

3-9-2017

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Recommended Citation

Sakinah N. Jones, *Having An Affair May Shorten Your Life: The Ashley Madison Suicides*, 33 GA. ST. U. L. REV. 455 (2017).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol33/iss2/6>

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HAVING AN AFFAIR MAY SHORTEN YOUR LIFE: THE ASHLEY MADISON SUICIDES

Sakinah Jones*

INTRODUCTION

Ashley Madison¹ is an online dating service originally designed for people in committed relationships who want to cheat on their partners.² In 2015, the website claimed to be “100% discreet.”³ Ashley Madison’s FAQs promised that its users would never compromise their “*safety, privacy or security*” and would never have to reveal their identities unless they chose to.⁴ Ashley Madison’s concept attracted over forty million ostensibly anonymous members to its site.⁵

In July 2015, a group calling itself The Impact Team (Impact) hacked into Ashley Madison’s parent company, Avid Life Media, Inc. (Avid Life), breaching its security walls and reaching directly into the Ashley Madison user database.⁶ Since the data breach, at least four class actions have been filed against Avid Life⁷ and several

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1. ASHLEY MADISON, Registration No. 2,812,950. Ashley Madison was originally started in 2001, but the website officially launched to the public on January 21, 2002. *Frequently Asked Questions*, ASHLEY MADISON, <https://www.ashleymadison.com/app/public/faq.p> (last visited Dec. 20, 2015).

2. Meghan Daum, *Ashley Madison’s Secret Success*, L.A. TIMES (Jan. 10, 2009), <http://www.latimes.com/la-oe-daum10-2009jan10-column.html> (“[U]nlike traditional Internet dating sites—where [you are] expected to say [you are] unattached no matter what the truth is—Ashley Madison is honest about its duplicity.”).

3. ASHLEY MADISON, <https://www.ashleymadison.com> (last visited Dec. 20, 2015).

4. *Frequently Asked Questions*, *supra* note 1 (emphasis added).

5. ASHLEY MADISON, *supra* note 3.

6. See generally Brian Krebs, *Online Cheating Site AshleyMadison Hacked*, KREBS ON SEC. (July 19, 2015, 11:40 PM), <http://krebsonsecurity.com/2015/07/online-cheating-site-ashleymadison-hacked/> (reporting Avid Life is a Toronto-based organization that owns Ashley Madison and two other dating sites: Cougar Life and Established Men). Although the hackers’ “manifesto” referenced the Established Men site, this Note only addresses the Ashley Madison site. See *infra* notes 17–21 and accompanying text.

7. Philip Ross, *Ashley Madison Hack: Lawsuits in California, Missouri, and Texas Seek Class-Action Status*, MIC: NEWS (Aug. 25, 2015), <http://mic.com/articles/124355/ashley-madison-hack->

suicides have been reported as linked to the Ashley Madison breach.⁸ Historically, courts have been largely unwilling to recognize data breach class action claims and reluctant to find third party liability for an individual's suicide.⁹ This Note asks whether the unique circumstances of the Ashley Madison data breach require an evolution of existing legal principles.

Part I of this note provides background on the Ashley Madison data breach, describes the reports of the suicides that have been linked to the data breach, and explains the current status of the class action lawsuits pending against Avid Life.¹⁰ Part I also describes existing precedent, outlining the current legal landscape of data breach class actions and suicide litigation.¹¹ Part II analyzes the facts of the Ashley Madison data breach and distinguishes the Ashley Madison issues from precedent.¹² Part III proposes a solution to the lack of legal remedy for consumers who are affected by data breaches by recognizing a new category of data breaches that satisfies both standing and tort-element damages.¹³ Part III also argues for an exception to the “artificial restriction”¹⁴ of the causation requirement in tort claims and suggests a limited statutory remedy to incentivize companies to respond to known threats to data security.¹⁵

lawsuits-in-california-missouri-and-texas-seek-class-action-status.

8. Laurie Segall, *Pastor Outed on Ashley Madison Commits Suicide*, CNN MONEY (Sept. 8, 2015, 7:10 PM), <http://money.cnn.com/2015/09/08/technology/ashley-madison-suicide/>; Sara Malm, *Two Suicides are Linked to Ashley Madison Leak: Texas Police Chief Takes His Own Life Just Days After His Email is Leaked in Cheating Website Hack*, DAILY MAIL (Aug. 24, 2015, 5:08 PM), <http://www.dailymail.co.uk/news/article-3208907/The-Ashley-Madison-suicide-Texas-police-chief-takes-life-just-days-email-leaked-cheating-website-hack.html>.

9. See discussion *infra* Part II.

10. See discussion *infra* Part I.

11. See discussion *infra* Part I.

12. See discussion *infra* Part II.

13. See discussion *infra* Section III.A.

14. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 498 (1989).

15. See discussion *infra* Sections III.B and III.C.

I. BACKGROUND

A. “Life is short. Have an affair.”¹⁶

The Ashley Madison data breach compromised its “user databases, financial records and other proprietary information.”¹⁷ Initially, Impact only leaked randomly sampled snippets of the stolen data, including some user information.¹⁸ However, along with the sensitive snippets, the hackers also posted a “manifesto” demanding Avid Life take Ashley Madison offline permanently.¹⁹ If Avid Life did not comply with its demands, Impact threatened to “release all customer records, including profiles with customers’ secret sexual fantasies and matching credit card transactions, real names and addresses, and employee documents and emails.”²⁰ Less than one month after making its demands known, Impact made good on its threat and posted almost ten gigabytes of stolen data to the “dark web” in a massive data dump.²¹

16. LIFE IS SHORT, HAVE AN AFFAIR, Registration No. 3,745,718.

17. Krebs, *supra* note 6. Ashley Madison allows people to first register as a guest for free. *Frequently Asked Questions*, *supra* note 1. Potential users first tell the site what kind of affair they are looking for, then describe themselves and their general sexual behavior limits by choosing prepopulated choices from a series of dropdown lists. Julie Bort, *I Spent a Month on Infidelity Dating Site Ashley Madison and Was Pleasantly Surprised by How Nice it Was*, BUS. INSIDER (Dec. 17, 2013, 9:25 PM), <http://www.businessinsider.com/how-to-use-cheating-site-ashley-madison-2013-12?op=1>. Next, users go through a series of prompts where they upload a profile photo, write a description of what they are looking for in an affair, provide a “pretty detailed list of [their] sexual tastes,” and describe their ideal partner. *Id.*

18. Krebs, *supra* note 6 (noting Impact also leaked “maps of internal company servers, employee network account information, company bank account data and salary information”).

19. *Id.* The “manifesto” stated “Avid Life Media has been instructed to take Ashley Madison . . . offline permanently in all forms.” *Id.*

20. *Id.*

21. Kim Zetter, *Hackers Finally Post Stolen Ashley Madison Data*, WIRED (Aug. 18, 2015, 5:55 PM), <http://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley-madison-data/>. Impact said its decision to publicize the stolen information was in response to Avid Life lying to its customers when it offered a \$19 service allowing members to permanently erase their profile information. Krebs, *supra* note 6. The hackers claimed the information Avid Life promised to remove—including users’ real names—was not actually deleted. *Id.*

1. “Christmas in September”²²

Since Impact’s data dump of some thirty-two million names, emails, sexual preferences, and other data about alleged customers of Ashley Madison, class action suits against Avid Life have been popping up in Federal District Courts around the country.²³ By the end of 2015, about a dozen class action lawsuits had been filed in the United States against Avid Life—including several in California, Missouri, Texas, and Arkansas.²⁴ Allegations included breach of contract, negligence, and violation of various state and privacy laws.²⁵ One lawyer described it as “Christmas in September” for the legal industry.²⁶

In California, plaintiffs claimed Avid Life did not “take appropriate measures to prevent hackers from accessing clients’ sensitive private details.”²⁷ Lawyers in Texas specifically alleged that Avid Life “should have known about vulnerabilities in their computer systems—because [they had] been warned about them.”²⁸

22. Malm, *supra* note 8.

23. Gina Smith, *Ashley Madison Class Action Suits Hit US Courts: Full Complaints Here*, NEW DOMAIN (Aug. 25, 2015), <http://anewdomain.net/2015/08/25/ashley-madison-class-action-suits-read-full-complaints-here/>. The first Ashley Madison class actions were not filed in the U.S. *Id.* Instead, the first lawsuits were actually filed in Canada, where Avid Life is based. *Id.* This Note will not address the legitimacy of the Canadian lawsuits.

24. Jeff John Roberts, *Ashley Madison Victim Must Identify Himself, Judge Rules*, FORTUNE (Dec. 15, 2015, 10:36 AM), <http://fortune.com/2015/12/15/ashley-madison-john-doe/>. See also Ross, *supra* note 7.

25. Alex Johnson, *Ashley Madison Faces Multiple Suits Seeking More Than a Half-Billion Dollars*, NBC NEWS (Aug. 26, 2015, 2:45 PM), <http://www.nbcnews.com/news/us-news/ashley-madison-faces-multiple-suits-seeking-more-half-billion-dollars-n415281>.

26. Malm, *supra* note 8.

27. Ross, *supra* note 7. One Los Angeles lawsuit also claims Avid Life caused “emotional damage by failing to adequately protect personal and financial information from theft.” *Ashley Madison Sued for Emotional Distress in Potential Class-Action Lawsuit*, GUARDIAN (Aug. 25, 2015, 3:21 AM), <http://www.theguardian.com/technology/2015/aug/25/man-sues-ashley-madison-for-emotional-distress-in-potential-class-action-lawsuit>. One California lawsuit alleges eight causes of action: negligence, negligent infliction of emotional distress, violation of California’s Unfair Competition Law, invasion of privacy, violation of California’s Customer Records Act, breach of implied contract, bailment, and conversion. Class Action Complaint at 8–15, *Doe v. Avid Life Media, Inc.*, No. 2:15-cv-06405 (C.D. Cal. filed Aug. 21, 2015). Another alleges seven: violations of state data breach notification statutes, violations of state consumer protection laws, violation of the California Customer Records Act, breach of implied contract, negligence, public disclosure of private facts, and breach of contract. Class Action Complaint at 18–36, *Doe v. Avid Life Media, Inc.*, No. 8:15-cv-01347 (C.D. Cal. filed Aug. 24, 2015).

28. Johnson, *supra* note 25. The Texas complaint alleges seven causes of action: violation of the federal Stored Communications Act, negligence, breach of implied contract, violation of Texas

In Missouri, an anonymous female plaintiff claimed she paid the nineteen-dollar fee for Ashley Madison to delete her account, however her personal information still appeared online in the data dump.²⁹ Joining the Missouri suit, two Canadian law firms filed a \$578 million class action lawsuit, also claiming Ashley Madison failed to protect its users' information.³⁰

Like many of the class action plaintiffs, an Arkansas plaintiff filed under the pseudonym John Doe.³¹ The choice is an understandable one because it attempts to hold on to any shred of privacy that the breach victims may have left. However, the federal judge in Arkansas rejected the plaintiff's request to remain anonymous.³² Seemingly adding insult to injury, the judge gave the plaintiff about a week to add his name.³³ If the plaintiff refused to disclose his identity in his complaint, the judge would permit Ashley Madison to dismiss the lawsuit.³⁴

2. *Suicides Following the Ashley Madison Breach*

The data exposed in the Ashley Madison breach includes the names of millions of Ashley Madison members,³⁵ and the lawsuits against Avid Life cover a wide spectrum of claims and damages.³⁶ In a few cases, the damages extend to wrongful death damages because

deceptive trade practice laws, breach of contract, intentional infliction of emotional distress, and violation of Texas identity theft enforcement protection laws. Class Action Complaint at 14–25, *Doe v. Avid Life Media, Inc.*, No. 3:15-cv-02750 (N.D. Tex. filed Aug. 21, 2015).

29. Tanya Basu, *Ashley Madison Faces \$578 Million Class Action Lawsuit*, TIME (Aug. 23, 2015), <http://time.com/4007374/ashley-madison-578-million-lawsuit-canada/>. There are just five allegations in the Missouri complaint: violation of the federal Stored Communications Act, negligence, breach of implied contract, violation of the Missouri Merchandising Practices Act, and breach of contract. Class Action Complaint at 10–18, *Doe v. Avid Life Media, Inc.*, No. 4:15-cv-01132 (E.D. Mo. filed July 22, 2015).

30. *Ashley Madison Faces Huge Class-Action Lawsuit*, BBC NEWS (Aug. 23, 2015), <http://www.bbc.com/news/business-34032760> (reporting that two Canadian firms brought action against Avid Life and that the firms are “acting on behalf on [sic] ‘all Canadians’ affected by the breach”). The Canadian firms issued a statement saying that the suit will not seek damages from the hackers who leaked the information. Basu, *supra* note 29.

31. Roberts, *supra* note 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. Segall, *supra* note 8.

36. See discussion *supra* Section I.A.1.

those whose names were exposed committed suicide, likely as a result of the data breach disclosures.³⁷ In one tragic story, John Gibson, a member whose name appeared in the list of stolen data, was a married Louisiana pastor with two children.³⁸ Just six days after the data dump, Gibson committed suicide, mentioning Ashley Madison in his suicide note.³⁹

In another story, Captain Michael Gorhum was a twenty-five year veteran of the San Antonio Police Department.⁴⁰ Shortly after his official police email address was published on a cop-hating blog in a “purported list of Ashley Madison users,”⁴¹ Gorhum committed suicide, shooting himself in his church parking lot.⁴² At least two other suicides have been reportedly linked to the Ashley Madison breach.⁴³

B. Data Breach Class Actions Are Historically Unsuccessful

Most hacking activity goes largely unnoticed by the media.⁴⁴ In fact, in order for a breach to reach “public awareness,” a hacker has to make a significant mistake that leads to getting caught, make a demand of money or other assets, or simply seek a platform to air grievances.⁴⁵ For every breach that becomes public knowledge, there

37. *Id.*

38. Segall, *supra* note 8.

39. *Id.* In his suicide note, Gibson talked about having his name on the Ashley Madison list and said that he was “just very, very sorry.” *Id.* Gibson’s wife said, “for John, it carried such a shame,” and that she believed he was “likely worried he’d lose his job.” *Id.* Avid Life issued the following statement in response: “Dr. Gibson’s passing is a stark, heart-wrenching reminder that the criminal hack against our company and our customers has had very real consequences for a great many innocent people.” *Id.*

40. Shekhar Bhatia, *EXCLUSIVE: ‘Ashley Madison’ Suicide Cop Killed Himself After Police-Hating Website Claimed His Email Address Was Among Members Even Though it Wasn’t Actually on Leaked List*, DAILY MAIL (Aug. 27, 2015, 3:57 PM), <http://www.dailymail.co.uk/news/article-3213302/Ashley-Madison-suicide-cop-NOT-leaked-list-cop-hating-website-published-email-address-member-took-life.html>.

41. Bhatia, *supra* note 40.

42. *Id.*

43. Malm, *supra* note 8. Canadian police reported on two alleged Ashley Madison suicides, but did not provide further information about the deaths. Chris Baraniuk, *Ashley Madison: ‘Suicide’ Over Website Hack*, BBC NEWS (Aug. 24, 2015), <http://www.bbc.com/news/technology-34044506>.

44. See John McAfee, *How the Most Damaging Hack in Cyber History Was Met with Little Notice*, SILICON ANGLE (June 14, 2015), <http://siliconangle.com/blog/2015/06/04/how-the-most-damaging-hack-in-cyber-history-was-met-with-little-notice/>.

45. *Id.*

are an estimated 100 that go undetected.⁴⁶ That said, when a breach is publicly exposed, lawsuits often follow.⁴⁷

A data breach is defined as “an incident in which an individual name plus a Social Security number, driver’s license number, medical record or financial record (credit/debit cards included) is potentially put at risk because of exposure.”⁴⁸ The number of data breaches and the number of records compromised in a single breach were on record pace at the time of the Ashley Madison hack.⁴⁹ But, there had been several significant data breaches in prior years.⁵⁰

In 2009, Heartland Payment Systems announced the “largest data breach ever to affect an American company” compromising 130 million credit and debit cards.⁵¹ Then, in December 2013 and January 2014, Target’s breaches affected as many as 110 million people.⁵² Other significant breaches include Sony’s, affecting 102 million;⁵³ Home Depot’s, fifty-six million;⁵⁴ and TJX Companies Inc.’s,

46. *Id.*

47. *See, e.g., In re Zappos.com, Inc.*, No. 3:12-CV-00325-R CJ-VPC, 2015 WL 3466943, at *1 (D. Nev. June 1, 2015); *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500, at *1 (N.D. Ill. July 14, 2014); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 953 (S.D. Cal. 2014).

48. Roy Urrico, *The 10 Worst Data Breaches of 2015 (So Far)*, CREDIT UNION TIMES (July 7, 2015), <http://www.cutimes.com/2015/07/07/the-10-worst-data-breaches-of-2015-so-far?page=1>.

49. *Id.*

50. Elizabeth Palmero, *10 Worst Data Breaches of All Time*, TOM’S GUIDE (Feb. 6, 2015, 7:00 AM), <http://www.tomsguide.com/us/biggest-data-breaches,news-19083.html>. *See, e.g., Palkon v. Holmes*, No. 2:14-CV-01234, slip op. at 1 (D.N.J. Oct. 20, 2014).

51. Palmero, *supra* note 50.

52. *Id.* *See also* Gregory Wallace, *Target Credit Card Hack: What You Need to Know*, CNN MONEY (Dec. 23, 2013, 11:43 AM), <http://money.cnn.com/2013/12/22/news/companies/target-credit-card-hack/>. In December 2013, Target confirmed that the data breach affected forty million credit and debit card accounts. Brian Krebs, *Sources: Target Investigating Data Breach*, KREBS ON SEC. (Dec. 13, 2013, 2:33 PM), <http://krebsonsecurity.com/2013/12/sources-target-investigating-data-breach/>. In January 2014, Target announced that the personal information of seventy million customers had also been compromised. Palmero, *supra* note 50.

53. *Data Breaches: A Year in Review*, PRIVACY RTS. CLEARINGHOUSE (Dec. 16, 2011), <https://www.privacyrights.org/data-breach-year-review-2011>.

54. Palmero, *supra* note 50. *See also* Ben Elgin, Michael Riley, & Dune Lawrence, *Home Depot Hacked After Months of Security Warnings*, BLOOMBERG BUS. (Sept. 18, 2014, 6:12 PM), <http://www.bloomberg.com/bw/articles/2014-09-18/home-depot-hacked-wide-open>; Jose Pagliery, *Home Depot Confirms Months-Long Hack*, CNN MONEY (Sept. 9, 2014, 7:10 AM), <http://money.cnn.com/2014/09/08/technology/security/home-depot-breach/>; Andrew Soergel, *53 Million Email Addresses Stolen in Home Depot Attack*, U.S. NEWS & WORLD REP. (Nov. 7, 2014, 11:24 AM), <http://www.usnews.com/news/newsgram/articles/2014/11/07/53-million-customer-email-addresses-leaked-in-home-depot-hack>.

forty-six million.⁵⁵ Class action litigation rapidly follows large data breach cases.⁵⁶

Consumers affected by data breaches typically seek a remedy as a class because the expected damages for any one individual are very low.⁵⁷ Most cases follow the same pattern: “a consumer, suing on behalf of a putative class, alleges that a company breached its duty to customers by allowing a data breach to occur and confidential information to fall into the hands of third parties.”⁵⁸ The consumer commonly alleges injuries of “(1) the cost of fraudulent transactions, (2) the increased risk of future identity theft resulting from the breach, and (3) the burden of closing affected accounts and opening new ones.”⁵⁹ Almost all of these class actions are brought as negligence claims.⁶⁰

Unfortunately, data breach class actions are notoriously unsuccessful.⁶¹ Many courts find that data breach class action plaintiffs fail to satisfy the injury-in-fact element necessary for constitutional standing.⁶² These courts reason that the alleged injuries

55. Mark Jewell, *T.J. Maxx Theft Believed Largest Hack Ever*, NBC NEWS, http://www.nbcnews.com/id/17871485/ns/technology_and_science-security/t/tj-maxx-theft-believed-largest-hack-ever/#.V-2_60bYilh (last updated Mar. 30, 2007, 11:17 AM). TJX is the parent company of several major retail brands, including Marshalls, T.J. Maxx and HomeGoods. *Id.*

56. J. Thomas Richie, *Data Breach Class Actions*, 44 BRIEF 12, 14 (2015) (discussing the 2014 statistics on data breach preparedness). A 2014 study by the Ponemon Institute reported that 43% of respondents said their companies experienced a data breach affecting more than 1,000 records, an increase of 10% from 2013. PONEMON INST. LLC, IS YOUR COMPANY READY FOR A BIG DATA BREACH? THE SECOND ANNUAL STUDY ON DATA BREACH PREPAREDNESS 3 (2014), <http://www.experian.com/assets/data-breach/brochures/2014ponemon-2nd-annual-preparedness.pdf>.

57. Richie, *supra* note 56, at 14.

58. *Id.*

59. *Id.*

60. *Id.* When a person negligently causes injury or damage to the person or property of another, he may be liable in a tort action. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 120 (2d ed. 2011). Negligence is “the failure to exercise reasonable care to avoid injury or damage to another person or property.” KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 51 (4th ed. 2012). To establish a *prima facie* case for negligence, a plaintiff must produce evidence of all four elements of the tort: duty, breach, causation, and damages. *Brookview Holdings, LLC v. Suarez*, 645 S.E.2d 559, 562 (Ga. Ct. App. 2007).

61. Richie, *supra* note 56, at 14.

62. *Id.* at 14–15 (stating the first major fight in most data breach class actions is “whether the plaintiff has suffered an injury-in-fact sufficient to confer standing”). Constitutional standing “requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *In re Zappos.com, Inc.*, No. 3:12-CV-00325-RCJ-VPC, 2015 WL 3466943, at *3 (D. Nev. June 1, 2015) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561

are not “actual or imminent,” but are instead “conjectural or hypothetical.”⁶³ Those that overcome the constitutional standing hurdle still face a high likelihood of dismissal because the alleged injury is not “sufficient to satisfy the damages requirement of a tort claim.”⁶⁴ For example, while the Seventh Circuit found standing was satisfied in *Pisciotta v. Old National Bancorp*, ultimately the plaintiff’s claims were dismissed “for want of damages” under the controlling state law.⁶⁵ In *Krottner v. Starbucks Corp.*, the Ninth Circuit also found standing but dismissed “for lack of tort-element damages.”⁶⁶ *Moyer v. Michaels Stores, Inc.* saw the same result.⁶⁷

C. Wrongful Death by Suicide

People usually move on with life after being injured by someone else’s negligence.⁶⁸ Unfortunately, a few find the pain of the injury unbearable, and instead take their own lives.⁶⁹ Under these circumstances, a suicide can turn a personal injury action into a wrongful death action.⁷⁰ In every tort suit, a plaintiff must not only prove that the defendant breached the standard of care, but also that “the defendant’s act or omission caused the injury or damage for which the plaintiff claims compensation.”⁷¹ This latter element establishes the legal cause, also known as the “factual cause”⁷² or the

U.S. 139, 140 (2010)). *See also*, U.S. CONST. art. III, § 2, cl. 1. Data breach class action issues associated with causation and redressability are outside the scope of this Note.

63. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *In re Zappos.com*, 2015 WL 3466943, at *3 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 960 (S.D. Cal. 2014). Data breach class action issues associated with causation and redressability are outside the scope of this Note.

64. *Richie*, *supra* note 56, at 15.

65. *Pisciotta v. Old Nat’l. Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007); *Richie*, *supra* note 56, at 15.

66. *Krottner v. Starbucks Corp.*, 406 F. App’x 129, 131 (9th Cir. 2010); *Richie*, *supra* note 56, at 15.

67. *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500, at *7 (N.D. Ill. July 14, 2014) (“Here, as in *Pisciotta*, Plaintiffs’ claims must be dismissed because they have failed to plead a required element of their Illinois law claims for breach of contract and consumer fraud: actual monetary damages.”).

68. Matthew P. Smith, *Tragic, But is it a Wrongful Death? Tips for Defending a Suicide Case*, 40 BRIEF 60, 60 (2015).

69. *Id.*

70. *Id.*

71. ABRAHAM, *supra* note 60, at 116.

72. DOBBS, HAYDEN & BUBLICK, *supra* note 60, § 186.

“cause-in-fact,”⁷³ of the harm.⁷⁴ Further, a tort plaintiff must produce evidence from which it can be reasonably inferred that the defendant’s conduct was the proximate cause of the plaintiff’s injuries.⁷⁵ Proximate cause operates to limit the scope of a defendant’s liability even after duty and breach have been established.⁷⁶

In order to establish liability and recover damages, wrongful death plaintiffs must prove that the defendant’s wrongful conduct was the proximate cause of their loved one’s death.⁷⁷ If the conduct did not cause the death directly, then a chain of causation must be established connecting the defendant’s conduct to the subsequent death.⁷⁸ Generally, the defendant will not escape liability if any of the intervening events that occurred in the chain were “natural and foreseeable consequences.”⁷⁹

Suicide is almost categorically considered a deliberate act that “breaks the chain of causation between the defendant’s wrongful act and the death.”⁸⁰ Although most suicide cases reject liability,⁸¹ some permit it where “the suicide was foreseeable and the defendant had a special duty of care to the decedent and could have acted to prevent it, or where the suicide was a psychotic act or the product of an ‘irresistible impulse.’”⁸²

73. ABRAHAM, *supra* note 60, at 116.

74. *Id.*

75. *Gentry v. Douglas Hereford Ranch, Inc.*, 962 P.2d 1205, 1209 (Mont. 1998) (quoting *Kitchen Krafters v. Eastside Bank*, 789 P.2d 567, 574 (Mont. 1990) (“The causation element requires proof of both cause in fact and proximate cause.”)). However, in cases where there is no issue of an intervening cause, the causation element is satisfied. *Id.*

76. ABRAHAM, *supra* note 60, at 141.

77. Smith, *supra* note 68, at 60.

78. *Id.*

79. *Id.*

80. *See Edwards v. Tardif*, 692 A.2d 1266, 1269 (Conn. 1997) (“As a general rule, negligence actions seeking damages for the suicide of another will not lie because the act of suicide is considered a deliberate, intentional and intervening act which precludes a finding that a given defendant, in fact, is responsible for the harm.”). *See generally* C.T. Drechsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R.2d 751 (1950).

81. DOBBS, HAYDEN & BUBLICK, *supra* note 60, § 214. Suicide is often held as the “sole proximate cause” of a plaintiff’s death. *Id.* Except for limited exceptions, a defendant’s negligent acts that lead to suicide by a plaintiff are categorically excluded from liability. *Id.*

82. Smith, *supra* note 68, at 60.

The first exception covers certain circumstances where a state imposes a special duty of care on a defendant to prevent a suicide.⁸³ If the defendant had “physical custody and substantial control over the decedent,” or where the defendant had “special training or expertise in mental illness” and “sufficient control over the decedent to prevent the suicide,” this exception may apply.⁸⁴ Courts focus on “whether the defendant could reasonably have foreseen that the decedent might harm himself” because of the negligent act, and whether the defendant had the opportunity to prevent the suicide and did not take action to do so.⁸⁵

The second exception, which is widely recognized in the majority of jurisdictions, is the “irresistible impulse” exception.⁸⁶ Under this exception, a defendant is liable for the suicide in two scenarios.⁸⁷ First, the defendant may be liable if “the decedent did not understand the nature of the suicidal act.”⁸⁸ Second, the defendant may be liable “if the decedent knew the act would cause his or her death but, as a result of a mental illness caused by the defendant’s negligent act, was unable to resist committing suicide.”⁸⁹ In other words, if the defendant’s conduct caused the mental illness that culminated in the suicide and the decedent could not resist the urge to commit suicide, some courts will likely find the defendant liable.

83. *Id.*

84. *Id.* Under this exception, common institutional defendants include hospitals and jails while individual defendants could be a physician, psychotherapist or law enforcement officer. *Id. See, e.g.,* Haworth v. State, 592 P.2d 820, 824 (1979) (holding that the “state, by reason of the special relationship created by its *custody* of [the] prisoner, is under a duty to the prisoner to take reasonable action to protect the prisoner against unreasonable risk of physical harm.”).

85. Smith, *supra* note 68, at 60.

86. *Id.* Courts apply this exception if “the defendant’s negligence caused insanity in the victim, who then committed suicide as a result of that insanity.” DOBBS, HAYDEN & BUBLICK, *supra* note 60, § 214.

87. Sindler v. Litman, 887 A.2d 97, 109 (Md. 2005). A defendant is liable for the suicide if the defendant’s negligent conduct causes the insanity of the decedent and “(1) the insanity prevents the person from understanding the nature of the act and the certainty of harm or (2) the insanity makes it impossible to resist an ‘uncontrollable impulse’ that deprives the person of the capacity to govern the person’s own conduct in a reasonable manner.” *Id. See also* RESTATEMENT (SECOND) OF TORTS § 455 (AM. LAW INST.1965).

88. *Id.*

89. *Id.*

D. Expansion of Torts

Over the years, tort law liability has evolved to capture injuries outside of the previously established scope.⁹⁰ For example, the tort of battery, when first established, focused on the presence or absence of a physical touching.⁹¹ That tort evolved to encompass a much wider range of situations, extending liability for even slight touching to eventually finding no physical contact was necessary for a valid battery claim. One of the earliest cases, *Cole v. Turner* (1704), involved trespass to the person.⁹² *Cole* held even the slightest touching of another in anger constitutes a battery.⁹³

Over two centuries later, the tort of battery expanded further to adequately protect a plaintiff, even where there was no physical contact.⁹⁴ In *Fisher v. Carrousel Motor Hotel, Inc.*, Fisher, a NASA mathematician, was invited to a private club located in the defendant's hotel to attend a meeting regarding telemetry equipment.⁹⁵ After the morning session, Fisher was standing in the lunch buffet line with approximately thirty other guests who were also attending the meeting.⁹⁶ Just as Fisher was about to be served, Flynn, an employee of the hotel and the manager of the private club, approached Fisher, snatched the plate from Fisher's hand, and shouted at him using offensive comments and derogatory racial language.⁹⁷ Fisher testified "he was not actually touched," but that "he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates."⁹⁸

90. See *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) ("However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.").

91. *Cole v. Turner*, 522 U.S. 1056, 1056 (1706).

92. *Id.*

93. *Id.* The case provides no facts, but instead gives a recitation of the existing law. *Id.*

94. See *Fisher*, 424 S.W.2d at 629 ("However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.").

95. *Id.* at 628.

96. *Id.*

97. *Id.* at 628–29.

98. *Id.* at 629 (stating that Fisher did not testify that he suffered fear or apprehension of physical injury).

The jury found for Fisher, stating that Flynn “forceably [sic] dispossessed plaintiff of his dinner plate” and “shouted in a loud and offensive manner” and therefore subjected Fisher to “humiliation and indignity.”⁹⁹ But, the trial court rendered judgment for the defendants notwithstanding the verdict,¹⁰⁰ and the Court of Civil Appeals affirmed holding that “there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact.”¹⁰¹

On Appeal, the Supreme Court of Texas “refused to adopt the ‘new tort’ of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery.”¹⁰² Instead, relying on precedent,¹⁰³ the *Fisher* court held “that the forceful dispossession of plaintiff Fisher’s plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.”¹⁰⁴ *Fisher* illustrates how courts can use existing precedent to develop new claims, which should happen in cases like the Ashley Madison breach.

II. ANALYSIS

A. *Ashley Madison is Not Typical of Data Breach*

As discussed in Section I.B. *supra*, for a number of reasons, data breach class actions have enjoyed little success.¹⁰⁵ Where a data

99. *Id.*

100. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 628 (Tex. 1967).

101. *Id.* at 629.

102. *Id.* at 630. *See also* *Harned v. E-Z Fin. Co.*, 254 S.W.2d 81, 85 (Tex. 1953) (concluding that “appellees’ ‘new tort’ is condemned by the general rule announced by this court in [] many [] cases, and that it is not within any of the rule’s recognized exceptions”).

103. *Fisher*, 424 S.W.2d at 629. (“*In S. H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex. Civ. App. 1932, no writ), the defendant was held to have committed ‘an assault or trespass upon the person’ by snatching a book from the plaintiff’s hand. The jury findings in that case were that the defendant ‘dispossessed plaintiff of the book’ and caused her to suffer ‘humiliation and indignity.’”).

104. *Id.* at 630.

105. *Richie*, *supra* note 56, at 14. Plaintiffs often struggle to satisfy class certification and also have a hard time “identify[ing] an injury that creates standing and gives rise to a cause of action.” *Id.*

breach compromises financial information, “[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy.”¹⁰⁶ The Ashley Madison breach, however, was not conducted with the goal of acquiring confidential financial information.¹⁰⁷ Instead, it was the “second high-profile attack on a no-strings-attached solicitation site” in 2015, both attacks the result of hacker groups with an “ax to grind.”¹⁰⁸ In addition, Ashley Madison plaintiffs allege injuries outside of “increased risk of future identity theft” typically claimed by data breach class actions.¹⁰⁹ Therefore, in claims like those brought by people affected by the Ashley Madison breach, we are seeing a different category of data being compromised with a different motivation for the breach resulting in different types of damages.

1. *Old-School Data Breaches*

Data breaches that compromise financial information are almost commonplace, and the class action litigation that follows is well-documented.¹¹⁰ Consumer plaintiffs affected by the Heartland Payment System data breach asserted claims for negligence, breach of contract, and various state and federal statutory violations.¹¹¹

106. *Pisciotta v. Old Nat’l. Bancorp*, 499 F.3d 629, 639 (7th Cir. 2007) (finding an increased risk of identity theft satisfied Constitutional requirements but did not establish sufficient damages under Indiana law).

107. Heather Havrilesky, *Are Broken Marriage Vows Grounds for Blowing Up Someone’s Life?*, N.Y. MAG. (July 20, 2015, 6:10 PM), <http://nymag.com/thecut/2015/07/cheaters-deserve-to-have-their-lives-ruined.html>. The Ashley Madison hackers claimed to be “alerting the public to the fact that the site’s \$19 ‘full delete’ option, which purports to allow customers to permanently delete their records, doesn’t actually do what it claims.” *Id.*

108. Malm, *supra* note 8; McAfee, *supra* note 44. While Ashley Madison’s breach may be the most widely publicized, it is not the only website of its kind to experience this kind of breach. Earlier in 2015, AdultFriendFinder (AFF)—another adult dating site—was also the victim of a massive data breach. David Goldman & Jose Pagliery, *Adult Dating Site Hack Exposes Sexual Secrets of Millions*, CNN MONEY (May 22, 2015, 2:21 PM), <http://money.cnn.com/2015/05/22/technology/adult-friendfinder-hacked/>. After AFF failed to comply with a hacker’s demands to pay \$100,000, the hacker published the “sexual preferences, fetishes and secrets” of over 3.5 million people. *Id.*

109. See discussion *supra* Section I.A.1.

110. See discussion *supra* Section I.B.

111. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1048 (S.D. Tex. 2012).

Victims of Sony's 2011 data breach alleged fifty-one independent causes of action categorized into nine sub-groups including negligence, negligent misrepresentation, breach of express and implied warranty, unjust enrichment, and various state and federal statutory violations.¹¹²

Zappos.com plaintiffs contended that their injury stemmed from “an increased risk that they will become victims of identity theft or other fraudulent activities because their personal information ha[d] been jeopardized.”¹¹³ However, none claimed they had actually suffered any harm yet, and “only three of the twelve named Plaintiffs had purchased credit monitoring services to protect against the allegedly increased threat of fraud.”¹¹⁴

With ninety-six percent of people recognizing its Bullseye logo,¹¹⁵ Target is the second-largest discount retailer in the United States.¹¹⁶ Few people cannot empathize with the millions of Target customers whose private information was compromised in its data breaches.¹¹⁷ The odds of identity theft and impaired credit ratings drastically increase for data breach victims.¹¹⁸ But this increased risk does not necessarily “mean Target customers have a cause of action in federal court.”¹¹⁹ In fact, the majority of the hacked Target customers were not expected to surpass the constitutional requirement of an actual injury.¹²⁰

112. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 959 (S.D. Cal. 2014).

113. *In re Zappos.com, Inc.*, No. 3:12-CV-00325-RCJ-VPC, 2015 WL 3466943, at *2 (D. Nev. June 1, 2015).

114. *Id.*

115. *10 Things You Didn't Know About Target*, TARGET (Aug. 25, 2012), <https://corporate.target.com/article/2012/08/10-things-you-didnt-know-about-target>.

116. *Target Corporation*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/Target_Corp.aspx (last visited Oct. 03, 2016).

117. Alison Frankel, *Why (Most) Consumer Data Breach Class Actions Vs Target Are Doomed*, REUTERS BLOG (Jan 13, 2014), <http://blogs.reuters.com/alison-frankel/2014/01/13/why-most-consumer-data-breach-class-actions-vs-target-are-doomed/>. See generally Beth Pinsker & Mitch Lipka, *Factbox: How to Deal with Target's Data Breach*, REUTERS BLOG (Jan 10, 2014, 7:20 PM), <http://www.reuters.com/article/2014/01/11/us-credit-theft-tips-idUSBREA0915320140111>.

118. Frankel, *supra* note 117.

119. *Id.*

120. *Id.* Target was predicted to be subject to some liability for its data breaches. *Id.* Some of the cases against the company were class actions by financial institutions that incurred costs associated with informing customers that their debit cards had been compromised, closing the accounts of some

2. Ashley Madison Breach Victims

Many predicted the Ashley Madison data dump would have significant repercussions,¹²¹ but this is the first time suicides have been linked to a data breach.¹²² Canadian police called it “one of the largest data breaches in the world,” and projected it would “affect[] all of us.”¹²³ The social impact of this breach was unprecedented.¹²⁴ Families, children, wives, and husbands were all at risk in the fallout.¹²⁵

An increased risk of identity theft—common to breaches targeted at financial information¹²⁶—is quite different than the consequence of having private indiscretions posted online for everyone with internet access to see.¹²⁷ The dumped Ashley Madison data included names, addresses, and phone numbers submitted by the site’s users as well as descriptions of what members were seeking.¹²⁸ Sharing this kind of data online essentially thrust the Ashley Madison users into public eye, inviting the public shaming that ensued.¹²⁹ The data dump increased the likelihood that the users’ private decisions to participate

customers, and issuing new cards. *Id.* Because those cases involved “real-money claims,” they were more challenging for Target to defeat with threshold defenses. *Id.* But customer claims are different due to the “fatal intersection between the 2013 *Clapper* decision and the Class Action Fairness Act.” Frankel, *supra* note 117.

121. Erica Schwiegershausen, *Police Link Two Suicides to Ashley Madison Hack*, N.Y. MAG. (Aug. 24, 2015, 1:14 PM), <http://nymag.com/thecut/2015/08/police-link-two-suicides-to-ashley-madison-hack.html#>.

122. See Maria Coder, *New Orleans Pastor Allegedly Outed in Ashley Madison Breach Commits Suicide*, PEOPLE (Sept. 9, 2015, 1:10 PM), <http://www.people.com/article/ashley-madison-pastor-new-orleans-allegedly-commits-suicide-john-gibson>.

123. Rob Gillies, *Police: Ashley Madison Hack Might Have Led to Suicides*, ASSOCIATED PRESS (Aug. 24, 2015, 8:50 PM), <http://bigstory.ap.org/article/51c042560d8d489a8814a285a1c13f76/cheating-site-ashley-madison-offers-reward-info-hack>. Other than reporting that the Ashley Madison breach has “triggered extortion crimes and led to two unconfirmed reports of suicides,” Toronto police have not provided any further details. *Id.*

124. See Coder, *supra* note 122.

125. See *id.*; Gillies, *supra* note 123.

126. Palmero, *supra* note 50.

127. David Weldon, *Ashley Madison Breach Shows Hackers May Be Getting Personal*, CIO (Sept. 30, 2015, 5:43 PM), <http://www.cio.com/article/2987830/online-security/ashley-madison-breach-shows-hackers-may-be-getting-personal.html> (stating “really personal information such as the potentially embarrassing kind stored on a dating site or an ‘adult-oriented website . . . could be a whole new set of worries”).

128. Zetter, *supra* note 21.

129. Havrilesky, *supra* note 107.

in Ashley Madison would impact “their ability to find future employment, secure custody of their kids, and have any kind of peace of mind about love, friendships and family relationships moving forward”¹³⁰

One Ashley Madison member was looking for “someone who isn’t happy at home or just bored and looking for some excitement.”¹³¹ It is not difficult to understand the embarrassment of such intimate details becoming public knowledge or to anticipate the impending “wrath of angry partners” who were victims of the cheating Ashley Madison users.¹³² Although Ashley Madison users’ financial information was also comprised in the breach, the public embarrassment and personal consequences go beyond usual injuries caused by conventional data breaches.

Following the data dump, news stories announced that the Ashley Madison breach was ruining lives.¹³³ For example, David Browne, district school superintendent of Randolph, New Jersey, “lost his job, his wife, his mind, and possibly his freedom—thanks to the Ashley Madison data breach.”¹³⁴ Browne confessed to his wife and the school board that he had an account with the “infamous infidelity website” after the site was breached and the data was dumped.¹³⁵ Weeks after the data dump, Browne took a medical leave of absence

130. *Id.* (“This might be a good day for us to rethink our attitudes about victims of hacking . . . because the mob is coming for us, too.”).

131. Zetter, *supra* note 21. This member provided the name and phone number of a person employed by the Customs and Immigration Union of Canada. *Id.* The profile went on to say “I love it when I’m called and told I have 15 minutes to get to someplace where I’ll be greeted at the door with a surprise—maybe lingerie, nakedness. I like to ravish and be ravished . . . I like lots of foreplay and stamina, fun, discretion, oral, even willingness to experiment—*smile*.” *Id.*

132. *Id.*

133. See, e.g., Jose Pagliery, *The Ashley Madison Hack Ruined My Life*, CNN MONEY (Aug. 21, 2015, 5:41 PM), <http://money.cnn.com/2015/08/21/technology/ashley-madison-ruined-lives/>. The Ashley Madison hack is “exposing affairs, confirming suspicions, and keeping cheaters up at night in cold sweats.” *Id.* Paula Mooney, *David Browne’s Ashley Madison Hack Demise: \$167,500-Per-Year Job Lost as Browne Gets Divorced, Burns House*, INQUISITR (Dec. 6, 2015), <http://www.inquisitr.com/2614178/david-brownes-ashley-madison-hack-demise-167500-per-year-job-lost-as-browne-gets-divorced-burns-house/>.

134. Dean Balsamini, *Man Literally Goes Down in Flames After Ashley Madison Hack*, N.Y. POST (Dec. 6, 2015, 6:02 AM), <http://nypost.com/2015/12/06/ashley-madison-hack-steals-mans-job-wife-and-mind/>.

135. *Id.*

and was eventually replaced by an acting superintendent.¹³⁶ Less than a month later, Browne set his home on fire using an accelerant.¹³⁷ Rescuers responded to find Browne lying on the ground outside, with numerous injuries.¹³⁸ Neighbors commented online that Browne slit his wrists before starting the blaze.¹³⁹ The day of the fire, Brown was placed on paid administrative leave and resigned two weeks later.¹⁴⁰ On his fourteenth wedding anniversary the following month, his wife filed for divorce, citing “irreconcilable differences . . . which have caused a total breakdown of the marriage.”¹⁴¹ She is seeking custody of their ten- and twelve-year-old children.¹⁴² David Browne’s story is one of many.

In addition to news reports, several people directly affected by the Ashley Madison breach quickly spoke out.¹⁴³ In one story, a well-educated businesswoman in her forties, who was in the midst of finalizing her divorce with her husband, said she was concerned about her finance job.¹⁴⁴ If her clients searched for her email address in any of the available Ashley Madison databases, she would be exposed and possibly even fired.¹⁴⁵ In another story, a neurophysiologist from Richmond, Virginia, stumbled across news of the Ashley Madison data breach while on a business trip.¹⁴⁶ She had been having marital issues and decided to plug in her husband’s email address.¹⁴⁷ After discovering her husband was a user on the site, she moved in with her parents until her husband moved out.¹⁴⁸

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Balsamini, *supra* note 134.

141. *Id.*

142. *Id.*

143. Pagliery, *supra* note 133. The identities and details of the individuals have been independently verified, but the victims were only willing to share their stories in the condition of anonymity. *Id.*

144. *Id.* “Ana’s” clients consist of couples and small businesses built on very personal relationships. *Id.*

145. Pagliery, *supra* note 133. “Ana” believes she had over fifty encounters on Ashley Madison—“everything ranging from ‘a benign flirtatious lunch’ to ‘three days in a hotel room and ordering room service.’” *Id.* Ashley Madison was her “playground.” *Id.*

146. *Id.*

147. *Id.*

148. Pagliery, *supra* note 133. Initially “Kimberly” asked her husband, “What do you know about this

Although data breach cases predictably allege negligence,¹⁴⁹ as do the Ashley Madison class actions,¹⁵⁰ the injuries suffered by the Ashley Madison breach victims fall outside the “increased risk of future identity theft” typically claimed by data breach class actions.¹⁵¹ Instead of the possibility of harm in the future, Ashley Madison victims have lost relationships, jobs, and even their own lives.¹⁵² These actual damages change the standing and tort damages analysis from the analysis typically seen in other data breach claims.

B. “Public Shaming in the Age of the Internet”¹⁵³

Public humiliation is not new.¹⁵⁴ The goal of public humiliation is the same today as it was centuries ago: “to dissuade the [target] and the public from committing further acts that could be deserving of such punishment by making a public example of the [individual].”¹⁵⁵ But, public humiliation is known to sometimes culminate in the death of the person targeted by the shaming.¹⁵⁶ The difference between an angry mob killing a prisoner centuries ago and a group bullying a person into taking her own life today is just technology. Internet shaming is modern public humiliation with medieval consequences.¹⁵⁷ In the age of social media, public shaming means mistakes are not permitted and forgiveness is not available.¹⁵⁸

website, Ashley Madison?” *Id.* He responded, “I read a little about how they had a hack.” *Id.* After she told him his email came up in the search, he admitted to using the site. *Id.* Even though “Kimberly” does not know the whole story yet, she said, “I’m done. Even if it’s just him getting on there looking. I don’t trust him.” *Id.*

149. See discussion *supra* Section II.A.1.

150. See discussion *supra* Section I.A.1.

151. See discussion *supra* Section I.A.1.

152. See discussion *supra* Section I.A.1.

153. Todd Leopold, *The Price of Public Shaming in the Internet Age*, CNN (Apr. 16, 2015, 12:37 PM), <http://www.cnn.com/2015/04/16/living/feat-public-shaming-ronson/>.

154. Larry Ray Palmer, *What is Public Humiliation?*, WISE GEEK, <http://www.wisegeek.com/what-is-public-humiliation.htm> (last modified Sept. 15, 2016) (defining public humiliation as, “a form of physical punishment or shaming that dates back to man’s early history”).

155. *Id.* Impact claimed that “cheating dirt-bags . . . deserve no [] discretion.” Heather Havrilesky, *Are Broken Marriage Vows Grounds for Blowing Up Someone’s Life?*, N.Y. MAG. (July 20, 2015, 6:10 PM), <http://nymag.com/thecut/2015/07/cheaters-deserve-to-have-their-lives-ruined.html>.

156. *Id.* “Although public humiliation was not generally intended to be a death sentence, sometimes, the mob justice mentality that took over created a situation in which the death of the prisoner occurred.” *Id.*

157. Amanda Hess, *The Shaming of Izzy Laxamana*, SLATE (June 12, 2015, 3:51 AM),

Public shaming does not discourage the behavior that prompted the shaming.¹⁵⁹ In fact, “civility” is far more persuasive.¹⁶⁰ But the phenomenon of internet shaming has created a substantial dialogue.¹⁶¹ The “personal consequences for people who have been shamed on Twitter, Facebook, and other social media” are apparent.¹⁶² Shaming is a form of “social control” where a person who has violated community norms is publicly criticized, avoided, or ostracized.¹⁶³

For example, thirteen-year-old Izzy Laxamana’s parents warned her not to use social media, and threatened to cut off her hair if she disobeyed.¹⁶⁴ After discovering what she had done, her father, Jeff, followed through on the threat.¹⁶⁵ Days later, Izzy jumped from a highway bridge and later died in the hospital.¹⁶⁶ Unfortunately, Izzy’s story is not the first of its kind.¹⁶⁷ The consequences of modern public shaming are emerging in a wide variety of circumstances.¹⁶⁸

http://www.slate.com/articles/technology/users/2015/06/izabel_laxamana_a_tragic_case_in_the_growing_genre_of_parents_publicly_shaming.html?wpsrc=kwfacebookdt&kw_0=35575&kw_4=277192&kw_1=195917; Jon Ronson, ‘Overnight, Everything I Loved Was Gone’: The Internet Shaming of Lindsey Stone, *GUARDIAN* (Feb. 21, 2015, 2:00 AM), <http://www.theguardian.com/technology/2015/feb/21/internet-shaming-lindsey-stone-jon-ronson>.

158. See Leopold, *supra* note 153.

159. See Libby Anne, *Is Shame a Productive Tactic for Affecting Change?*, *PATHEOS BLOG* (Jan. 9, 2013), <http://www.patheos.com/blogs/lovejoyfeminism/2013/01/lets-stop-shaming-men.html>.

160. *Id.*

161. See Eric Posner, *A Terrible Shame: Enforcing Moral Norms Without the Law is No Way to Create a Virtuous Society*, *SLATE* (Apr. 9, 2015, 11:14 AM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/04/internet_shaming_the_legal_history_of_shame_and_its_costs_and_benefits.html.

162. *Id.*

163. *Id.*

164. Hess, *supra* note 157.

165. *Id.* Izzy’s defiant act was sending a picture of herself—dressed in a sports bra and some leggings—to a boy. *Id.* Her father “cut her hair to her shoulders, leaving just one long strand untouched.” *Id.* He filmed the conversation where he asked if losing her hair was worth it, and she replied softly, “No.” *Id.* The next morning at school, the “new humiliating social media artifact—her father’s video—was . . . being passed from phone to phone.” *Id.*

166. Hess, *supra* note 157.

167. *Id.* Izzy’s story has been compared to a similar tale about a Christian martyr from the third-century, Christina of Bolsena, whose “father chopped off her hair when she denounce[d] his pagan religion.” *Id.* The only detail separating Izzy and Christina is that the two incidents occurred 800 years apart. *Id.*

168. See, e.g., Leopold, *supra* 153 (describing the social media outcry for American dentist Walter Palmer “to be shot and skinned” after he was determined to be the hunter behind the killing of the famous lion, Cecil, in Zimbabwe).

Remedial action to stop the shaming can be ineffective. Shortly before the Impact data-dump exposed the confidential information of Ashley Madison subscribers, Gawker—a blog that promotes itself as “the source for daily Manhattan media news and gossip”¹⁶⁹—posted a story publicly outing an executive, a married father of three, for soliciting a male escort.¹⁷⁰ Eventually the article was deleted and two editors quit in protest of the “unacceptable and unprecedented breach of the editorial firewall.”¹⁷¹ Despite the removal of the article, the damage had already been done.¹⁷² Although some argued that the executive was not a public figure, the Gawker article certainly made his private life public knowledge.¹⁷³ The same is true for Ashley Madison subscribers whose personal information was exposed in the Impact data-dump. Imposing consequences for shaming after the fact may do little to remedy some of the irreversible effects.

C. The “Dangerous” Link Between Bullying and Suicide¹⁷⁴

Suicide is defined as “the act of taking one’s own life on purpose,” but some of the most prevalent triggers linked to suicide are not self-imposed.¹⁷⁵ “Stressful life issues, such as serious financial or relationship problems,” as well as “bullying,” are well-recognized contributors to suicide.¹⁷⁶ Today, bullying is easier than ever because

169. *Gawker Editors Quit After Controversial Article Pulled*, YAHOO NEWS (July 20, 2015, 2:40 PM), <http://news.yahoo.com/gawker-editors-quit-controversial-article-pulled-184004932.html>.

170. Havrilesky, *supra* note 107.

171. *Gawker Editors Quit After Controversial Article Pulled*, *supra* note 169.

172. Havrilesky, *supra* note 107.

173. *Id.*

174. Katherine Bindley, *Bullying and Suicide: The Dangerous Mistake We Make*, HUFFINGTON POST (Feb. 2, 2012, 9:41 AM), http://www.huffingtonpost.com/2012/02/08/bullying-suicide-teens-depression_n_1247875.html.

175. See U.S. Dep’t of Health & Human Servs., Nat’l Insts. of Health, U.S. Nat’l Library of Med., *Suicide and Suicidal Behavior*, MEDLINE PLUS (Mar. 4, 2015), <https://www.nlm.nih.gov/medlineplus/ency/article/001554.htm> (listing bipolar disorder, borderline personality disorder, post-traumatic stress disorder, schizophrenia as common causes of suicide); *15 Common Causes of Suicide: Why do People Kill Themselves?*, MENTAL HEALTH DAILY (July 23, 2014), <http://mentalhealthdaily.com/2014/07/23/15-common-causes-of-suicide-why-do-people-kill-themselves/> (“Suicide is defined as the act of intentionally causing one’s own death.”).

176. U.S. Dep’t of Health & Human Servs. et al., *supra* note 175. See also *15 Common Causes of Suicide*, *supra* note 175 (stating a traumatic experience, bullying, relationship problems, and financial problems are among the top causes of suicide).

people who may have previously been accessible on a limited basis are now perpetually available at the fingertips of strangers through social media.¹⁷⁷ To exacerbate the issue, bullying by publicly shaming others for their personal choices has become wildly popular.¹⁷⁸

Although bullying and suicide can be connected, a simplistic approach to the link can be “misleading and potentially damaging as it ignores key underlying mental health issues, such as depression and anxiety.”¹⁷⁹ In the aftermath of something as difficult to understand as suicide, people often want a simple answer to the question of: “Why did this happen?”¹⁸⁰ In the legal analysis, the answer to that question is considered the proximate cause of the suicide.

D. The Causation Hurdle

When a suicide occurs, the element of causation is almost categorically unmet, therefore liability rarely attaches.¹⁸¹ Suicide is often held as the “sole proximate cause” of a plaintiff’s death.¹⁸² With limited exceptions,¹⁸³ a defendant’s negligent acts that lead to suicide by a plaintiff are emphatically excluded from liability.¹⁸⁴ In his suicide note, John Gibson mentioned his struggles with depression as well as his remorse regarding his exposed use of the Ashley Madison website.¹⁸⁵ The question is whether courts should expand their causation analysis because of the foreseeability that public shaming, like that in the Ashley Madison breach, could, in fact, lead to suicides.

177. See Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. LEGAL F. 415, 415 (2008) (“Today the internet is everywhere.”).

178. Havrilesky, *supra* note 107. See also discussion *infra* Section II.B.

179. Bindley, *supra* note 174.

180. *Id.*

181. See discussion *supra* Section I.C.

182. DOBBS, HAYDEN & BUBLICK, *supra* note 60, § 214.

183. *Id.*

184. *Id.*

185. Coder, *supra* note 122.

The facts of the Ashley Madison breach parallel the two key elements in the first exception to the categorical rejection of liability for a suicide—foreseeability and failure to act in the face of an opportunity to prevent the suicide.¹⁸⁶ Impact’s initial leak of snippets of the stolen data put Avid Life on notice that their user data had been compromised.¹⁸⁷ The sensitivity of Ashley Madison’s data, paired with the prominence of public shaming in today’s technological age, should be grounds for courts to find that the ensuing public shaming of Ashley Madison users was foreseeable. Further, Impact’s manifesto presented Avid Life with an opportunity to take action to prevent the ultimate data dump.

Ashley Madison users could have believed Avid Life would act to prevent a known threat to the security of its user data.¹⁸⁸ After all, the 2015 website made two bold promises: users would never compromise their “safety, privacy or security” and users would never have to reveal their identity unless they chose to do so.¹⁸⁹ Here, although the state imposed no special duty for Ashley Madison to prevent the suicide of its users, as is required for the first exception to apply,¹⁹⁰ Ashley Madison’s promises may have led its users to believe it had undertaken a duty to prevent such a significant data breach—the breach that was a “tipping point” for the suicides.¹⁹¹

III. PROPOSAL

The law should evolve to provide a remedy for data breach harm in cases like Ashley Madison where the foreseeable risk goes beyond conjectural financial damages—especially in an era of increasingly available virtual interfaces such as social media platforms, online publications, and blogs.¹⁹² Such a remedy may incentivize companies

186. See *supra* notes 83–85 and accompanying text.

187. Krebs, *supra* note 6. See also discussion *supra* Section I.A.

188. See also *supra* notes 3–4 and accompanying text.

189. *Frequently Asked Questions*, *supra* note 1.

190. See *supra* notes 83–85 and accompanying text.

191. Malcolm Gladwell, *The Tipping Point*, GLADWELL, <http://gladwell.com/the-tipping-point/> (last visited Oct. 3, 2016).

192. See Jordan L. Ludwig, *Protections for Virtual Property: A Modern Restitutionary Approach*, 32

to pay more attention to what could be potentially devastating data breaches. Without an adequate remedy, companies will face almost no legal liability for their slack data security processes.¹⁹³

A. Some Ashley Madison Injuries Satisfy Constitutional Standing and Tort-Element Damages

A “decisive majority” of data breach cases have found the “fine line between a constitutionally sufficient injury and a tort-sufficient injury” that prevents a case from moving forward.¹⁹⁴ However, that hurdle, which is common to typical financial data breaches, does not exist for those Ashley Madison breach victims who experienced measurable damages—ruined marriages, tarnished professional reputations, and lost lives—and should be evaluated and interpreted to reflect these distinct characteristics.¹⁹⁵ The quantifiable injuries experienced by Ashley Madison breach victims satisfy the “actual” requirement necessary to confer standing and satisfy tort damages.

Standing does not require a plaintiff to demonstrate “that it is literally certain that the harms they identify will come about.”¹⁹⁶ Rather, the United States Supreme Court has recognized standing “based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.”¹⁹⁷ Courts should continue to find the harm of an increased risk of identity theft or fraud sufficient if the harm is “certainly impending,” therefore allowing Ashley Madison plaintiffs to satisfy

LOY. L.A. ENT. L. REV. 1, 1 (2012) (stating “virtual online worlds have become a staple of modern society”).

193. See discussion *supra* Section I.B.

194. Richie, *supra* note 56, at 14–15. See also discussion *supra* Section I.B.

195. Pagliery, *supra* note 133. The Ashley Madison hack is “exposing affairs, confirming suspicions, and keeping cheaters up at night in cold sweats.” *Id.* One Ashley Madison user whose name was exposed in the data dump lost his job, his wife, and his house. Mooney, *supra* note 133 (noting the “fallout from the Ashley Madison hacking is still being realized” months after approximately 32 million user names were exposed). See also discussion *supra* Sections II.A.2 and I.B.

196. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150 n.5 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 252–55 (2010)).

197. *Id.*

standing where they can establish that the threat of harm is credible.¹⁹⁸

According to the Oregon Supreme Court, “[e]very court that has addressed damage claims for credit monitoring following the theft of computer records containing personal information—but no wrongful use of that information—” has found no actionable damages.¹⁹⁹ The tort of negligence should expand—in a manner similar to battery—and allow the costs incurred to guard against the increased risk of identity theft to satisfy the damage element of a negligence claim.

B. *Stretching Causation*

The causation requirement in tort law is “an artificial restriction on the reach of loss-spreading.”²⁰⁰ This restriction should be loosened to capture the societal costs of trauma from data breaches and the ensuing internet shaming. The two existing exceptions that permit liability where there has been a suicide²⁰¹ are both partially satisfied by facts surrounding the Ashley Madison breach. The Ashley

198. Richie, *supra* note 56, at 14. *Accord* Moyer v. Michaels Stores, Inc., No. 14 C 561, 2014 WL 3511500, at *6 (N.D. Ill. July 14, 2014) (concluding the elevated risk of identity theft stemming from the data breach was sufficiently imminent to give Plaintiffs standing); *In re* Adobe Sys., Inc. Privacy Litig., No. 13-CV-05226-LHK, 2014 WL 4379916, at *8 (N.D. Cal. Sept. 4, 2014) (“Unlike in *Clapper*, where respondents’ claim that they would suffer future harm rested on a chain of events that was both ‘highly attenuated’ and ‘highly speculative,’ the risk that Plaintiffs’ personal data will be misused by the hackers who breached Adobe’s network is immediate and very real.” (citation omitted)); *In re* Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F. Supp. 2d 942, 962 (S.D. Cal. 2014) (“Although . . . none of the named Plaintiffs have alleged that their Personal Information was actually accessed by a third party, neither *Krotmer* [*v. Starbucks*] nor *Clapper* require such allegations. Instead, Plaintiffs have plausibly alleged a ‘credible threat’ of impending harm based on the disclosure of their Personal Information following the intrusion.”).

199. Paul v. Providence Health System-Oregon, 273 P.3d 106, 111 (Or. 2012). *See* Reilly v. Ceridian Corp., 664 F.3d 38, 46 (3d Cir. 2011) (holding increased risk of identity theft did not establish injury—in fact for purposes of seeking credit monitoring expenses or other relief); Forbes v. Wells Fargo Bank, N.A., 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (stating credit monitoring expenses are “not the result of any present injury, but rather anticipation of future injury that has not yet materialized”); Ruiz v. Gap, Inc., 622 F. Supp. 2d 908, 918 (N.D. Cal. 2009), *aff’d*, 380 Fed. Appx. 689 (9th Cir. 2010) (stating no claim for credit monitoring expenses because plaintiff “has no actual damages to mitigate since he has never been a victim of identity theft”); Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1, 8 (D.D.C. 2007) (rejecting the “theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit”).

200. Weinrib, *supra* note 14, at 498.

201. *See* discussion *supra* Section I.C.

Madison suicides were “foreseeable.”²⁰² Ashley Madison had notice of Impact’s intent to dump its users’ data; the plan was explicitly stated in the “manifesto.”²⁰³ Exposure of the data stored by Ashley Madison triggered several of the known causes of suicide, including traumatic experiences, bullying, unemployment, relationship problems, and financial problems.²⁰⁴

Avid Life could have “acted to prevent” the data dump and, therefore, the Ashley Madison suicides.²⁰⁵ Impact’s warning gave Avid Life an opportunity to attempt to mitigate the risk of exposing its users’ data. Courts should consider these factors in evaluating liability for suicides following negligent data breaches where highly sensitive data—such as that collected by Ashley Madison—is at a known risk of exposure and the company takes no action to mitigate the risk.

C. A Statutory Consequence

When a plaintiff can prove that a company had a duty to keep its private information secure and it breached that duty, courts should expand how they envision causation and damages and impose a limited statutory consequence. The Ashley Madison breach represents a new type of data breach, which creates a wider range of risks to data breach victims.²⁰⁶ This breach is distinguishable from highly-publicized financial data breaches due to the type of information that was compromised.²⁰⁷ A statutory consequence could deter companies from failing to respond to serious security threats, as Ashley Madison did, and reduce the likelihood that these risks materialize.

202. See discussion *supra* Section I.C.

203. See discussion *supra* Section I.A.

204. *15 Common Causes of Suicide*, *supra* note 175. See discussion *supra* Section II.B.

205. See discussion *supra* Section I.C.

206. See discussion *supra* Section II.A.2.

207. Weldon, *supra* note 127 (“While large-scale breaches such as Ashley Madison are not new, the type of information being compromised is different than the typical personally identifiable information (PII) that’s at risk in most hacks.”).

CONCLUSION

Since 2002, Ashley Madison has provided an online venue for people seeking extramarital affairs.²⁰⁸ Its pledge to protect its users' "safety, privacy [and] security" enticed over forty million users to the site.²⁰⁹ In July 2015, Impact tested the strength of the Ashley Madison guarantee when it hacked into Avid Life, stealing a massive amount of user information and company data.²¹⁰

In an extensive "manifesto,"²¹¹ Impact demanded Avid Life take Ashley Madison offline permanently and threatened to expose the nearly ten gigabytes of stolen data if the demands were not met.²¹² When Avid Life did not comply, Impact leaked the stolen data as promised.²¹³ The Ashley Madison breach and the subsequent data dump have "wreaked havoc" in the lives of its users whose information was published to the dark web.²¹⁴ The fallout from the breach is still unfolding many months after the data dump.²¹⁵

Following Impact's publication of some thirty-two million names, emails, and sexual preferences of Ashley Madison users, Avid Life was flooded with class action lawsuits as victims scrambled to pick up the pieces of their lives left in the wake of the data breach.²¹⁶ Some lost their job²¹⁷ or their marriage,²¹⁸ while others paid the ultimate price with their lives.²¹⁹ The massive data dump accomplished the hackers' goal of publicly humiliating Ashley Madison members—a goal that should have been foreseeable by

208. *Frequently Asked Questions*, *supra* note 1 (emphasis added).

209. *Id.*

210. Krebs, *supra* note 6.

211. Michael Talbot & Avery Haines, *Ashley Madison Hacker Manifesto Exposes Two Members, Including Mississauga Man*, CITY NEWS (July 23, 2015, 9:20 PM), <http://www.citynews.ca/2015/07/23/ashley-madison-hacker-manifesto-exposes-2-members-including-mississauga-man/>.

212. Mooney, *supra* note 133.

213. *Id.*

214. *Id.*

215. *Id.* ("The fallout from the Ashley Madison hacking is still being realized months after the hacking of Ashley Madison users exposed approximately [thirty-two] million names.")

216. Smith, *supra* note 23.

217. Balsamini, *supra* note 134.

218. Pagliery, *supra* note 133.

219. Bhatia, *supra* note 40; Coder, *supra* note 122.

Avid Life and should have prompted the company to take the known security threat seriously by taking some action.²²⁰

In its original form, a data breach jeopardized financial information and created a risk of identity theft.²²¹ Although cyber security experts agree that the top motivation for today's hacker is still the "monetization of any information stolen from the site,"²²² the Ashley Madison breach shows that data breaches have also become a platform for public humiliation.²²³ Impact sought out "embarrassing, lurid life- and career-ruining information" when it published Ashley Madison's member data online for everyone to see.²²⁴ The new category of data breaches used as a tool for shaming supports the proposition that the law should evolve to protect vulnerable consumers.²²⁵ Ashley Madison victims with quantifiable damages have legal remedies to pursue.²²⁶ However, the combination of the historically low success rate of data breach class actions²²⁷ and the categorical bar against liability for suicides²²⁸ leaves other Ashley Madison victims without recourse.²²⁹

First, courts should continue to find Constitutional and tort claim injuries are satisfied where plaintiffs have shown there is a "certainly impending" threat.²³⁰ Second, legislative bodies should impose a statutory consequence when a data breach is foreseeable, as it was with the Ashley Madison breach, and companies fail to take

220. Weldon, *supra* note 127; Zetter, *supra* note 21.

221. Weldon, *supra* note 127 ("It's bad enough that we have to worry about identity theft and assaults on our bank accounts.").

222. *Id.*

223. *Id.*

224. *Id.*

225. See discussion *supra* Part III.

226. See, e.g., Max Slater-Robins, *Here's What Ashley Madison's \$19 "Full Delete" Feature Actually Removes*, BUS. INSIDER (Aug. 26, 2015, 6:04 AM), <http://www.businessinsider.com/ashley-madison-full-delete-class-action-lawsuit-2015-8?r=UK&IR=T> (claiming the "Full Delete" feature netted Avid Life nearly \$2 million and suggesting those who paid for the feature thought they were safe and feel the most betrayed).

227. See discussion *supra* Section I.B.

228. See discussion *supra* Section I.C.

229. *Pisciotta v. Old Nat'l. Bancorp.*, 499 F.3d 629, 639 (7th Cir. 2007) (proclaiming "[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy").

230. See *Richie*, *supra* note 56, at 14.

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reasonable action to prevent the breach.²³¹ These changes will give injured plaintiffs a remedy for the damage flowing from the Ashley Madison data breach and will impose a consequence for Ashley Madison that could deter others from ignoring a foreseeable breach in the future.

231. See discussion *supra* Section III.C.