suits.

This increase in the number of individuals who might have a cause of action in negligence has been recognized as a principal effect of the shift from the forms of action to common law liability for negligence,<sup>99</sup> and undoubtedly this effect was enormously important. Along with the rise in the accident rate resulting from urbanization and industrialization in the latter years of the nineteenth century, this shift helps explain the eventual dramatic increase in the number of tort claims brought and the amounts paid to tort victims that continues to this day.<sup>100</sup> Importantly, however, the shift also explains why, in many of the tort actions that could now be brought even when there was no previous relationship between the injurer and the victim, the dimension of temporality would much more frequently be present. That dimension was present either because of a time delay between the actions of a party whose conduct had allegedly created a risk of injury to others and the occurrence of that injury, or because the link between the risky conduct and the injury was sequential, involving more than one party and more than one activity that remained causally connected.

As cases involving these newly actionable injury-causing sequences were brought, the courts had to invent new doctrines to deal with what can now be seen to have been temporality issues, or call upon existing doctrines from the earlier era to address those issues. In

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those from harms for which there were no remedies. See ABRAHAM & WHITE, *supra* note 93, at 202, 207.

<sup>98</sup> *Id.* at 62-70.

<sup>99</sup> KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 33-35 (2008).

<sup>100</sup> See Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 134 *YALE L.J.* 2165, 2184, 2187 (2024) (citing estimates of contemporary tort liabilities of several hundred billion dollars per year).

their efforts to apply doctrines to sequential injuries, courts naturally stayed close to the facts of the cases, developing or deploying doctrines that fit the way the facts could most naturally be described in common parlance. Doctrines centered on aggravation, mitigation, avoidable consequences, rescue, and so forth were products of particular factual contexts. That way of resolving disputes and developing legal doctrine served its immediate purposes perfectly well. Few courts at the time showed any evidence of an intention of building a coherent and consistent tort "system." The torts scholars of the late nineteenth and early twentieth centuries certainly failed in their efforts to identify coherence in the law of torts or even the law of negligence.<sup>101</sup> Tort law was understood as consisting of a set of liabilities imposed for civil wrongs not arising out of contract, but often nothing more cohesive or unified than that. It is no surprise, therefore, that each of the temporality doctrines developed largely independently of the others, and that there was no felt need for judicial policing of the doctrines to ensure that there was overall consistency.

### *B. Consistency Hypotheses*

Each of the temporality doctrines we have identified deals with sequential causation, but some of the doctrines deal with that phenomenon differently from others in ways that appear to be contradictory. That raises the question whether doctrines that appear to be inconsistent because they deal differently with similar patterns of sequential causation can be reconciled by the invocation of principles or policies that justify the different treatments they give to temporality. In this Section we offer a number of hypotheses that might explain the differences among the doctrines and therefore persuasively reconcile them. Our analysis of the hypotheses, however, concludes that each of them must be rejected.

The purposes of the different doctrines identified in Part I can be summarized as follows. Avoidable consequences and mitigation are concerned with both the moral responsibility of the plaintiff for negligently failing to reduce harm caused by the defendant's negligence, and with the incentives that might be created by denying plaintiff recovery of damages for this harm. Enablement, aggravation, and rescue are concerned with the moral responsibility of the first wrongdoer for harm that results from that wrongdoer's negligent conduct, even if that harm is directly caused by a subsequent force, innocent party, or a second wrongdoer, as well as creating incentives for defendants to internalize the foreseeable costs of their negligent conduct. Last clear chance is designed to hold the last wrongdoer liable for all the harm the defendant causes in order to mitigate the harsh effect of the contributory negligence rule.

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<sup>101</sup> ABRAHAM & WHITE, *supra* note 93, at 64-85.

In one respect those purposes are strikingly similar: they have in common an overriding concern with deterrence, fairness, and what we would term moral hazard. Yet they have resulted in divergent treatment of analogous issues. It could be that there is some principle which explains the divergences but is not captured by a summary of the doctrines' purposes.

### *1. Foreseeability versus the Last Wrongdoer Rule*

Foreseeability is a principal component of negligence liability. The absence of reasonable foreseeability usually rules out liability.<sup>102</sup> And the existence of reasonable foreseeability tends to rule in negligence liability, when its other prerequisites are satisfied. The enablement and aggravation doctrines reject the last wrongdoer rule and substitute foreseeability as a principal basis for the imposition of liability in situations where harm caused by an earlier wrongdoer was also caused by a later or last wrongdoer.<sup>103</sup> And liability to a rescuer was adopted on the basis of foreseeability, without any need to displace the last wrongdoer rule. Clearly those three doctrines treat the problem of temporality consistently, by hinging liability on foreseeability.

In contrast, the last wrongdoer is solely liable for the harm that both the last (the plaintiff) and an earlier (the defendant) wrongdoer caused under both avoidable consequences and anticipatory mitigation. The different treatment brought about by the two categories of doctrines cannot turn on foreseeability, for a plaintiff's failure to mitigate or avoid consequences is just as foreseeable as enablement, aggravation, and rescue. The negligence of a plaintiff that occurs before an accident, such as failure to wear a seatbelt or a helmet, is foreseeable from a defendant's perspective, but the defendant is permitted to reduce the amount of the plaintiff.

The different treatment of temporality issues by the enablement, aggravation, and rescuer doctrines on the one hand, and the avoidable consequences and anticipatory mitigation doctrines on the other, therefore cannot be reconciled by reference to foreseeability. We must look to other possible considerations if reconciliation is to occur.

### *2. Sequentiality as a Proxy for Responsibility*

It is conceivable that the doctrine of proximate cause is not sufficiently refined and context-sensitive to differentiate between the scenarios governed by enablement, aggravation, and rescue, on the one

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<sup>102</sup> ABRAHAM, *supra* note 83, at 76-77.

<sup>103</sup> *Id.* at 156. The last clear chance doctrine also applied what amounted to a last wrongdoer rule, and to the extent that this doctrine has been abolished, so has its last wrongdoer approach. *Id.* at 176-79.

hand, and avoidable consequences and anticipatory mitigation, on the other. That is, it is possible, in principle, that negligent plaintiffs are generally much more responsible and blameworthy for their losses in avoidable consequences and anticipatory mitigation scenarios than the original wrongdoers in the enablement, aggravation, and rescue scenarios (who are not relieved of liability). It may be that we need bright-line rules to mandate different results in those different scenarios.

Although that might be possible, it does not seem to be the case. We see no reason to think that the second wrongdoer in an aggravation case (for example), is generally less blameworthy than the plaintiff (also the second wrongdoer) in an avoidable consequences case. At least not so much less blameworthy that it makes sense to hold the first wrongdoer liable for harm that the second wrongdoer also causes, but at the same time hold the plaintiff in an avoidable consequences or mitigation case solely responsible for the injuries that both the defendant and the plaintiff caused. These conflicting per se rules do not reflect anything persuasive in general about the relationship between sequentiality and responsibility in those situations. The two sets of doctrines thus appear inconsistent.

### 3. *Adding a Solvent Defendant*

It could be that the last wrongdoer rule was eliminated, and the enablement and aggravation doctrines were substituted, simply to add a second, solvent defendant in order to make it more likely that a successful plaintiff could collect a judgment that it had secured.<sup>104</sup> On this theory, a service station could be held liable for negligently enabling a thief to steal a car and injure the plaintiff, because a service station would be more likely than a thief to have assets readily available. Under the policy of adding a solvent defendant, in principle the preferable rule would be the last wrongdoer rule, which would generally supersede the avoidable consequences and mitigation rules. Enablement and aggravation would then be understood to be practical, rather than principled, exceptions to the paradigm, last wrongdoer approach.

We think that this rationale, while not implausible as a matter of history and policy, ignores both the stronger foreseeability arguments for the enablement and aggravation doctrines, and the much greater contemporary likelihood that a later, "enabled" defendant will have assets of its own or access to liability insurance that can satisfy a judgment.<sup>105</sup> Enablement and aggravation would therefore not be necessary as a practical matter to enhance full

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<sup>104</sup> See ABRAHAM, *supra* note 83, at 159.

<sup>105</sup> See generally Abraham & Sharkey, *supra* note 100 (surveying evidence of the incidence of liability insurance purchased by individuals and organizations).

recovery by the plaintiff, and would have a principled basis—sounding largely in foreseeability, as we contended earlier—that is inconsistent with avoidable consequences and mitigation.

#### 4. “Completed” versus “Uncompleted” Torts

The Reporters for the *Restatement (Third) of Torts: Remedies* have argued that avoidable consequences can be justified on the ground that, at the point where the plaintiff fails to avoid the consequences in question, the tort has been completed, because the injury-causing event and at least some of its consequences have already occurred.<sup>106</sup>

But in many negligence cases, whether governed by a temporality doctrine or not, once the forces set in motion by the defendant are out in the world, there also is nothing more that the defendant can do to prevent harm. In that sense many torts are completed before all, and sometimes any, harm occurs. This is certainly the case in most products liability cases.

If this is the argument for avoidable consequences, then it is an argument for the last wrongdoer rule across the board, for the first wrongdoer frequently has finished acting before the last wrongdoer has acted. That is part of what makes it the *first* wrongdoer. And if the argument is limited to cases in which the plaintiff has already suffered some harm before the plaintiff's negligence occurs, the same is true, by definition, of the first wrongdoer in every scenario involving aggravation. Yet the first wrongdoer in aggravation cases is not relieved of liability for the aggravation, even though the first wrongdoer in avoidable consequences is so relieved of liability. In fact, another name for avoidable consequences could be "aggravation," for that is exactly what avoidable consequences are: injuries to a plaintiff that were aggravated because of the plaintiff's conduct.

For these reasons, the distinction between completed and uncompleted torts cannot be the basis for reconciling the temporality torts. Even if the distinction is coherent—something we are skeptical about—it is incapable of accomplishing such a reconciliation, because some of the temporality doctrines emphasize it but others clearly do not.

#### 5. Favoring Plaintiffs or Defendants

The aggravation, enablement, and rescue doctrines favor plaintiffs; they render certain wrongdoers liable who would not otherwise be liable to plaintiffs. In contrast, the avoidable consequences and mitigation rules disfavor plaintiffs and therefore favor defendants. The difference in the effects of those two categories

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<sup>106</sup> RESTATEMENT (THIRD) OF TORTS: REMEDIES, at § 8 cmt. r.

of doctrines is enough to reject, as a ground for reconciling them, the notion that somehow tort law is seeking to favor liability or to disfavor it.

Nor is there anything about the deeper structure of the doctrines that could reveal a plaintiff-favoring or defendant-favoring theme running through them all. Rather, in effect, the first set of doctrines rejects the last wrongdoer rule, whereas the second set accepts that rule. But there seems to be nothing about plaintiffs qua plaintiffs, or defendants qua defendants, that would lead to the acceptance or rejection of the last wrongdoer rule on this differential basis. In short, an unacknowledged but systematic effort to favor liability, or disfavor liability, cannot explain the inconsistency among the temporality doctrines.

### *6. Avoiding Administrative Difficulties*

Another possible explanation for the underlying differences among the doctrines is a practical one: the difficulty of calculating proportional damages that would be posed if avoidable consequences and mitigation were subject to comparative negligence, rather than barring plaintiffs from any recovery of damages for harm that both the defendant and the plaintiff had caused. This would be especially difficult when the plaintiff was negligent not only for contributing to the initial harm that the defendant's negligence had also caused, but also for contributing to the harm resulting from the plaintiff's negligent failure to avoid consequences or mitigate harm, and the percentage of negligence attributable to the plaintiff for the two different categories of harm was different.<sup>107</sup> For example, if the plaintiff were 30 percent negligent for contributing to the accident that caused the plaintiff's initial injuries, but 40 percent negligent for causing the incremental injuries that exercising reasonable care could have avoided, the necessary calculations would be complex, and jury instructions about the calculations could be difficult to follow.

In this situation, there would no doubt be a greater challenge for the trier of fact than is posed by some of the other temporality doctrines. Enablement and rescue require only a straightforward attribution of the amount of the plaintiff's negligence to the damages in question when the plaintiff's negligence has contributed to the plaintiff's harm. On the other hand, like avoidable consequences and mitigation, aggravation could require a more complex and challenging calculation than enablement and rescue if the plaintiff was negligent. In such instances the plaintiff's total damages would need to be reduced by the amount of negligence attributable to the plaintiff, and then the portion of the plaintiff's damages caused by the defendant

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<sup>107</sup> See *id.* at cmt. v, for a discussion on comparative responsibility.

that aggravated the harm separately calculated and reduced by the percentage of negligence attributable to the plaintiff. Those percentages might not always be the same.

There is thus a big difference, from the standpoint of administrative considerations, between enablement and rescue, on the one hand, and avoidable consequences and anticipatory mitigation, on the other. The latter require much more detailed and complex calculations, and depending on how much calculation is left to the trier of fact, they involve a greater possibility of confusion and miscalculation. There is considerably less difference in this respect, between avoidable consequences and anticipatory mitigation and aggravation. Yet the challenges posed by complex calculations have not stood in the way of applying the aggravation doctrine even when the plaintiff was negligent. We are inclined to think, therefore, that the administrative challenges posed by avoidable consequences and mitigation are not sufficient to explain or justify their being treated differently from enablement, rescue, and aggravation.

### III. THE FUTURE OF THE TEMPORALITY IMPASSE

Our purpose in this Article has been to uncover and explore the fact that a particular set of seemingly unrelated common law negligence doctrines are all concerned with the phenomenon of temporality. This phenomenon has not been clearly recognized before, and we have tried to show that, along a number of dimensions of assessment, the doctrines do not consistently address the temporality phenomenon. In this sense the contribution of the Article is positive rather than normative.

It might be the case that once the inconsistent application of temporality doctrines was identified, reform in the shape of resolving their inconsistencies might occur. But we predict that reform of the temporality doctrines is unlikely, and that the inconsistencies we have identified will remain a part of negligence law. We identify three reasons for our prediction.

The first reason turns on the exigencies of the appellate process, which pose a barrier to reconciling the doctrines. The second reason is that comparative negligence, the wholesale application of which could serve to partially harmonize some of the temporality doctrines, is, we will seek to show, not only undertheorized but incompletely applied. The third reason turns on the very nature of common law tort doctrine, of which the temporality doctrines are only an example. Because tort law almost inevitably consists of the kind of doctrinal silos that we have described in this Article, the siloed nature of tort law itself will impede efforts to treat all of tort law, or even all of negligence law, as a coherent and cohesive doctrinal system.

### A. *The Exigencies of the Appellate Process*

For the temporality doctrines to be reconciled, the appellate courts would be required to overrule or modify some of them. But the exigencies of the appellate process create significant obstacles to achieving this goal. These involve the structure and functioning of appellate courts as well as the incentives and disincentives created by the adversary system.

#### 1. *The Structure and Functioning of the Appellate System*

There are a number of features of the appellate process in common law cases that help to explain the persistence of the inconsistencies that we have identified, and that are likely to impede harmonizing the temporality doctrines. First, most appeals in most states go first to an intermediate level appellate court.<sup>108</sup> Those courts typically do not have a discretionary docket, because a first appeal is a matter of right.<sup>109</sup> As a consequence, those courts decide a much greater volume of appeals than the state courts of last resort and have correspondingly less time to spend on any given appeal. Even intermediate appellate courts that consider themselves authorized to overrule established precedent (and in our experience, many do not)<sup>110</sup> are likely to be hesitant to take time and effort away from the rest of their crowded dockets to determine whether to do so.

Second, some tort suits are diversity actions brought in federal court. In a diversity suit in federal court, the precedents of the state whose substantive tort law governs the dispute are binding on the federal court. Where that state's highest court has ruled on the issue and established a precedent that would bind a lower state court, the federal court is bound by and follows that precedent. If a state supreme court has continually applied the avoidable consequences doctrine, for example, then a federal court would not be authorized to overrule it. Where a state's highest court has not ruled on an issue, the federal courts try to predict how the state's highest court would rule. This is sometimes referred to as making an "Erie guess" or prediction.<sup>111</sup>

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<sup>108</sup> See *Appellate Procedure Resource Guide*, NAT'L CENTER STATE COURTS <https://ncsc.contentdm.oclc.org/digital/collection/appellate/id/1215/rec/2> (last accessed Jan. 29, 2024).

<sup>109</sup> See *id.*; Practical Law Litigation, *Civil Appeals in New York: Initial Considerations for Appellate Division Appeals*, Practical Law Practice Note 0-535-6702 (West).

<sup>110</sup> "The traditional and proper course of action is for the intermediate or trial court to apply the precedent's rule but explain its dissatisfaction with the rule and its consequences." Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 333 (1999).

<sup>111</sup> 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 19 FEDERAL PRACTICE & PROCEDURE § 4507 (3d ed. 1998).

Predicting overruling would be unusual. And in any event, all the doctrines we analyzed in Parts I and II are longstanding and conventional features of negligence law. Each doctrine would already have been adopted, or impliedly followed, for all intents and purposes, by every state court of last resort.

Federal courts do not have a hard-and-fast obligation to follow an intermediate state appellate court decision about the content of state law, because their guiding principle is how the state's highest court would rule. Still, what the intermediate state courts say about the content of state law is usually understood to be pretty good evidence of what the state's highest court would also say. An intermediate state court's decision therefore strongly influences and often determines the federal court's making of an educated "*Erie* guess." If an intermediate state court has followed a doctrine, including the doctrines we have been analyzing, then a federal court would be extremely likely to follow it.<sup>112</sup>

Third, unlike the U.S. Supreme Court, which sees its job as consisting mainly of constitutional interpretation,<sup>113</sup> state appellate courts are mainly in the business of resolving disputes between litigants by correcting errors made by trial courts, including errors that involve misapplying established precedents. The state courts are likely to see the overruling of established precedents as a very secondary part of the principal job of resolving disputes between the parties.<sup>114</sup>

Finally, state appellate courts generally resolve disputes based on the issues presented by the parties.<sup>115</sup> Apart from jurisdiction, those courts typically do not (and usually cannot) address issues not raised by the parties, including issues that the parties are required to have preserved at the trial court level.<sup>116</sup> Consequently, unless counsel for

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<sup>112</sup> In fact, the U.S. Supreme Court indicated that "federal courts, under the doctrine of *Erie Railroad Co. v. Tompkins* . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. New York Life Insurance Co.*, 311 U.S. 467 (1940).

<sup>113</sup> See *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/constitutional.aspx>.

<sup>114</sup> ABRAHAM & WHITE, *supra* note 93, at 8-9; Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 336 (1999) ("Even if they are freed from the bonds of precedent, intermediate appellate judges may be tempted to continue looking above in an attempt to guess how the issue might be treated in the high court.").

<sup>115</sup> "[Courts'] decision-making is constrained by the scope of the information provided through the adversarial process." Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POLICY REV. 61, 70 (2017).

<sup>116</sup> See, e.g., TRACEY BATEMEN ET AL., CARMODY-WAIT 2D NEW YORK PRACTICE WITH FORMS § 207:23 (2024) ("[G]enerally the court of appeals does not consider

a party anticipates posing an issue turning on the inconsistency of a doctrine that is applied at trial with a different doctrine which does not figure directly at trial, that issue will not be raised on appeal. That is a lot to ask of trial counsel.

For all these reasons, it is extremely unlikely that appellate courts will be asked to harmonize any particular temporality doctrine with another temporality doctrine. Each has remained and probably will remain in its own "doctrinal silo", sitting on its own with its own accumulated body of precedent governing it, without being treated as related to any of the other temporality doctrines.

## *2. Incentives Created by the Adversary System*

Further, the adversary system profoundly influences the issues that are presented when a case is appealed, and the arguments that are made on appeal. This influence would also tend to discourage efforts to reconcile the temporality doctrines by making new law or overruling existing precedent.

Counsel for the appellant chooses the assignment or assignments of error, and then selects the arguments to make in favor of reversal. Counsel for the respondent does exactly what the title "respondent" indicates. There is no need to respond to and refute arguments for reversal that have not been made. In our experience, counsel for the parties are almost always interested exclusively in obtaining a reversal or affirmance of the judgment below. Attempting to make new law is the last thing either side wants to do unless that is necessary for success. Other things being equal, an argument that the trial court applied existing law incorrectly is much more likely to succeed than an argument that existing law should be changed, and vice versa. Consequently, the former argument is much more likely to be made than the latter.

It is no doubt possible for counsel to make both kinds of arguments. But several factors may hinder doing that. If the argument for overruling comes after a more conventional assertion that the trial court applied existing law incorrectly, then the appellate court may see the second argument (rightly) as a long-shot fallback position and give the argument little credence. On the other hand, if an argument urging the court to make new law is the sole basis for appeal, the court may see it (again, rightly) as a "hail mary" type of argument, which may also detract from its credibility. Counsel is in a bind either way; the better part of valor may be not to argue for overruling unless that is absolutely necessary.

Moreover, counsel also may face an utterly mundane, but important obstacle to advocating a change in the law. Appellate courts

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claims of error not preserved by appropriate objection in the court of first instance.").

almost always impose page limits on appellate briefs.<sup>117</sup> Depending on the number of assignments of error on which an appeal is based, counsel for the appellant may have to decide whether to devote space to a long-shot argument seeking the overruling of precedent at the cost of devoting less space to an argument or arguments that have a better chance of succeeding.

### *B. The Misleading Allure of Comparative Negligence*

It is tempting at first glance to think that the uniform application of comparative negligence to the temporality doctrines could resolve all their inconsistencies. After all, what seems to render avoidable consequences and anticipatory mitigation (as well as last clear chance) inconsistent with the other doctrines is that they are not subject to comparative negligence. But close examination reveals that, far from being a solution, the application of comparative negligence would throw the temporality doctrines into further disarray. They would go from being a set of doctrines with clearly identifiable inconsistencies to a disordered mess that would defy easy description.

Comparative negligence is in force in one form or another in all but a handful of states, either by statute or judicial decision.<sup>118</sup> But in fact comparative negligence is a series of different approaches that differ in their scope and application depending on the law of each state and the setting in which an issue arises.<sup>119</sup> More extensive application of comparative negligence to the temporality doctrines would be an unsatisfactory and unsuccessful method of resolving their inconsistencies.

First, comparative negligence is not one thing. This is because three different levels of approach regarding the application of comparative negligence must be distinguished, and an approach from each level would have to be selected in order for comparative negligence to "apply."

The first level concerns whether the doctrine applies to permit a contributorily negligent plaintiff to obtain a partial recovery from a negligent defendant or defendants. Forty-six states permit such recovery under some circumstances. But in more than half, "modified" comparative negligence precludes recovery when the plaintiff was more negligent than the defendant. In modified comparative negligence jurisdictions, therefore, applying comparative negligence

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<sup>117</sup> See, e.g., *Slater v. Gallman*, 339 N.E.2d 863, 864-65 (N.Y. 1975) ("We are fully cognizant of the fact that the Federal appellate courts, faced with this same problem, have imposed a specific page limitation on briefs . . . and that the United States Supreme Court, by rule, requires that briefs be 'compact' . . . Nevertheless, we have avoided a specific rule in the belief that such a rule would be an insult to those appellate counsel who understand the functions of this court . . .").

<sup>118</sup> ABRAHAM, *supra* note 83, at 180.

<sup>119</sup> *Id.* at 180-90.

would not, in all cases render avoidable consequences and anticipatory mitigation consistent with the other temporality doctrines. For this reason alone, comparative negligence as it now exists could not fully resolve the inconsistencies we have identified. But simply applying "pure" comparative negligence across the-board would not be a solution because two other levels of application would still be involved.<sup>120</sup>

The second level involves whether, when the plaintiff is not negligent and multiple defendants are liable, those defendants are jointly and severally liable, or those defendants' liability to the plaintiff is limited by virtue of comparative negligence, with their liability being only "several"—proportional to the amount of negligence attributed to them. It is only a slight exaggeration to say that every state has a slightly different approach to this issue. There are numerous variations among the states.

The third level applies once a payment has been made to the plaintiff on whatever basis that it is directed to occur. Then the issue is on what basis subsequent contribution among defendants occurs, when and if it occurs. Sometimes defendants who are jointly and severally liable to the plaintiff, for example, are permitted subsequent contribution on a pro-tanto basis—when one of three defendants pays the plaintiff that defendant can recover contribution of one-third of the amount paid to the plaintiff from each of the other two defendants, and so forth. In other states, however, subsequent contribution among defendants is apportioned on a comparative basis, by reference to the amount of negligence attributed to them. But in still other states, comparative contribution occurs only under some circumstances, the method of which varies among the states taking this approach.<sup>121</sup>

Given this tremendous amount of variation across states along all three of these levels of comparative negligence, it is impossible to say what the "principle" underlying comparative negligence actually is. There are in fact conflicting principles, taking into account, among other things, the extent to which a highly negligent plaintiff should be permitted to recover at all, whether a solvent defendant should bear the risk of a second defendant's insolvency, and whether a highly negligent defendant should be permitted contribution from a less negligent defendant.

Those different principles—or the way each state applies them—are themselves inconsistent with each other. Attempting to

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<sup>120</sup> The most accessible state-by-state breakdown we have found is *Apportionment of Fault Rules*, BLOOMBERG LAW, [https://assets.bbhub.io/bna/sites/7/2023/11/2022-Dockets-Apportionment-of-Fault-Rules.pdf?utm\\_source=sfmc&utm\\_campaign=BLAW%7eNA%7eNA%7eCONFIRM\\_EM%7eNA%7eReport%7eNA%7eNA%7eNA%7eNA%7e20230201&utm\\_term=Report\\_CTA\\_Body&trackingcode=&id\\_mc=69203586](https://assets.bbhub.io/bna/sites/7/2023/11/2022-Dockets-Apportionment-of-Fault-Rules.pdf?utm_source=sfmc&utm_campaign=BLAW%7eNA%7eNA%7eCONFIRM_EM%7eNA%7eReport%7eNA%7eNA%7eNA%7eNA%7e20230201&utm_term=Report_CTA_Body&trackingcode=&id_mc=69203586).

<sup>121</sup> See *id.* (detailing the variations).

render the temporality doctrines consistent with each other through the application of a particular version of comparative negligence—created by selecting one particular feature from each of the three levels of comparative negligence and combining them into a single "approach"—would run headlong into the conflicting principles. As a matter of substance, there is no single combination of variables selected from the three levels—and there are at least dozens and maybe hundreds of possible combinations—that could do the job in a consistent way. Just as importantly, even if there were some ideal combination, identical reform legislation in all fifty states would have to be enacted in all fifty states in order to implement it. And as a practical matter, that is inconceivable.

In short application of “comparative negligence,” whatever exactly that approach might mean in a particular case, cannot resolve the inconsistencies among the temporality doctrines.

### *C. Temporality and the Nature of the Common Law Process*

The very nature of tort doctrine, and especially negligence doctrine, is conducive to the development and persistence of conceptual separations among doctrines, such as the temporality doctrines, that address similar phenomena. That was the message of our analysis in Part I. The persistence of these doctrinal silos is partly a matter of perception, and partly a matter of the operation of the common law.

Our analysis of the temporality doctrines suggests that even within a form of negligence liability that is established and largely coherent—liability for negligently-caused bodily injury and property damage, for example—there are nonetheless inconsistencies that are not working themselves pure. In addition, our analysis suggests that, ironically, some of the many consistencies that can be observed in common law negligence doctrines may also have occurred either by chance, rather than through system-based thinking by the courts or through some kind of invisible hand whose operation would have to be identified.

In any event, what is clear is that the evolution of the common law forms of action into different torts, each in its own silo,<sup>122</sup> has been replicated by the evolution of the temporality doctrines within the law of negligence. They too occupy their own silos. The common law process of adjudication through reliance on precedent has encouraged this phenomenon.

It is often said that a system based on precedent relies on analogy to determine outcomes.<sup>123</sup> But that can be a misleading way of describing the process. It is true that, when the facts of a case seem

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<sup>122</sup> See WHITE, *supra* note 93, at 13-14.

<sup>123</sup> See, e.g., FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 85-102 (2009).

to be roughly analogous to two existing precedents whose application would yield different outcomes, reasoning by analogy assists in determining which precedent governs. But reasoning by analogy of this sort usually takes place under the aegis of a single doctrine. The question in an aggravation case, for example, might be whether the aggravation in question was sufficiently foreseeable, under the terms of a particular precedent, to warrant application of the aggravation doctrine, or sufficiently unforeseeable to be governed by a different precedent, under which the second defendant would not be liable for the aggravation. This kind of analogizing to precedent accepts as a given the relevance of the aggravation doctrine. But at least one aspect of this kind of categorization is a matter of perceiving that relevance.

For example, the aggravation doctrine is simply perceived—that is, recognized—to be occupying its own silo. Typically, it is not recognized that the aggravation doctrine might have implications for other doctrines that occupy their own separate silos, or that these other doctrines have implications for aggravation. They each remain comfortably "unaware" of each other, and for the reasons involving the nature of the appellate process that we discussed above, they each remain in their own silos. To reconcile the aggravation doctrine when the facts warrant applying it with another doctrine—for example, avoidable consequences—would first require a perception that the doctrines are inconsistent. Yet lawyers and the courts will rarely have this perception. Many of the doctrines seem, conceptually, to have nothing to do with each other. For example, aggravation and enablement are about proximate cause, whereas mitigation and avoidable consequence are defenses involving the plaintiff's conduct. They involve different concepts and they are found in different sections of torts treatises and casebooks.

To reconcile the aggravation doctrine when the facts warrant applying it, however, with another doctrine—avoidable consequences, for example—would require something different from reasoning by analogy. If we are right, then by the very terms of the two doctrines, they are irreconcilable. To be rendered consistent, one of the two doctrines must be overruled. That typically involves identifying the principle or policy that underlies each, and choosing which doctrine is underwritten by the preferable principle or policy.

It is one thing, however, to overrule a doctrine because the principle or policy that underlies and supports it has become obsolete, or because other factors or developments have intervened, or because the principle or policy is no longer valued. Even then, overruling occurs infrequently. It would be even more unusual, however, for a doctrine to be overruled because of its inconsistency with a different, seemingly unrelated, doctrine.

There are two different scenarios in which the issue might arise. First, one of the parties may seek to have the doctrine overruled, on the ground that it is inconsistent with some other doctrine that, at

first glance, has no relevance to the case at hand. In our running example, the first defendant would seek to avoid liability for the aggravation of harm caused by the second defendant's negligence, through the overruling of the rule that this first defendant is jointly and severally liable, with the second defendant, for the aggravation. That first defendant's argument would have to be that, by analogy to the avoidable consequences rule, the second defendant should be solely liable for the aggravation.

The argument might invoke the principle or policy underlying the avoidable consequences rule in its support. The responses of the second defendant and the plaintiff would likely be to avoid joining issue on that point, arguing that the two doctrines have nothing in particular to do with each other, that they address different situations, and that a doctrine that is conventionally understood not to have any bearing on the aggravation issue should not be hauled into a case that is resolvable by reference to the doctrine that so obviously governs the case directly.

The second doctrine that could be overruled in order to achieve reconciliation, in our running example, would be avoidable consequences. But none of the parties in our running example would be seeking to overrule that doctrine, for overruling it would not affect the outcome. A court would have to render an advisory opinion in order to do, or state in what amounted to obiter dicta that the doctrine should be, or would be, overruled when the right case arose. Courts are not in the habit of doing that sort of thing.

The result is that, in contrast to overruling in conventional situations—which is rare itself—the kind of overruling that would be necessary to start on the road to reconciling the temporality doctrines would require even more extensive judicial vision and insight about the connections between and among seemingly unrelated doctrines.

## CONCLUSION

The conflict among the temporality doctrines is striking. But on reflection, this conflict should not be completely surprising. When the forms of action were abolished and a seemingly unified law of negligence emerged, it turned out that negligence law was unified and coherent only to the extent that substantive principles explained why and when there was and was not liability for negligently-caused harm. There has never been a completely coherent explanation.

Our analysis of the temporality doctrines suggests that, even within a form of negligence liability that is established and largely coherent—liability for negligently-caused bodily injury and property damage, for example—there are nonetheless also inconsistencies that are not working themselves pure. On the contrary, although the temporality doctrines address causal sequences that arise in different ways, the doctrines are concerned with very nearly the same issue. But

because of absence of recognition that they address the same issue, each of the temporality doctrines has come to occupy its own silo, with little or no communication, cross fertilization, or mutual enrichment taking place among them.

The forms of action at common law were subject to their own particular requirements, with little concern with the existence or non-existence of consistency between and among them. As the common law forms of action evolved into different torts, each in its own silo, the forms of action have been replicated by the temporality doctrines within the law of negligence. Those doctrines also occupy their own silos, and are likely to remain in that state, producing tort law's temporality impasse.

