

July 2014

Doomed Steamers and Merged Fires: The Problem of Preempted Innocent Threats in Torts

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Recommended Citation

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DOOMED STEAMERS AND MERGED FIRES: THE PROBLEM OF PREEMPTED INNOCENT THREATS IN TORTS

Anthony M. Dillof*

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INTRODUCTION

This Article addresses the problem of preempted innocent threats. The problem arises in tort law and concerns the measure of damages due a plaintiff.

The problem of preempted innocent threats goes like this: A force, condition, or event is a threat if it may cause physical harm to a person or property. An “innocent threat” is a threat that arises either naturally or as a result of nontortious human activity. Lightning bolts, common diseases, cars reasonably driven, and guns fired with due care are innocent threats. A threat is “preempted” if, due to the existence of some force or condition, the threatened harm does not materialize. The question is: *When determining the compensation due a tort plaintiff, to what extent is it relevant that the defendant’s tortious conduct preempted an innocent threat to the plaintiff?*

Some examples may help clarify the question above. There are some cases where it is clearly relevant that an innocent threat was preempted by the defendant’s tortious conduct. For example, imagine P is a high school teacher in a large city. He hires a taxi to take him to his destination. The taxi is owned and operated by the driver, D. On the way, D drives negligently and the taxi crashes. Luckily, D escapes without serious injuries. P, however, is killed. Under tort law, P’s estate is entitled to compensation from D for, among other things, the income P lost due to the accident.¹ But how much income

1. Claims for lost future wages are usually brought in wrongful death actions. See 2 DAN B. DOBBS, LAW OF REMEDIES 430 (2d ed. 1993). Some states allow claims for future lost wages to be brought in survival actions. *Id.* at 425.

is that? This depends in part on how long P would have worked if he had not been injured.² How long P would have worked, in turn, may be a function of what else might have prevented him from working. For example, in determining the extent of P's lost income, it would be relevant that, at the time of the accident, P was in the initial stages of an untreatable form of brain cancer and that, had it not been for the accident, P would have had to retire from work in six months.³ Where these facts can be established at trial, D's liability will be limited.⁴ He will be liable for six months' worth of lost wages (from the time of the accident up to the point when he would have retired due to cancer), but no more.⁵ In this case—which I shall refer to as the “Incurable Cancer Case”—the cancer was an innocent threat that could have caused P to retire and not receive future wages. It was, however, the taxi accident that actually prevented him from receiving his wages. The risk posed by the incurable cancer to P's career never materialized. Thus, the defendant's tortious conduct preempted an innocent threat, and, in light of this preempted threat, the plaintiff's recovery for lost wages will be greatly reduced from what it otherwise would have been.⁶

2. *Id.* at 461–62.

3. *See infra* note 8.

4. *Id.*

5. Professor Dobbs stated in the context of wrongful death and survival actions that “the plaintiff is permitted to show that the decedent in a death case was in excellent health just before the mortal injury; and likewise the defendant might show . . . the decedent or plaintiff was in poor health and unlikely to live long in any event.” 2 DOBBS, *supra* note 1, at 463. *See also* Butera v. Dist. of Columbia, 83 F. Supp. 2d 25, 35–36 (D.D.C. 1999) (noting that the defendant properly introduced evidence of the effect of HIV status on victim's life-expectancy to mitigate its liability to plaintiff for victim's future earnings) *aff'd in part, rev'd on other grounds* by Butera v. Dist. of Columbia, 235 F.3d 637 (D.C. Cir. 2001); Smith v. Southland Corp., 738 F. Supp. 923, 925–26 (E.D. Pa. 1990) (stating that evidence regarding plaintiff's alcoholism and drug use was admissible for purposes of determining plaintiff's loss of earning capacity); Follett v. Jones, 481 S.W.2d 713, 714–15 (Ark. 1972) (limiting liability to actual life expectancy where defendant was responsible for the death of a man with terminal cancer); Groat v. Walkup Drayage & Warehouse Co., 58 P.2d 200, 204 (Cal. Ct. App. 1936) (noting that the jury properly reduced damages in wrongful death suit based on plaintiff's high blood pressure, the hardening of his arteries, and his diseased heart and kidneys); Harlow v. Chin, 545 N.E.2d 602, 611–12 (Mass. 1989) (noting that defendant properly introduced evidence that a quadriplegic's life expectancy is substantially shorter than that of a non-quadruplegic to reduce its liability for future medical expenses and pain and suffering); Kilmer v. Browning, 806 S.W.2d 75, 82 (Mo. Ct. App. 1991) (“[P]robative value [of standard mortality tables] may be weakened by evidence of ill-health and these matters may be considered by the jury in weighing the testimony.”).

6. *See infra* note 8.

The preceding analysis of the Incurable Cancer Case is well-established. Other cases involving innocent threats, however, are more controversial. Here is one: P is a high school teacher in perfect health. D owns and operates a taxi. P hires D to drive him to a cruise ship—which, following the tradition of the literature, I shall refer to as a “steamer.”⁷ The steamer is to take him for a ten-day cruise to Alaska. On the way to the steamer, D drives negligently and gets into a serious accident. D escapes without significant injury, but P is permanently disabled. P sues D. When determining what compensation is due P, is it relevant that the cruise ship P would have taken struck an iceberg, sank, and all the passengers and crew were drowned? Assume that absent the taxi accident, P would have boarded the steamer and would have drowned, and that these facts can be established at trial. Should P—in what I shall refer to as the “Doomed Steamer Case”—be denied recovery for lost wages analogously to the partial denial of recovery for wages in the Incurable Cancer Case? Is a taxi accident’s preempting of potentially career-ending cancer analogous to a taxi accident’s preempting of a potentially career-ending steamer sinking?

Another controversial case is the Merged Fire Case. P owns property that borders on a forest in a public park. D is a camper in the forest. Due to the negligence of D in tending his campfire, a forest fire starts. The fire spreads towards P’s property, threatening to engulf it. Before it reaches P’s property, however, the fire merges with another equally large forest fire moving toward P’s property. The second fire is a naturally occurring one, started by lightning. The two fires merge and P’s property, including his house, is burnt to the ground. P sues D for negligence. Should P’s recovery be reduced or eliminated because, in the absence of the fire started by D, the naturally occurring fire would have destroyed his house?⁸

7. See, e.g., Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1139 (1934).

8. The two controversial cases are structurally similar. In both the Doomed Steamer Case and the Merged Fire Case, the defendant’s tortious conduct prevents an innocent threat—the iceberg’s drowning of P, the natural fire’s independent destruction of P’s house—from being realized. For purposes of exposition, this Article will generally focus on the former case and return to the latter only toward the end of the Article.

In exploring these questions, this Article proceeds as follows: Part I reviews the positions commentators have taken on the problem of preempted innocent threats in the context of the Doomed Steamer Case;⁹ Part II considers and evaluates arguments that seek to distinguish the Incurable Cancer Case, on one hand, from the Doomed Steamer Case and the Merged Fire Case, on the other hand, based on considerations of foreseeability.¹⁰ Part III seeks to limit the relevance of preempted innocent threats to damages based not on considerations of foreseeability, but based on the concept of identity.¹¹

As will be seen, this Article argues for a minority position—that for at least a significant subset of claims, including the Doomed Steamer Case, the preemption of an innocent risk by an actor’s tortious conduct should reduce the amount of damages that a victim may recover in a tort action. Specifically, this Article will advance the claim that identity is a key concept in analyzing cases of preempted innocent threats. According to this Article, the preemption of an innocent threat should reduce the damages available to a plaintiff in those cases where, and only where, had it not been for the defendant’s tortious conduct, the plaintiff would have suffered the very same, or identical, harm as the harm actually suffered. The “identity of harm test,” it is contended, best fits with existing case law and our moral intuitions about how the law should resolve cases of preempted innocent threats.

The scope of this Article is limited in three respects. First, it will not discuss the very different issue of what should happen if the preempted threat is not innocent but arises from a third person’s intentionally wrongful or negligent conduct. Second, it will not discuss the criminal law or contract law incarnations of the problem.¹² Third, it will focus on substantive rules of tort liability

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

12. The criminal law version of the problem is usually referred to as the problem of “unknowing justification.” Should an accused be able to raise as a full or partial defense the fact that unknown to him, his otherwise criminal conduct was, with the benefit of hindsight, the correct conduct because it preempted a more serious threat? This problem has received greater scholarly attention than the tort

and damages and will not discuss evidentiary issues, such as the burden of proof associated with the implementation of the substantive rules.

I. SOME VIEWS ON THE PROBLEM

Commentators have taken various positions on the problem of preempted innocent threats.¹³ Based on these positions, commentators can be roughly divided into two schools. Those in the first school emphasize that in cases like the Doomed Steamer Case, the preemption of the innocent threat was in some sense highly contingent or unforeseeable, and conclude that the preemption is therefore legally irrelevant and should not reduce the plaintiff's recovery ("Full Recovery School").¹⁴ Commentators in the second school take the view that there is no legally relevant difference between the Incurable Cancer Case and the Doomed Steamer Case, and hence in the Doomed Steamer Case, plaintiff's recovery for lost wages should be reduced or eliminated ("Reduced Recovery School").¹⁵ As a general matter, these opposing views are offered with little argument and cursory analysis. This part of the Article surveys the existing literature discussing the Doomed Steamer Case and its implications.

issue considered in this article. MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 180–81 (1993); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 23–27 (2d ed. 1961); Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence*, 15 OXFORD J. LEGAL STUD. 229, 251 (1995); Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1586–99 (2002); Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY, 45, 47 (A.P. Simester & A.T.H. Smith eds., 1996).

13. David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1144–45 (1999); John Marks, *Symmetrical Use of Universal Damages Principles—Such as the Principles Underlying the Doctrine of Proximate Cause—to Distinguish Breach-Induced Benefits That Offset Liability from Those That Do Not*, 55 WAYNE L. REV. 1387 (2009); Peaslee, *supra* note 7.

14. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981); Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003); David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997).

15. RESTATEMENT (SECOND) OF TORTS § 920 (1965); Peaslee, *supra* note 7, at 1135.

A. *Robert Peaslee*

The problem of preempted innocent threats is first clearly stated in a 1934 article by Robert Peaslee.¹⁶ Peaslee compares two cases. The first is *Dillon v. Twin State Gas & Electric Co.*¹⁷ Dillon was a young boy who, with his friends, routinely played on a bridge.¹⁸ The bridge was very close to electrical wires owned by the defendant, Twin Gas.¹⁹ One day, sitting on a bridge girder, Dillon lost his balance, instinctively threw out his arm, and grabbed an electrical wire to save himself from falling.²⁰ The wire was charged with a high-voltage current, and Dillon was electrocuted.²¹ Plaintiff alleged that the defendant's failure to insulate the wires was negligent.²² On appeal of defendant's motion for a directed verdict, the court held that Dillon should not recover for lost wages if the jury were to find that even if the wires had been insulated, Dillon would still have fallen, and as a result of the fall, would have died.²³ Peaslee agrees with the court's holding in *Dillon*, stating, "The loss of balance and incipient fall were accomplished facts, the serious consequences of which were certain, before the defendant's wrong became an operative cause."²⁴

Peaslee also considers the case of a doomed steamer,²⁵ which inspired the example at the beginning of this Article. Peaslee would treat *Dillon* and the Doomed Steamer Case differently, allowing no

16. Peaslee, *supra* note 7, at 1134. A similar case was discussed by the ancients in the context of contracts. H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 251 (2d ed. 1985) (discussing JUSTINIAN THEODOR MOMMSEN, *DIGESTA IUSTINIANI AUGUSTI* (1870) and BERNHARD WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* 258 (1862)). Labeo asserts that a plaintiff could recover the cost of the goods, but Paul and Windscheid assert that no damages are due a plaintiff whose goods are, in breach of contract, placed on the wrong ship, which sinks during its voyage, where the ship that the goods should have been placed on also sinks during its voyage. HART & HONORÉ, *supra* at 251–52.

17. *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111 (N.H. 1932).

18. *Id.* at 111–12.

19. *Id.* at 111.

20. *Id.* at 112.

21. *Id.*

22. *Id.* at 111.

23. *Dillon*, 163 A. at 114–15 ("Although he died from electrocution, yet, if by reason of his preceding loss of balance he was bound to fall except for the intervention of the current, he either did not have long to live or was to be maimed. In such an outcome of his loss of balance, the defendant deprived him, not of a life of normal expectancy, but of one too short to be given pecuniary allowance, in one alternative, and not of normal, but of limited, earning capacity, in the other.").

24. Peaslee, *supra* note 7, at 1135.

25. *Id.* at 1139–41.

reduction in damages based on the sinking of the steamer.²⁶ Peaslee writes, “The distinction [between *Dillon* and the doomed steamer] is more readily felt than stated. . . . [O]nly known portents can be considered. Unsuspected future developments must be disregarded”²⁷

Peaslee equivocates somewhat, both with respect to his conclusion and its grounds. Peaslee allows, “It is quite possible to advance some logical support for recovery of full damage[s] in the *Dillon* case, or no damage[s] in that of the traveller [sic].”²⁸ Peaslee suggests that disregarding unsuspected future developments has the advantage of practicality and uniformity, and may be supported by unspecified “moral considerations.”²⁹ Peaslee also considers the case of a defendant who negligently starts a fire that burns a house where next week “a great and innocently caused conflagration swept the site.”³⁰ Peaslee claims that the plaintiff’s recovery should not be reduced because the innocent fire was not in “active operation” when the defendant’s act caused the destruction of the house, nor was it “of sufficient imminence to make the result certain.”³¹ Foreseeability, activeness, imminence, morality, and practicality, in some measure, thus underlie Peaslee’s “known portents” standard. Based on his analysis of the Doomed Steamer Case and the case of the fires, Peaslee falls into the Full Recovery School.

By combining a number of considerations generally relevant to tort, it is likely that Peaslee’s standard retains enough flexibility to accommodate a range of reasonable outcomes. Yet this analysis appears both ad hoc and arbitrary. Why, for example, should it matter that the innocent fire itself was not in active operation if the forces that caused the innocent fire were in active operation? How imminent must a result be before it is judged to be “certain,” and why should it matter? Whose perspective should count when determining whether a

26. *Id.* at 1140.

27. *Id.*

28. *Id.*

29. *Id.*

30. Peaslee, *supra* note 7, at 1134.

31. *Id.*

future development is “unsuspected”? Peaslee’s approach seems to offer courts little guidance for resolving future cases. It is not surprising that his word was not the last word.

B. Restatement (Second) of Torts

The problem of preempted innocent threats is considered in the Restatement (Second) of Torts, which was published in 1965.³² Section 920 of the Restatement falls in the Restatement’s chapter on damage remedies.³³ That Section provides:

When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.³⁴

A lot obviously turns on the meaning of “equitable.” Implicitly elaborating on this term, the Commentaries to Section 920 state, “The rules of causation applicable to the creation and extent of liability . . . apply to the diminution of damages.”³⁵ As an illustration, the Restatement gives the Doomed Steamer example: “A knocks B down, as a result of which B is prevented from taking a ship that later sinks with all on board.”³⁶ According to the Restatement, B’s damages for battery are “not diminished by his escape from death resulting from A’s act.”³⁷ The Restatement thus resolves the Doomed Steamer Case by ignoring the preemption of the risk to the plaintiff, apparently on the ground that under the rules of causation, the prevention of B’s death was not proximately caused by A’s blow. The Restatement, however, provides no justification for its interpretation of “equitable” in terms of causation rules and cites no

32. RESTATEMENT (SECOND) OF TORTS § 920 (1965).

33. *Id.*

34. *Id.*

35. *Id.* cmt. d.

36. *Id.* cmt. d, illus. 8.

37. *Id.*

supporting case law.³⁸ The Restatement's position on the issue should be noted, but not treated as authoritative.

Because proximate cause rules are largely a matter of foreseeability, the Restatement, like Peaslee, falls into the Full Recovery School.

C. *Joseph H. King*

Joseph H. King considers the problem of preempted innocent threats in an influential 1981 article on the topic of recovery for lost chance.³⁹ To resolve the problem, King introduces the concept of “attachment.”⁴⁰ King argues that the law should take into account—and so reduce or deny a plaintiff's recovery—threatening forces or conditions, such as incurable cancer, which have “attached” before the tortious condition created by the defendant has attached.⁴¹ King states that a condition has attached where it “could not be avoided even if the victim were aware of its existence”⁴² Based on this analysis, King concludes that Dillon's prospect of falling to his death should have been taken into account, but the iceberg threatening the doomed steamer should not be.⁴³ At the point just before he reached the uninsulated wires, Dillon could not have avoided the loss of balance, which presumptively would have killed him, but he could have avoided the wires if he had known contacting them would result in his electrocution.⁴⁴ Thus, the risk of falling to death had attached before the possibility of electrocution had.⁴⁵ Therefore, the risk of death from the fall should have been taken into account when it came to Dillon's recovery. In contrast, just before the taxi passenger was injured in the traffic accident, the risk of that accident had attached (because it had become unavoidable), but “assum[ing] prescience,” the threat of the iceberg could have been avoided by canceling the

38. RESTATEMENT (SECOND) OF TORTS § 920 cmt. d.

39. See generally King, *supra* note 14.

40. *Id.* at 1393.

41. *Id.* at 1357, 1393–94.

42. *Id.* at 1357.

43. *Id.* at 1357–58.

44. *Id.*

45. King, *supra* note 14, at 1357–58.

trip on the steamer.⁴⁶ Thus, the risk from the iceberg should not be taken into account. King claims his approach “affords an appropriate and predictable selection mechanism” for identifying those conditions that should be taken into account.⁴⁷ King prefers his avoidability, or attachment, test to Peaslee’s “known portents” test because his “more accurately reflects the actual status of the affected interest at the time of the injury.”⁴⁸

The motivation for King’s avoidability test is not clear. The test requires assessing whether a threat could be avoided if there were knowledge of the threat, no matter how unlikely such knowledge might be. Why should such a potentially far-fetched situation be morally or legally relevant? Why not consider whether the threat could be avoided by assuming that the victim was equipped with state-of-the-art protective gear like a parachute that would have saved Dillon from the fall? Or consider whether some other parties’ prescience could have avoided the injury? For example, what if a party below Dillon, knowing of his fall, could have moved a nearby mattress under him, thus saving his life? Although tort law frequently considers counterfactuals where actors do not make unreasonable mistakes, invoking counterfactuals involving knowledge of practically unknowable matters, such as whether an iceberg would sink a ship, seems unprecedented. King provides no theory or explanation in support of his test.⁴⁹

Cogency aside, King’s attachment test seems reasonably close to Peaslee’s “known portents” approach and the Restatement’s causation approach. The difference between whether some potential threat is known, foreseeable, or could be avoided if known seems to be a matter of degree or emphasis. Thus, King may be placed in the Full Recovery School.

46. *Id.* at 1358.

47. *Id.*

48. *Id.* at 1358 n.19.

49. *See generally id.* Another criticism of King’s approach is made by David Fischer. Fischer, *supra* note 13, at 1144. Fischer points out that courts use evidence of a plaintiff’s bad habits to predict life expectancy despite the fact that the detrimental effects of these habits have not yet “attached” in King’s sense of unavailability-assuming-prescience. *Id.* Thus, King’s approach is inconsistent with existing case law. *See, e.g.,* *Morris v. St. Paul City Ry. Co.*, 117 N.W. 500 (Minn. 1908).

D. David Robertson

In a 1997 article, David Robertson compares a minor variation of the Doomed Steamer Case with a skydiver whose parachute has failed and who happens to be shot by a negligent hunter just before hitting the ground.⁵⁰ Robertson finds that “[t]he difference between the two situations is easy to grasp intuitively.”⁵¹ According to Robertson, the operative line between the two cases “cannot be described with precision, but the rule is roughly” that the law should take into account “only those threats that are so far advanced and so nearly certain at the time of the accident” that ignoring their similarity to pre-existing conditions, such as diseases, “would seem dishonest.”⁵² While Robertson’s “so-far-advanced/dishonesty approach” seems too vague to serve as a useable standard, it seems generally in line with the approaches that have preceded it. Robertson is another member of the Full Recovery School.

E. David Fischer

David Fischer takes a different view of the problem of preempted innocent threats in his 1999 article.⁵³ With respect to damages generally, Fischer’s view is that “[f]rom a fairness perspective, imposing liability for harm duplicated by non-tortious forces is undesirable because it would give the plaintiff a windfall. Corrective justice requires no more than that the plaintiff be restored to the position that he would have occupied if the tort had not occurred.”⁵⁴

But how should this principle be applied in the context of preempted innocent threats? Fischer cites a number of examples of courts taking into account the preemption of an innocent threat, but concedes that “[i]t is difficult to determine when to apply the rule exonerating the tortfeasor from having to pay damages for harm that

50. Robertson, *supra* note 14, at 1797–98.

51. *Id.* at 1798.

52. *Id.*

53. *See generally* Fischer, *supra* note 13.

54. *Id.* at 1136.

would have been duplicated by a pre-existing potential cause.”⁵⁵ In this regard, Fischer considers the Doomed Steamer Case and King’s attachment test. He believes that the attachment test is best understood as a test to preclude defendants from relying on overly speculative matters to reduce their liability.⁵⁶ Fischer, however, cites miscarriage cases involving pain and suffering where no discount was made for the pain and suffering, which certainly would have been experienced by the expectant plaintiff had she delivered her child.⁵⁷ Such cases, Fischer observes, are inconsistent with the evidentiary theory of preempted threats.⁵⁸ He believes, following Hart and Honoré,⁵⁹ that a distinction may be drawn between economic losses and pain and suffering.⁶⁰ According to Fischer, “our sense of justice is less offended when a defendant is exonerated for potentially duplicated economic losses as opposed to potentially duplicated pain and suffering.”⁶¹ In cases of economic injuries, failing to reduce awards may violate our sense of justice by allowing plaintiff a “windfall.”⁶² Fischer ultimately rejects King’s approach to the Doomed Steamer Case and, in the context of another set of facts, indicates that the extent of liability should depend simply “on the quality of proof.”⁶³ Because he rejects King’s approach, and does not consider any other reason not to reduce damages, it appears Fischer would allow a reduction in damages in the Doomed Steamer Case, at least assuming that the defendant could establish with sufficient

55. *Id.* at 1142.

56. *Id.* at 1143.

57. *Id.* at 1144 n.92 (“See *Morris v. St. Paul City Ry. Co.*, 117 N.W. 500, 502 (Minn. 1908); *Plonty v. Murphy*, 84 N.W. 1005, 1006–07 (Minn. 1901); *Occhipinti v. Rheem Mfg. Co.*, 172 So. 2d 186, 190 (Miss. 1965); see also *Big Sandy & Cumberland R.R. Co. v. Blankenship*, 118 S.W. 316, 317–18 (Ky. Ct. App. 1909); *Graf v. Taggart*, 204 A.2d 140, 146 (N.J. 1964); *Endresz v. Friedberg*, 248 N.E.2d 901, 906 (N.Y. 1969); *Raynor v. Tacoma Ry. & Power Co.*, 126 P. 91, 93 (Wash. 1912). *But see Nevala v. City of Ironwood*, 205 N.W. 93, 94 (Mich. 1925); *Hawkins v. Front-St. Cable Ry. Co.*, 28 P. 1021, 1024 (Wash. 1892).”).

58. *Id.* at 1144.

59. Hart and Honoré state that “there is an argument” for treating economic loss and pain and suffering differently. They fail, however, to identify what that argument is. HART & HONORÉ, *supra* note 16, at 251.

60. See generally Fischer, *supra* note 13.

61. *Id.* at 1144.

62. *Id.* at 1145.

63. *Id.* at 1146.

certainty that plaintiff would have been drowned if he had taken the steamer. Fischer is thus the first scholar who falls into the Reduced Recovery School.⁶⁴

F. Stephen Perry

In a 2003 article, the legal philosopher Stephen Perry considers an updated version of the Doomed Steamer Case involving an airplane that crashes.⁶⁵ Perry states that his moral intuition is that compensation should not be reduced based on the unrealized possibility of the plaintiff's death in the airplane.⁶⁶ Perry sees the beneficial avoiding of the doomed aircraft as a potential "offset" of the harm actually caused.⁶⁷ However, according to Perry, the offset is "too much of a coincidence" and "too little connected" to the defendant's tortious conduct to be taken into account.⁶⁸ Perry likens the case to one where the defendant's tortious conduct places the plaintiff under a tree that just happens to fall.⁶⁹ According to Perry, defendant would bear no liability for the harm caused by the tree under the doctrine of proximate cause.⁷⁰ Perry argues that similar considerations of the moral irrelevance of coincidental events should rule out mitigation based on the doomed airplane.⁷¹ Perry thus draws an explicit connection between causal limits on harm and limits on offsets, and so advances a position along the lines of the Restatement (Second) of Torts.⁷² Perry concedes that a respectable argument could probably be made that would come out the other way.⁷³ Perry, however, does not articulate such an argument. Accordingly, Perry may be placed in the Full Recovery School.

64. Fischer, however, does not explain why our sense of justice is more offended by full recovery in the Doomed Steamer Case—assuming sufficient proof—than in cases involving claims for pain and suffering.

65. Perry, *supra* note 14, at 1288.

66. *Id.* at 1312.

67. *Id.*

68. *Id.* at 1313.

69. *Id.*

70. *Id.*

71. Perry, *supra* note 14, at 1313.

72. *Id.* See discussion *supra* Section II.B.

73. Perry, *supra* note 14, at 1313.

G. *John Goldberg*

Professor Goldberg discusses the updated Doomed Steamer Case in an article contained in the same symposium issue as Perry's.⁷⁴ Goldberg believes that the operative question is whether the avoidance of the airplane death should be viewed as an offset that mitigates damages.⁷⁵ He acknowledges that most have the strong intuition that it should not be.⁷⁶ Goldberg seeks to explain this intuition by appealing to the law of restitution.⁷⁷ Goldberg notes that a taxi driver who *without negligence* fails to deliver the passenger on time to a doomed airplane would have no claim for an award under the law of restitution.⁷⁸ Goldberg explains "the fortuitous conferral of an unrequested benefit will not support a claim in restitution."⁷⁹ Likewise, Goldberg implies there should be no reduction on an award in a torts suit, and so he too falls into the Full Recovery School.

One difficulty with Goldberg's analysis is that it fails to account for the Incurable Cancer Case. In that case, D negligently crashed the taxi P rode in and P died, thus avoiding the detrimental future effects of the cancer he suffered from. Clearly if the crash had produced no significant injuries, but had miraculously cured P's cancer, D would have no claim against P for unjust enrichment. Why then should the preemption of the threat of the incurable cancer be taken into account in a tort action when it is bestowed as gratuitously as the benefit of not traveling on a doomed airplane?

In addition, Goldberg also considers Perry's position that the avoiding of the airplane crash should be legally irrelevant because it was a benefit that was "fortuitous."⁸⁰ Goldberg uses the term, "symmetry principle," to describe the idea that the limits on liability for harms (e.g., proximate causation or foreseeability limits) should symmetrically apply to bar reductions in damages based on the

74. John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1333 (2003).

75. *Id.*

76. *Id.*

77. *Id.* at 1333–34.

78. *Id.*

79. *Id.* at 1334.

80. Goldberg, *supra* note 74, at 1333–34; Perry, *supra* note 14, at 1312–13.

preemption of innocence threats.⁸¹ Just as the defendant would not be liable for a plaintiff's death where his negligent conduct had placed the plaintiff on the steamer that sank, so defendant's liability would not be reduced where his negligence prevented the plaintiff's potential death by drowning.⁸² Stated more formally, the argument for allowing P full recovery might run like this:

(1) D negligently injures P, and, as a result, P does not take Steamer-1 that is hit by an iceberg, killing all aboard. P eventually recuperates.

(2) Imagine that, contrary to fact, as a result of P's injury, P took Steamer-2, which is hit by an iceberg, killing P and all aboard. (Perhaps P had taken Steamer-2 to convalesce from the injury D negligently caused.)

(3) Assume, as seems quite likely, that in such a case D's liability would not extend to liability for P's drowning on the ground that D's drowning was not proximately caused by D's tortious conduct.

(4) The harm in fact preempted by D's conduct (death on Steamer-1) is comparable to the harm caused in the imagined case (death on Steamer-2).

(5) Therefore, per the symmetry principle, just as D's liability would not have been extended based on drowning on a cruise, so D's liability should not be reduced in light of the fact his tortious conduct prevented P from drowning on a cruise.

Goldberg, however, does not endorse the symmetry principle.⁸³

81. Goldberg, *supra* note 74, at 1334.

82. *Id.* The terms "proximate cause" and "scope of liability" rules shall be used interchangeably.

83. *See id.* at 1342 ("The preceding sketches an account of the rationale for a proximate cause limitation on responsibility for harms (and, if the symmetry principle holds, an equivalent limitation on credit for benefits conferred).") (emphasis added). At least one court has reasoned along the lines of the

H. *The Restatement (Third) of Torts and Michael Green*

Michael Green is one of the reporters for the Restatement (Third) of Torts: Liability for Physical and Emotional Harm.⁸⁴ Unlike the Restatement (Second) of Torts, the Restatement (Third) of Torts appears to take no position on the Doomed Steamer Case. The hypothetical is not specifically addressed. The Merged Fire Case, mentioned at the beginning of this Article, however, is.⁸⁵ In the Merged Fire Case, there are two independently originating fires. Each is sufficient to destroy a given property. One of the fires is tortiously started by the defendant. The fires merge and the resultant conflagration engulfs the plaintiff's property. Under Section 27 of the Restatement (Third) of Torts, both fires would be treated as factual causes of the property's destruction.⁸⁶ Furthermore, the commentaries to Section 27 specify that the same analysis would apply if one of the fires was nontortiously started, for example through an innocent accident or a natural cause such as lightning.⁸⁷ An actor's tortious conduct's being a factual cause of harm, however, apparently does not necessitate that the actor will be liable for the full amount of the harm. The commentaries state that whether the property owner's damages should be reduced in light of the fact they would have been destroyed anyway is outside of the scope of the Restatement and belongs to the law of damages.⁸⁸ The Restatement (Third) of Torts thus punts on the ultimate question of whether the tortious fire starter in the Merged Fire Case will have to compensate the property owner.⁸⁹

symmetry principle. Pub. Citizen Health Research Grp. v. Young, 909 F.2d 546, 550 (D.C. Cir. 1990) ("While the rationale [for liability] is obscure . . . there is at least a symmetry with the limitation of liability under the concept of proximate cause. Just as the latter excuses the defendant when a fluke extends the consequences of his negligence, so [a liability] rule denies him any benefit when a fluke renders his negligence causally redundant.").

84. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2005).

85. See discussion *supra* INTRODUCTION.

86. Section 27 provides: "If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2005).

87. *Id.* at cmt. d.

88. *Id.*

89. *Id.*

The case of the merged tortious and nontortious fires is structurally similar to the *Doomed Steamer Case*. In both cases, but for the existence of a nontortious force (the lightning and the iceberg), the negligent conduct (the igniting of the first fire and the negligent driving of the taxi) would be the but-for cause of plaintiff's loss. Accordingly, it is reasonable to infer that the Restatement (Third) of Torts would take the position that the resolution of the *Doomed Steamer Case* is also outside of its scope.

Green, in his 2006 article, *The Intersection of Factual Causation and Damages*,⁹⁰ seeks to elucidate the Third Restatement's approach to factual causation. In so doing, he considers cases of preempted innocent threats. First, he observes that the preemption of a broad, statistically-defined set of life-threatening risks is always considered relevant in tort actions for wrongful death or permanent disability where lost wages are sought.⁹¹ It is well-established that a defendant may submit actuary tables about life expectancy to establish the limits of plaintiff's earning capacity.⁹² Such tables imply that but for the defendant's tortious conduct, some other event would have occurred that would have terminated plaintiff's ability to earn income. Thus, some preempted threats are legally relevant. Next, he discusses the case of a plaintiff rendered a paraplegic in an automobile accident who later contracts a neurological disease that would have deprived her of the same use of her body had she not already lost it in the automobile accident.⁹³ He implies that even though statistical proof is not involved, the law correctly reduced the plaintiff's recovery in such a case.⁹⁴ Furthermore, immediately before his article's conclusion, Green rejects the position that problems of proof should, as a categorical matter, result in events like a steamer's sinking being excluded from consideration in mitigating damages. Green states:

90. Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 671-72 (2006).

91. *Id.* at 688.

92. *Id.*

93. *Id.* at 692.

94. *Id.*

Indeed, cases in which plaintiffs who suffer tortious injury and have a disease that may produce duplicated harm some time in the future are even less sympathetic cases for discounting damages than the accident victim who avoids the doomed airline flight because in the latter case, we know the disposition of the duplicating causal possibility⁹⁵

Green thus implies that tort law should reduce P's claim for damages in light of the preemption of the risk from the iceberg. Green then adds in a footnote:

The fact that the duplicating cause in one is a disease or other physical attribute of the plaintiff while in the other it is an exogenous event, whether manmade or an act of God, might cut the other way, but I do not see a reason why that should be so.⁹⁶

Green thus declines to distinguish between settled case law permitting a reduction in damages, such as the actuary-table cases, and controversial cases, like the Doomed Steamer Case. Green, along with Fischer, falls into the Reduced Recovery School.

While Green's analysis is persuasive, it may be faulted for not investigating the possibility of distinguishing between diseases and physical attributes on one hand, and exogenous events on the other. Because exogenous events have a quality of being unattached, avoidable, and nonproximate, such a distinction may hold an attraction for some. Indeed, Green's very act of identifying the distinction in a footnote, even if only to dismiss the distinction, suggests there is enough to it to warrant further attention.

I. John Marks

John Marks is the first scholar who explicitly endorses the symmetry principle. In his 2009 article, Marks seeks to develop a theory of when breach-derived benefits, such as employment

95. *Id.* at 708.

96. Green, *supra* note 90, at 708 n.143.

benefits, should be treated as damage offsets in breach of contract cases.⁹⁷ Advancing a trans-substantive theory of offsets, Marks proposes that offsets in contract cases should be governed by the same rules as offsets in tort cases.⁹⁸ Offsets raise the same issue as preempted innocent threats since a reduction in recovery based on the preemption of an innocent threat may be characterized as an offset. According to Marks, tort offset rules reflect the same principles of risk nexus, culpability, and policy that apply to limit the scope of a defendant's liability for consequences of tortious conduct.⁹⁹

Marks's analysis, however, does little to illuminate the problem of preempted innocent risks. Marks argues that some aspects of tort rules for scope of liability parallel those for offsets.¹⁰⁰ For example, under the Restatement (Third) of Torts, all things equal, a defendant's scope of liability is greater for negligent acts than intentionally tortious acts.¹⁰¹ Pursuant to the commentaries of Section 920 of the Restatement (Second) of Torts, the scope of the offset allowed is greater in cases of negligent torts than intentional torts.¹⁰² While not precisely a matter of symmetry,¹⁰³ the equitable principle that intentional tortfeasors should bear more liability seems present in both sets of rules. Likewise, Marks argues that "policy-based considerations" inform both scope of liability rules and liability offset rules.¹⁰⁴ Yet broad principles of equity, like the relevance of culpability to liability, and considerations of policy hardly establish that more detailed scope of liability doctrines should be imported to the area of offsets. Indeed, Marks describes the commonalities identified above as mere "hints" of a symmetry between scope of

97. Marks, *supra* note 13, at 1392–93 (“[T]he theory offered here is that, just as such doctrines limit the scope of losses for which a defendant can be held liable, the principles underlying these doctrines symmetrically apply to limit the scope of benefits that can offset the plaintiff's recovery.”).

98. *Id.* at 1401.

99. *Id.* at 1400–07.

100. *See id.* at 1400–01.

101. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33 (2005).

102. RESTATEMENT (SECOND) OF TORTS § 920 cmt. f, illus. 10–11 (2010).

103. Strict symmetry might require, in cases of intentional torts, the extension of both the scope of result harms deemed to be legally relevant and the scope of preempted harms deemed legally relevant.

104. Marks, *supra* note 13, at 1414.

liability rules and offset rules.¹⁰⁵ Critically, Marks never argues that the symmetry principle should be used to resolve cases like the Doomed Steamer Case, as opposed to the employment cases he is primarily interested in. Rather, he cites “scholarly recognition” that there should be no offset in the Doomed Steamer Case as evidence for the symmetry principle.¹⁰⁶ The scholarly support Marks identifies are commentaries to Section 920 of the Restatement (Second) of Torts and Goldberg’s article, both discussed earlier.¹⁰⁷ As I do not consider these sources authoritative or compelling, Marks’s discussion does little to resolve the puzzle of preempted innocent risks.¹⁰⁸

J. Summary

Over the last seventy-five years, a range of commentators have weighed in on the problem of preempted innocent threats—or, equivalently, the application of offsets—in torts. Most have taken the position that there should be no reduction of the plaintiff’s recovery in cases where the defendant’s tortious conduct preempted an innocent threat that was in some sense undetermined, avoidable, coincidental, or overly contingent relative to the position of one or other of the parties. In contrast, a couple of commentators have taken the position that a plaintiff’s recovery should be reduced in light of the preemption of an innocent threat, at least assuming such preemption can be adequately established. Concerns of windfalls and legal precedent have informed the positions of such commentators.

105. *Id.* at 1393.

106. *Id.* at 1408–09.

107. *Id.* at 1408–10, 1412–14.

108. Marks also considers the collateral source benefits rule. *Id.* at 1415–25. According to this rule, benefits to the plaintiff, such as gifts or insurance payments made as a result of the injury, are not considered offsets reducing the defendant’s liability. *Id.* at 1415. The rule is a form of offset limitation. *Id.* Marks believes there is a policy justification for this rule, even in cases in which its application results in double recovery for the plaintiff. *Id.* at 1421. Marks states that the rule “prevents the defendant from ‘taking advantage of an externality’” and suggests that the rule ensures full compensation to plaintiffs who are often undercompensated due to litigation costs. *Id.* at 1419 (citations omitted).

II. FORESEEABILITY AND THE PROBLEM OF PREEMPTED INNOCENT THREATS

This part of the Article and the next try to resolve the problem of preempted innocent threats. The analysis begins with a well-settled point of tort law identified by Professor Green: When determining the damages due a plaintiff who has been tortiously disabled, courts will take into account the plaintiff's work expectancy, i.e., how long the plaintiff would have likely worked had she not been tortiously injured.¹⁰⁹ In doing so, courts will rely on actuarial tables that predict work expectancy on the basis of statistical evidence about potential career-ending events, like diseases and accidents.¹¹⁰ Thus, preempted innocent threats from diseases and accidents are implicitly being taken into account. Furthermore, as Green points out, taking into account such statistical threats is not an arbitrary or unprincipled part of our tort system.¹¹¹ In determining damages for lost wages, courts must take into account the fact that plaintiff's work expectancy will be limited by accidents, diseases, and the like. It would be incoherent to award damages for lost wages on the assumption that the plaintiff would have lived and worked forever.¹¹² Whether there is a viable distinction between diseases and accidents predicted by statistical actuarial tables and specific events like doomed steamers and merged fires is the core of the problem of preempted innocent threats.

Where dependable and reliable actuarial tables predict that a plaintiff will suffer some career-ending event by a certain date, the future potential occurrence of such an event is, almost by definition, foreseeable. In contrast, one of the most salient features of the Doomed Steamer Case is the unexpected, improbable, contingent nature of the events that occurred after the taxi accident and the potential they had for harming P had the taxi accident not occurred.

109. Green, *supra* note 90, at 675–76.

110. E.B. Morris, Annotation, *Admissibility and Weight of Mortality Tables as Evidence as Affected by Lack of Normal Health*, 116 A.L.R. 416 (1938).

111. Green, *supra* note 90, at 689.

112. *Id.*

Indeed, the fact that the steamer's sinking was unexpected, etc. seems essential to the hypothetical. Assume that D, gifted with Cassandric foresight, had known that P was to board a steamer that would be hit by an iceberg, resulting in the drowning of all aboard, and that the only way he could save D's life was crashing the taxi, and sending D to the hospital. In that case, D's conduct would be justified, and so nontortious.¹¹³ Or assume that in the Merged Fired Case, discussed at the beginning of this article, D, before starting a fire in the woods that places P's home at risk, knew from weather reports that there would be a very high likelihood that regardless how he tended his fire, P's home would be consumed by flames. Because there would be only a small possibility that his act would create the risk of putting P in a worse position than he would have been in, D's conduct would likely not be considered tortious.¹¹⁴ The apparently critical fact that the iceberg in the Doomed Steamer Case was unexpected or unforeseeable suggests that its potential to end P's career should be excluded from the determination of P's damages.

A. The Argument From the General Rule That Unforeseeable Matters Are Not Relevant to Damage Determination

1. The General Rule and its Exceptions

The legal irrelevance of unforeseeable events to a plaintiff's recovery is a well-established doctrine of tort law.¹¹⁵ For example, consider the following variation of the Doomed Steamer Case. In this variation (the "Falling Brick Case"), there is no iceberg, and the steamer that P missed because of the accident safely arrives at its destination. P, having been discharged from the hospital following the taxi accident, drives home on a highway with an overpass. A

113. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43 (4th ed. 1971) ("It was held that since the conduct of the defendants had no justification or social value, they were not justified in neglecting even that slight risk, and they were therefore liable. The decision would appear to have adopted the American formula of balancing magnitude of risk and gravity of harm against utility of conduct, and to have applied it to foreseeability in relation to 'proximate cause.'").

114. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 30 (2005).

115. See, e.g., 1 DAN B. DOBBS, THE LAW OF TORTS 466 (2001).

loose brick from the overpass dislodges due to traffic vibrations and falls through the windshield of P's car, killing him. In this variation, P would not be able to recover in a wrongful death action against D even if he could establish that, had it not been for the initial taxi accident, he would not have been driving under the overpass and would not have been killed. Citing either the proximate causation or scope of liability doctrines, a court might explain that such injuries were unforeseeable, and hence outside the scope of D's liability.¹¹⁶

The exclusion of unforeseeable events, however, is not limited to those that cause harm, such as falling bricks. Consider a second variation on the Doomed Steamer Case. In this variation, there is no iceberg and the steamer arrives safely at its destination. However, en route to the steamer's destination, an on-board lottery is held in which passengers try to pick the number on a ball drawn out of a hat ("Ship Lottery Case"). Assume that it can be established at trial that P would have picked the number that was actually drawn, and thereby would have won \$1,000. I am confident that P would not be able to recover \$1,000 from D despite the fact that, had it not been for the taxi accident, P would have won the lottery.¹¹⁷ The explanation for this result seems closely tied to the explanation for P's not being able to recover in the Falling Brick Case. Just like the falling brick's injuring P was not foreseeable, so too the failure of P to win the lottery due to his not being on board to play would be considered unforeseeable.

The Ship Lottery Case involves the unforeseeable prevention of a *potential* benefit. The Falling Brick Case involves the unforeseeable occurrence of an actual *harm*. These cases together suggest that the law will not take into account the unforeseeable prevention of a *potential harm*. Thus, it might be argued that the unforeseeable

116. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. j (discussing the close connection between risk rules and the foreseeability test); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 42–44 (discussing proximate causation largely in terms of foreseeability).

117. There appear to be fewer cases involving unforeseeable failures to receive benefits when compared to unforeseeable harm. It is not clear to me why we should expect more unexpected harms than unexpected failures to receive benefits, because the requirement of unexpectedness seems to place equal limits on both classes of adverse events.

preemption of the iceberg—a potential harm causer—by the taxi accident should not be considered in the evaluation of P’s recovery. The discussion thus far can be summarized by the following chart:

	Unforeseeable Benefit	Unforeseeable Harm
Actual		Falling brick—Irrelevant
Potential	Ship lottery—Irrelevant	Iceberg—Arguably Irrelevant ¹¹⁸

The argument above, however, permits a response. Although in tort law the general rule is that unforeseeable events are not considered, there are exceptions. Imagine that instead of causing a serious accident, D’s negligent driving merely caused a fender bender. D himself is uninjured. P, however, is severely injured. The accident caused P’s head to hit the roof of the taxi. Normally, such an impact would produce no more than a bump. But P—unforeseeably—suffers from a previously unknown congenital birth defect that rendered his skull abnormally susceptible to impacts. As a result of P’s “thin skull,” he is severely disabled. A court determining the damages owed to P would take into account the injuries resulting from P’s thin skull even though they were unforeseeable.¹¹⁹ Or imagine a variation of the Doomed Steamer Case in which, as in the original hypothetical, the taxi accident was severe. Furthermore, P was a young actor who just got his first big break—he was cast as the lead in a planned series of mega-movies about teenage vampires. As a result—although there is no way D could have predicted it—P was deprived of an extremely lucrative career (“High Salary Case”).

118. “Irrelevant” and “relevant” should be construed as irrelevant or relevant to a plaintiff’s recovery.

119. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 (2005). Section 31 provides that “[w]hen an actor’s tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.” *Id.*

Again, a court would award damages based on P's actual loss of wages despite the fact that the magnitude of this loss was unforeseeable.¹²⁰ Finally, consider the Incurable Cancer Case presented at the beginning of this Article. It was argued that a court assessing P's damages would have taken into account the unforeseeable fact that P suffered from incurable cancer and that, had it not been for the accident, P would have retired in six months.

The cases discussed thus far, including the Incurable Cancer Case, may be summarized by the following chart:

	Unforeseeable Benefit	Unforeseeable Harm
Actual		Falling brick—Irrelevant Thin skull—Relevant
Potential	Ship lottery—Irrelevant High salary—Relevant	Incurable cancer—Relevant Iceberg—?

In light of these cases, how should the Doomed Steamer Case be resolved? The Unforeseeable Potential Harms category seems similar in some ways to the Unforeseeable Actual Harms and Unforeseeable Potential Benefits categories. In the latter two categories, there is a distinction between matters that are relevant and irrelevant. To determine how matters within the Unforeseeable Potential Harm category should be treated, it seems useful to determine the rationale for the distinctions in the other categories.¹²¹ In light of that rationale, the distinction may then be extended to the Unforeseeable Potential Harm category. Accordingly, the next section examines the treatment of matters within the Unforeseeable Actual Harms category with an eye to isolating a principle that may be applied to resolve cases in the Unforeseeable Potential Harm category, such as the Doomed Steamer

120. 2 DOBBS, *supra* note 1, at 361–62 (discussing recovery of lost wages without reference to foreseeability limitations).

121. This is the approach noted, but not investigated, by Green. Green, *supra* note 90, at 708 n.141. See discussion *supra* Part I.H.

Case.¹²² Stated in other words, if we can understand what is going on when we take thin skulls into account, we may be able to decide whether we should be taking doomed steamers into account.

2. *Unforeseeable Actual Harms and the Thin Skull Rule*

As a matter of legal doctrine, the doctrine of proximate causation, also known as scope of liability limits,¹²³ explains the result in the Falling Brick Case. The doctrine of proximate causation is famously murky.¹²⁴ Roughly speaking, it provides that defendants shall not be liable for unforeseeable harmful consequences of their tortious conduct.¹²⁵ The doctrine operates both as a liability doctrine, establishing a necessary condition for tort liability, and a damage doctrine, establishing limits on recovery.¹²⁶ The Thin Skull Rule is often presented as an exception to the requirement of proximate causation.¹²⁷ It permits recovery where a victim's harm is greater

122. This section focuses on the distinction between the Falling Brick Case and the Thin Skull Case, because the distinction between types of actual harms is better established than the distinction concerning types of potential benefits.

123. Section 29 of the Restatement (Third) of Torts substitutes “scope of liability” for the doctrine earlier described as proximate cause. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. j (2005). There is likely little difference between the two in theory or practice. *See id.*

124. *See, e.g.*, 65 C.J.S. *Negligence* § 188 (2012) (“Many . . . definitions and tests [for proximate cause] are inadequate . . . to afford a definite and invariable rule whereby a line can be drawn between those causes that the law regards as sufficiently proximate and those that are too remote to be the foundation of an action; the applicability of an announced definition must be determined by the peculiar facts and circumstances of the particular case, on mixed considerations of logic, common sense, justice, policy, and precedent.”).

125. *Id.* Explicating proximate causation in terms of foreseeability is now more prevalent than explicating it in terms of directness. It is also more common than the recent reformulation of the doctrine in terms of negligence-creating risks. RESTATEMENT (THIRD) TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2005). *See* discussion *infra* Part A.2.c.

126. *See, e.g.*, 1 DOBBS, *supra* note 115, at 453–54.

127. The drafters of the Restatement (Third) of Torts construe the Thin Skull Rule as an exception to the general scope of liability limitation of Section 31. RESTATEMENT (THIRD) TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 cmt. b (2005) (“[E]ven in those cases in which the harm may be found to be beyond the risk standard, the thin-skull rule . . . applies and makes the tortfeasor subject to liability for the harm.”). Some scholars have conceptualized the Thin Skull Rule as embodying the background rule of liability for direct injuries and have presented the doctrine of proximate cause as a limited exception to it. Gary L. Bahr & Bruce N. Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive*, 15 LOY. L.A. L. REV. 409, 428 (1982). It is also possible to characterize the thin skull doctrine as not an exception to, but an implication of, the basic rationale of proximate cause and the risk rule. *See infra* Part A.2.c.

than might be reasonably foreseen due to the victim's preexisting mental or physical condition.¹²⁸

a. The Puzzle of the Thin Skull Rule

On first blush, the distinction that tort law draws between a victim's preexisting physical or mental condition, such as a thin skull, and other states of affairs, such as falling bricks, may seem surprising. Clearly they would be treated equivalently in cases where the defendant was aware of their existence. Assuming foreseeability, creating an unreasonable risk that a person will be hit by a falling brick and creating an unreasonable risk that a person will be severely injured by a light tap to the skull would both be grounds for liability. It is only when the victim's preexisting conditions and other states of affairs are unforeseeable that a distinction is drawn between the two.

Furthermore, even when they are unforeseeable, the distinction between the victim's preexisting condition and other states of affairs may appear puzzling from the perspective of tort policy. Both thin skulls and falling bricks may place persons at risk of severe injury. Tort law has a strong interest in compensating unforeseeable injuries, regardless of their precise nature, because such injuries impose great burdens on victims and their families.¹²⁹ From this perspective, the injuries of P in the Falling Brick and the Thin Skull cases seem equally worthy of compensation.

Tort law is also concerned with fostering productive economic activity.¹³⁰ Potential exposure to unforeseeably high liability may deter such activity.¹³¹ The doctrine of proximate cause has been justified on this basis.¹³² This rationale may justify shielding D from

128. RESTATEMENT (THIRD) TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 (2005).

129. PROSSER, *supra* note 116, at § 43.

130. *See, e.g.*, Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 30–33 (2011).

131. William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349, 408 (1993) (“Predictability in the law is favored because citizens should not have to wait until a court acts to know their legal rights. However, a legal right or duty defined in terms of foreseeability defies predictability: ‘What consequences are sufficiently predictable to foresee them? How does a potential tortfeasor go about measuring the probability and severity of harm to a potential victim against the cost of taking precautions?’”) (citations omitted).

132. *See* Cross, *supra* note 130, at 43.

liability in the Falling Brick Case. However, liability for P's death from a falling brick and P's incapacitation as a result of a fender bender are equally unlikely and roughly equal in magnitude. The prospect of paying damages for unforeseeable injuries for preexisting conditions, such as thin skulls, seems equally likely to deter socially desirable activity as the prospect of damages from other states of affairs, such as falling bricks.¹³³ This rationale therefore does not seem to explain why the Falling Brick Case and the Thin Skull Case are treated differently.

Finally, proximate cause limits have also been explained on the ground that tort law has an interest in creating incentives for the cheapest insurer to cover unlikely injuries.¹³⁴ It may seem sensible to require persons to carry accident insurance against being injured by all falling bricks, rather than to require people to carry liability insurance to cover the cost of injuries from bricks they cause to fall. However, it seems equally sensible to require persons to carry their own insurance against injuries resulting from their congenital defects and other preexisting conditions. Again, the rationale for treating such cases as the Falling Brick Cases and the Thin Skull Cases differently is not obvious.

b. Physical Distinctions Between Falling Bricks and Thin Skulls

One effort to explicate the distinction between preexisting conditions that may increase liability and equally unforeseeable states of affairs that will not increase liability might rest on the distinction between forces and conditions. The distinction between forces and conditions seems a plausible candidate because it has fairly deep metaphysical roots. A condition might be thought of as a potential vulnerability to a force. A force would be whatever activates the potential. All harms thus could be thought of as resulting from the combination of a condition and a force. The Thin Skull Rule might

133. *Id.* at 43 n.87 (collecting sources that argue “the prospect of tort liability . . . inhibits innovation”) (internal quotation marks omitted).

134. Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L. REV. 293, 300 (2002).

be interpreted as making defendants liable for harms that result from unforeseeable conditions, not unforeseeable forces. The condition/force theory would make sense of the Falling Brick and Thin Skull cases because a falling brick is easily characterized as a force and a thin skull as a condition. If the force/condition theory were valid, and the distinction was extended to the category of Unforeseeable Potential Harms, there would be full liability in the Steamer Case because the harm caused by the iceberg would likely qualify as one caused by an unforeseeable force, not an unforeseeable condition.

One problem with the condition/force approach to the Thin Skull Rule is that it does not seem to account for what is intuitively its full scope. Imagine that D negligently throws a baseball in the direction of P, who is not looking, and a sudden and unforeseeable gust of wind accelerates the baseball toward P so that when it hits him on the head, he is severely injured rather than merely bruised. My sense is that D would be held fully liable despite the fact that the unforeseeable state of affairs, the gust of wind, seems better described as a force than a condition or vulnerability. Like the falling brick—our example of an unforeseeable state of affairs that would be considered legally irrelevant—the gust of wind seems like a force because of its active nature. Furthermore, the force/condition distinction does not seem capable of being extended to cases of potential harm, such as the Incurable Cancer Case. The law takes into account the fact that incurable cancer will prevent wages from being earned, even though cancer is not as easily described as a vulnerability to a force. Notwithstanding the fact that it is located inside of P's body, the cancer is a state of affairs which itself will lead to harm in the absence of any force. Finally, even if the law did consistently treat forces and conditions differently, there would be the question of why it should. If forces and conditions—understood as vulnerabilities to forces—are complementary elements of harm, why should they be treated differently when they both seem to contribute in critical, even if distinguishable, ways?

Nor can the Thin Skull Rule be usefully understood as

distinguishing between states of the victim, which are legally relevant, and extra-victim states of affairs, like falling bricks, which are not legally relevant. First, as a matter of positive law, it is not clear this is the relevant distinction. As suggested earlier, my intuition is that the effect of a gust of wind would be considered as relevant as the effects of a thin skull despite the fact that it is an extra-victim state of affairs. Indeed, even if the inquiry is limited to conditions, it does not seem material that the condition is identified as a condition of the victim. Consider the case of a doctor who prescribes drugs to a patient, creating an unreasonable risk of mild nausea. Unforeseeably, the patient travels to a location where the climate is much hotter than at his home, and because of this hot climate, he experiences severe nausea. Here, an environmental condition combines with the negligent conduct of the defendant to produce a harm. While this case does not fit within the express terms of Section 31 of the Restatement (Third) of Torts, which codifies the Thin Skull Rule,¹³⁵ my guess is that courts would conclude that the doctor must compensate the patient for his experience of severe nausea rather than merely the lesser foreseeable nausea. Second, as a normative matter, there seems no ground for distinguishing between conditions of the victim and other conditions. If a tortfeasor must “take his victim as he finds him,” why should he not have to take the highway conditions as he finds them, and be liable for injuries the plaintiff receives as a result of being hit by a falling brick upon leaving the hospital? Indeed, it would seem more equitable that a plaintiff bear the costs associated with his own physical condition than those costs resulting from other unassociated factors. After all, even if the plaintiff is not at fault for having a thin skull, for better or worse, it is still his skull. Thus, the distinction between a victim’s condition and other conditions does not seem to be driving the Thin Skull Rule.

Nor can preexistence be critical to a state of affairs’ legal relevance. A victim’s thin skull exists prior to a defendant’s negligence. But so does the precipitous brick, the effects of which are

135. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 (2005).

not taken into account. Along the same lines, it might be thought that what is driving the Thin Skull Rule, and therefore, what should inform the resolution of the Doomed Steamer Case, is not merely preexistence, but interaction with D's negligent conduct. If D negligently throws a baseball, which severely injures P because of his thin skull, D's throwing of the baseball, or at least the baseball, has in some sense interacted with P's thin skull; thus, the thin skull and its effects are relevant. In contrast, the brick that falls on P after he has left the hospital seems not to have interacted with either D's negligent driving or D's taxi. If this is the distinction between states of affairs that are legally relevant and those that are not, it is difficult to see how this distinction might be extended to potential harm-causers, like incurable cancer and icebergs, to support the conclusion that the former is legally relevant but the latter not. Neither interacts with D's negligent driving, nor are their potential effects preempted through direct interaction with D's driving or the resultant accident. D's negligent driving did not cure P's cancer: it merely preempted the career-shortening effects of the cancer.

Finally, it might be thought that the critical feature of legally relevant, unforeseeable states of affairs like thin skulls is that such states make a difference only in extent or degree. For example, in the Thin Skull Case, P's injury due to his thin skull may be described as merely greater-in-degree than the one that D's negligent driving alone would have caused. In contrast, in the Falling Brick Case, P's injury from the brick may be described as distinct from his injury from the taxi accident. Likewise, in the High Salary Case, the benefit not received may be described as merely greater-in-degree than the one foreseen, while in the Ship's Lottery Case, the benefit not received may be described as distinct from the wages P foreseeably lost. If this is the relevant distinction, however, it does not seem like the distinction can be extended to cases of potential harm to support the conclusion that, although the preemption of the incurable cancer is legally relevant, the preemption of the icebergs is legally irrelevant. The incurable cancer, as much as the iceberg, would have produced injuries that are most naturally described as distinct from

the ones that were actually caused. Thus, the distinction between states of affairs causing injuries unforeseeable in extent and those causing injuries unforeseeable in type, even if suggested by some of the cases thus far considered, cannot be the basis of an argument for undiminished recovery for P in the Doomed Steamer Case.

In sum, thus far we have considered a number of physical features of thin skulls. They are (1) preexisting (2) conditions (3) of the plaintiff that (4) aggravated in degree the injury of the plaintiff. None of these features, however, seem to plausibly account for the scope of the Thin Skull Rule, nor explain why, when it comes to the preemption of innocent threats, incurable cancer would be considered legally relevant, but an iceberg would not.

c. Foreseeability and Thin Skulls

The previous section assumed that some states of affairs—such as thin skulls, high salaries, and incurable cancers—were exceptions to the general principle that unforeseeable matters are legally irrelevant and sought a principled basis for the exception to see whether this exception would apply in the Doomed Steamer Case. In contrast, this section considers the argument that, properly understood, these matters are foreseeable, but the potential drowning of P due to the iceberg is not, and hence should be ignored when P's damages are assessed. Thus, foreseeability—which is not an objective physical feature of a state of affairs, but a feature of an event relative to a body of knowledge—is considered the critical distinction between matters that are legally relevant to the calculation of damages and those that are not.

There is no general, commonly accepted definition of foreseeability.¹³⁶ Thus far, the discussion has presumed that such matters as thin skulls, high salaries, incurable cancers, and threatening icebergs were equally unforeseeable on the ground that,

136. Compare 65 C.J.S. *Negligence* § 211 (2012) (“Foreseeability in the context of causation asks whether an injury might reasonably have been contemplated because of the defendant’s conduct.”), with 1 DOBBS, *supra* note 115, at 464 (“The foreseeability or risk rule holds the defendant subject to liability if he could reasonably foresee the nature of the harm done, even if the total amount of harm turned out to be quite unforeseeably large.”).

ex ante, they would be thought by a reasonable person roughly unlikely to occur. As a matter of ordinary English usage, describing these events as unforeseeable is unproblematic. Yet for purposes of tort law, foreseeability may not simply be a function of likelihood. In the tort context, foreseeability may be understood in terms of what matters a reasonable person would take into account when deciding how to act. This is the approach implicitly taken by the Restatement (Third) of Torts. Section 29 of the Restatement reformulates the traditional proximate causation limit.¹³⁷ Instead of limiting liability to foreseeable harms, Section 29 limits liability to harms that are the realization of the risks that made an actor's conduct negligent.¹³⁸ What risks might make an actor's conduct negligent is not simply a function of the magnitude of the risk—understood as ranging from 0 to 1—it is also a function of the severity of the harms that are risked.¹³⁹ Risks of more severe harms should obviously be given greater consideration than risks of lesser harms.

Likewise, the increase in risk, rather than the absolute magnitude of the risk, may be important in determining whether a risk is foreseeable. Imagine that a hiker asks a forest ranger which of two trails, A or B, is safer. The ranger thoughtlessly responds, "Trail A," and the hiker is subsequently injured on Trail A by wild animals. Here, the risk of wild animals on Trail A, no matter what its absolute magnitude, would not be among the risks that made the ranger's response negligent if there were the same risk of wild animals on Trail B. If this were the case, pursuant to Section 29 of the Restatement (Third) of Torts, the harm suffered by the hiker would seem to be outside of the ranger's scope of liability. The risk would be deemed unforeseeable. In contrast, if the risk of rock slides on Trail A were greater than on Trail B, and a reasonable ranger would

137. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2005).

138. *Id.* Section 29 provides, "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.*

139. *Id.* § 3 ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

know this, this risk would make the ranger's response negligent, and the ranger would be liable for the injuries caused by a rock slide even if, in absolute terms, the risk of a rock slide was small.¹⁴⁰

This analysis of foreseeability may solve the puzzle presented in the previous section. The relevant feature of a thin skull that makes an actor liable for injuries that involve such feature is not its likelihood in absolute terms, which might be very low, but its tendency to increase the likelihood of a greater injury where there is negligent conduct. From this perspective, one can understand why courts might take into account an unexpected gust of wind that accelerates a negligently thrown baseball, but might not take into account an equally unexpected gust of wind that causes a tree branch to break and fall on a negligently injured victim. Where an actor makes an unreasonable decision to throw a baseball in another's direction, the negligent throwing of the baseball increased the risk of injury from a wind-accelerated baseball from 0 to a small amount, but did not increase the risk of injury from a wind-blown tree branch at all.

We may apply this analysis of foreseeability to the cases of a person being injured and, as a result, missing a steamer that sinks. The likelihood of P having a thin skull, or being hit by a falling brick, or having a high salary, or having incurable cancer, or being on a steamer hit by an iceberg may all be equally small. Indeed, all might be associated with harms of equal severity. It does not follow, however, that they are all equally unforeseeable in the relevant sense. For the sake of being concrete, let us assume the likelihood of all these events was 1/100. By driving negligently, D, in the Thin Skull Case, increased the risk of P's suffering a serious head injury from 0 to 1/100, because there would be no risk of serious head injury if D avoided the fender bender, and there was a 1/100 risk of serious injury, due to P's possibly having a thin skull, if there were to be a fender bender. In contrast, in the Falling Brick Case, the risk of P's

140. This result is expressly confirmed by Section 30 of the Restatement (Third) of Torts, which provides: "An actor is not liable for [physical] harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 30 (2005).

being hit by a falling brick, even if that risk is 1/100 where D's conduct sends P to the hospital, was not increased by sending P to the hospital. Simply by driving on a public road there is, we might imagine, a 1/100 chance of being hit by a falling brick. It is a general background risk, the magnitude of which is unaffected by D's negligent driving.¹⁴¹ Likewise, it may be argued, in cases where a passenger is unable to board a doomed steamer due to negligence, the chance of the passenger's drowning when his steamer is hit by an iceberg was not decreased. This is so because, even if the accident had prevented the passenger from being on the steamer, it is reasonable to infer that, having missed one cruise, P would go on another in its place, thus leaving the relevant risk at 1/100. Because saving the passenger from the iceberg was not foreseeable in this sense, the fact that the passenger was saved from an iceberg should not be taken into account when assessing damages.

The foregoing argument for excluding threat-preemption from damage calculation on the grounds of unforeseeability seems sound for a large set of cases. However, I believe it is flawed for a not insignificant subset. This subset likely includes the Doomed Steamer Case, as presented at the beginning of this Article. The risk of being drowned on a steamer which is hit by an iceberg may be characterized as a background risk insofar as it, at least when taken together with other similar risks, is a small but non-zero risk, the size of which is not appreciably diminished by a wide range of negligent conduct by others. If P is negligently tripped by D, and cannot board the specific steamer passage he has booked, his risk of being on a sinking steamer is no more diminished than the risk that he will be hit

141. Of course, one might argue that the risk of P being hit by a brick that falls from a bridge near the hospital is increased by D's negligent conduct because D's negligent conduct increases the chance of D's driving below the bridge near the hospital. There are two related responses to this argument. The first response is that the risk of "being hit by a brick that falls from a bridge near the hospital" is not a relevant category of risk. Risks must be described in the more general terms that reasonable people use to think about the risks in the world, terms like "falling bricks," without reference to largely irrelevant matters like geographical location of potential risk realization. The second response is that even though D's conduct increased the risk of his being hit by a brick that falls from a bridge near the hospital, it decreased the risk of his being hit by a brick that falls from another bridge because, being at the bridge near the hospital, P is not going to be under another bridge. Thus, the increase in risk is offset by a decrease in risk, and so does not contribute to making D's driving negligent.

by a falling brick is increased. In contrast, in cases where a victim is killed or permanently disabled as a result of an actor's negligence, his risk of being disabled by what are generally regarded as background risks drops to zero. Though it would be unusual to describe the situation as one in which the deceased or disabled victim benefitted from his condition, he is obviously no longer at risk of losing his ability to work. Suffering a death or disability is an extreme form of protection from the realization of future disability risks. Because this change in risk level with respect to the possibility of becoming disabled is appreciable,¹⁴² it should not be deemed unforeseeable and excluded from consideration as might a subsequent injury from falling bricks.¹⁴³ Stated in terms of considerations relevant to a reasonable person's decision-making, the point may be put like this: A reasonable person trying to assess the risks he may be imposing on others will take into account the fact the person his act threatens does not have an unlimited life span with infinite potential earnings. Furthermore, a reasonable person will realize that just as there is a significant chance a person will die from preexisting conditions, such as incurable cancer, there is a significant chance the person will die from other innocent causes, such as car accidents, lightning bolts, icebergs, etc. Thus a reasonable person will take into account potential causes of death and disability, like icebergs, just like he will take into account those like cancer. They are therefore as much foreseeable as the presence of incurable cancer, which is

142. It may be questioned whether the chance of being "shielded" from the effects of background risks through death or incapacitation is a significant enough occurrence to be considered foreseeable. Consider the following hypothetical involving actual harms. P lives in an absolutely safe environment. In this environment there are no background risks of falling bricks, wild animals, icebergs, cancer, death, or injury in any manner. Though acting otherwise would cause D absolutely no burden, D acts in a way that transports P into our world. Such action would be found negligent, even though the risks P is now exposed to are merely background risks. Furthermore, any harm that P suffered, from falling bricks or any other background risk, are foreseeable and within the scope of D's liability.

143. Note that when it comes to potential harms, the nature of the actual injury is relevant to determining whether a beneficial chance decrease in background risks is created. This effect exists, but is not noticed, when it comes to actual harms. If D's negligent conduct causes a slight injury, and P is subsequently hit by lightning when leaving the hospital, there will be no liability based on the lightning strike, because the risk of lightning was not appreciably increased by D's negligence. In contrast, if D's negligent conduct causes P's death, the question of whether D should be liable for a subsequent lightning strike does not arise.

uncontroversially taken into account when damages are assessed.

B. Foreseeability and Fairness

1. The Basic Argument

Thus far, in trying to formulate an argument for ignoring the preemption of the potential drowning in the Doomed Steamer Case, we have looked for a cogent rationale for distinguishing between such unforeseeable harm-causing states of affairs as falling bricks and thin skulls, such that, when that rationale is applied to preempted threats, preempted threats like icebergs will be ignored, but potential threats like cancer will not be. No such general rationale, however, has been identified. The Argument from Fairness presented here takes a different approach. According to the Argument from Fairness, even if there is not a rationale for the distinction between actual harms like falling bricks and thin skulls that can be extended to potential harms like icebergs and cancer, principles of fairness dictate that preempted threats like icebergs should be treated as legally irrelevant despite the fact that preempted threats, like cancer, are considered relevant to damages.¹⁴⁴

The Argument from Fairness runs like this: The baseline of relevance for purposes of assessing tort liability is foreseeability, as that term is ordinarily understood. If a state of affairs is unforeseeable, it generally should be excluded from consideration when damages are assessed. An exception is made in the case of certain preexisting conditions, like thin skulls, associated with the victim's physical condition that enhance actual injury. This feature of tort law, *whether or not based on a cogent rationale*, is a well-established fact.¹⁴⁵ Given this fact, it is fair that tort law consider the effects of the preemption of similar states of affairs, such as cancer, that might have caused future injury. Since thin skulls (and other

144. See Douglas N. Walton & Hans V. Hansen, *Arguments from Fairness and Misplaced Priorities in Political Argumentation*, 6 J. POL. & L. 78, 85 (2013) (describing the Argument from Fairness).

145. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 31 (2005); 86 C.J.S. *Torts* § 31 (2012); PROSSER, *supra* note 116, at 261.

personal vulnerabilities) will increase recovery, cancer (and other personal vulnerabilities) should be allowed to decrease recovery. Fair is fair. Tort law, however, does not take into account the harm-producing effects of other unforeseeable states of affairs, such as falling bricks, that harm the victim only because of a tortfeasor's negligence. Thus, there is no reason to take into account the preemption of the corresponding threats, such as icebergs. The fact that D's negligence preempted P's death as a result of the iceberg should be ignored when damages are being assessed; the Doomed Steamer Case should be resolved in favor of P. Stated in other words, the argument may run like this:

(1) The fact that D's negligent conduct benefitted P by preempting the threat from the iceberg should be ignored when assessing P's damages because the preemption was unforeseeable (in the ordinary sense of the word).

(2) It is not unfair to D to ignore the preemption based on its unforeseeability despite the fact that some unforeseeable actual harm increasers, such as thin skulls, which increase D's liability, are taken into account.

(3) It is fair to take thin skulls into account because similar cases of preemption, such as cancer, are taken into account.

(4) Since thin skulls cases and cancer cases in a sense "cancel each other out," the law can simply apply the general norm that in damage assessment, unforeseeable matters, such as the preemption of icebergs, are to be excluded from damages determinations.

2. *Evaluating the Argument*

It is somewhat difficult to assess the soundness of the Argument from Fairness. On one hand, it may be argued that from the perspective of fairness, it is not enough to permit the defendant to

decrease his liability simply by reference to those unforeseeably preempted states of affairs which, had they instead been realized due to D's conduct, would have been considered relevant (i.e., cancer). To preserve the fairness of the tort system, it is necessary to allow defendants to decrease their liability based on the preemption of additional states of affairs, such as threatening icebergs. This is so because increases in liability due to unforeseeable preexisting conditions of the victim are more burdensome to the defendant than the advantage to defendants from decreases in liability based on the preemption of corresponding threats.

First, decreases in liability based on preempted potential harms are systematically more difficult to establish, and hence less valuable, than the corresponding liability enhancements for actual harms. A plaintiff who has suffered a harm due to an unforeseeable preexisting condition will usually have little trouble establishing the necessary facts related to causation to recover fully. For example, consider the case where D has negligently thrown a tennis ball toward P's head and P, due to a thin skull, suffers a severe injury and is out of work for six months. Assuming D's negligence can be established, the remaining elements of P's case should be easy to establish. Circumstantial evidence clearly indicated that the severe injury was caused by the tennis ball (in conjunction with P's thin skull). The severe injury, which may have kept P in the hospital for 6 months, is clearly the cause of P's loss of wages. In contrast, D, attempting to mitigate his damages, will have a more difficult time establishing the preemption claim that had he not thrown the tennis ball, some other preexisting vulnerability would have prevented P from working. In general, it is more difficult to establish counterfactual claims about injuries that would have occurred than factual claims about injuries that did occur. Thus, asymmetrical obstacles to proof undermine the alleged fairness of ignoring some unforeseeably preempted harm while considering some unforeseeably caused harms.

There is a second reason why it is arguably unfair to defendants to take into account harm causing conditions, like thin skulls, while only taking into account harm preempting conditions comparable to

thin skulls, like cancer. Allowing plaintiffs to recover for harms resulting from unforeseeable preexisting conditions may, in any given case, increase a defendant's liability an indefinitely great amount beyond what he could have reasonably foreseen. In contrast, preemption-based decreases due to the corresponding states of affairs may only decrease defendant's liability to zero. A fundamental feature of our legal system is that plaintiffs will never be required to pay the defendant for causing a beneficial preemption that exceeds the magnitude of the harm caused.¹⁴⁶ Thus, a defendant is responsible for the entire additional harm that an unforeseen preexisting condition creates, but can only capture a limited amount of the benefit that might be conferred due to the unforeseeable preemption of an existing condition. The effect of this asymmetry is particularly pronounced in cases where the foreseeable harm to P is relatively small. Due to an unforeseeable preexisting condition, like a thin skull, D's liability may be far beyond what he could have foreseen. D's liability, however, can only be reduced a small amount due to the preemption of an unforeseen potential harm from a preexisting condition. In at least such cases, D will have a viable argument that in light of his unforeseeably large potential liability, he should be able to mitigate his liability based on the preemption of potential threats, including those from sources, such as icebergs, that are not based on so-called existing conditions, like cancer.

3. *An Alternative Argument*

An alternative argument based on fairness runs as follows: When it comes to tort damages, the baseline of fairness is that all effects of negligent conduct—good and bad, foreseeable and unforeseeable, caused and preempted—are taken into account (“universal relevance”). The fact that unforeseeable thin skulls, high salaries, low salaries, incurable cancer, etc. are taken into account follows from this baseline moral assumption. Sometimes, however, it is fair to take

146. *Cline v. Am. Aggregates Corp.*, 582 N.E.2d 1, 4 (Ohio Ct. App. 1989) (“Thus, this principle [the benefits rule] is intended to restrict an injured person's recovery to the harm he actually incurred, and not to permit the tortfeasor to force a benefit on him against his will.”) (citation omitted).

certain sets of unforeseeable matters off the table and out of the damages calculus. But is it fair to do so only when a corresponding matter that is either advantageous or disadvantageous to the other party, as the case may be, is taken off the table? Since it is clear that tort law does not take into account the benefits that P might have enjoyed on the steamer, such as winning the ship's lottery, it is fair to exclude from consideration the harms that P might have experienced on-board, such as drowning as a result of an iceberg collision. Thus, as a matter of fairness, the Doomed Steamer Case should be resolved in favor of P. D should get no credit for the preemption of innocent threats that are in some sense comparable to preempted benefits that are excluded from consideration.

The advantage of this argument is that it avoids the problems of asymmetrical obstacles to proof that arose with respect to the earlier fairness argument. It is as easy to prove that P would have won the ship's lottery as to prove that he would have been drowned if an iceberg had hit the steamer. Both assertions concern hypothetical events. Furthermore, the alternative argument avoids the symmetry of damages problem that plagued the original fairness argument. By excluding from consideration the lottery that P would have won, D is getting a potentially unlimited advantage. By excluding consideration of the preemption of the iceberg, D is only losing out on a mitigation claim capped by the size of what otherwise would be his liability. To the extent that ignoring a class of on-board events is unfair, it is unfair to P who loses out on claims for potentially unlimited benefits. But this might be rectified by allowing a larger class of harm-preempting events to be excluded. The Doomed Steamer Case would be fairly resolved in P's favor.

The greatest question about the previous argument is the strength of its premise that the baseline of fairness is universal relevance. If this is so, how are scope of liability rules, like the proximate cause doctrine or the risk rule, to be accounted for? Along the lines of the previous argument, it might be explained that it is fair not to consider actual harms from unforeseeable states of affairs, such as falling bricks, because actual benefits from unforeseen states of affairs are

not considered. Consider the Hospital Lottery Case. In this case P, after being injured in the taxi negligently driven by D, is taken to a hospital. Upon his discharge, he purchases a winning lottery ticket in the convenience store next to the hospital. He would not have purchased this ticket but for D's negligent conduct. Although there are not many cases on point,¹⁴⁷ it seems clear that P's recovery would not be reduced by the amount he won. Off-setting limitations on actual harms, such as from falling bricks, and actual benefits, such as from lottery wins—besides offering a novel justification of the doctrine of proximate causation—makes the background norm of universal relevance seem plausible.

The difficulty with this argument is that it assumes under the banner of universal relevance that D has a prima facie claim to credit of matters advantageous to P, such as the preemption of potential harms and the causing for benefits like hospital lottery winnings, which explains why disadvantages inflicted are not held against him. But this prima facie claim seems inconsistent with a fundamental asymmetry in the law. If A intentionally and without prior agreement confers a disadvantage on B—either by imposing a harm or preventing A from enjoying a benefit—B is entitled to legal relief in tort.¹⁴⁸ But if A intentionally and without prior agreement confers an advantage on B—either by preventing a harm or imposing a benefit—A has no claim to the value of the advantage conferred.¹⁴⁹ Thus, if D, through unilateral action, simply prevents a wild animal from injuring P or informs P where a gold nugget may be found, D has no legal entitlement to reimbursement and is due no more than a pat on the back. This result seems to have a solid foundation in morality. Under some views of autonomy, moral obligations cannot be unilaterally imposed.¹⁵⁰ The law of unjust enrichment and

147. *Id.* (holding that where tortious harm to property made owners to decide to have property annexed, which increased its value, recovery would not be diminished by increase); *Lodato ex rel. Lodato v. Kappy*, 803 A.2d 160, 160–61 (N.J. Super. Ct. App. Div. 2002) (holding that in a wrongful birth case, a jury award for emotional damages could not be offset by evidence of the joy of having the child).

148. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2005).

149. *Cline*, 582 N.E.2d at 4.

150. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 95 (1974) (arguing that receiving unbargained

restitution seems to reflect this principle.¹⁵¹ Thus, if D nontortiously prevents P from boarding a steamer which turns out to be doomed, or nontortiously sends P to the hospital where P wins a lottery, D is due no more than a pat on the back based on the fortuitously beneficial consequences of his act. If D tortiously causes the same results, why should D not receive a lawsuit plus a pat on the back? The only exception to the principle that unilaterally providing a benefit to another accrues to the benefit of the provider are cases where one party acts intentionally in situations, such as emergencies, where prior bargaining over the value of the advantage is infeasible.¹⁵² For example, if D breaks down P's door to put out a fire in P's home, D will not merely receive a pat on the back and a judgment for trespass to property, he will be entitled to a full defense under the doctrine of necessity.¹⁵³ The doctrine of necessity, however, is clearly driven by the sound policy consideration to remove liability-based disincentives to conduct with an expected net positive effect. Such considerations are not present in the Doomed Steamer Case and the Hospital Lottery Case. Again, the premise of universal relevance as a baseline for fairness is placed in doubt.

Indeed, if there is a solid moral or legal foundation against a person claiming credit for a gratuitously conferred benefit, why would the principle not itself be enough to resolve the question of preempted innocent threats in favor of plaintiffs? The answer, in brief, is that the Doomed Steamer Case might not be best described as one where a benefit—the preemption of a threatening iceberg—is gratuitously conferred on P; rather, it is one where a potentially harmful consequence of tortious conduct is not realized. This perspective on the problem is considered at greater length in the next Part.

for benefits creates no obligation to repay the person providing the benefits or to participate in activities conferring benefits to others).

151. Providing a benefit without prior agreement or negotiation at most entitles the provider to reimbursement of his costs, not the value of the benefit to the party benefitted. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49 (2011).

152. *See, e.g., id.*

153. RESTATEMENT (SECOND) OF TORTS § 197 (1965).

C. Summary

The argument to this point has been complicated, and the reader is owed a recap. The analysis of the problem of preempted innocent threats began with the well-settled point that actuarial tables regarding career length are clearly relevant to damages calculations. If statistically predicted career-ending events should be considered, why not more concrete ones, like doomed steamers? The answer advanced was that, while actuarial tables predict foreseeable matters, occurrences like doomed steamers are unforeseeable. It was observed, however, while many unforeseeable matters were excluded from damages consideration, like falling bricks, not all were, like thin skulls. The distinction between falling bricks and thin skulls was investigated to determine whether doomed steamers should be governed by the rule that unforeseeable matters were excluded, or the exception. That Part, however, failed to identify a distinction between thin skulls and falling bricks that is both cogent and would imply that doomed steamers should be treated like falling bricks and not taken into account on grounds of unforeseeability. Next, this Part examined the assumption that thin skulls are an exception to the rule that unforeseeable matters are not considered in damages calculations. Under a wider notion of foreseeability, they might be considered foreseeable, and thus, would not be an exception. But under a wider notion, doomed steamers might be considered foreseeable as well, and so should be taken into account as much as predictions from actuarial tables. Finally, an alternative argument, not relying on the cogency of the general rule that unforeseeable matters are irrelevant, was considered for understanding why the unforeseeability of the doomed steamer should result in its not being considered. The argument was that it is fair to exclude since other unforeseeable matters are also excluded. The argument was found to be wanting. Accordingly, the unforeseeability of the sinking steamer should not prevent it from being a basis for a reduction in plaintiff's recovery.

III. LIMITS TO THE RELEVANCE OF PREEMPTED INNOCENT THREATS

The previous Part considered and rejected the position that the preemption of innocent threats, such as the iceberg in the *Doomed Steamer Case*, should be excluded from the calculation of damages on the ground that they are unforeseeable. Beyond the fact that some innocent preempted threats, like brain cancer, are clearly relevant, however, the Article did not provide an affirmative argument for taking unforeseeable innocent preempted threats into account. That is the goal of this part of the article. As will be shown, the affirmative argument implies certain limits to the relevance of preempted innocent threats.

A. *The No-Windfall Principle*

As noted, when assessing damages, juries may take into account actuarial tables that predict that, absent a plaintiff's tortiously caused injuries, a plaintiff's prospects for wage-earning would likely have ended by a particular date.¹⁵⁴ Damages for lost wages are limited to the period that plaintiff probably would have worked.¹⁵⁵ One rationale for this doctrine is the No-Windfall Principle.¹⁵⁶ Professor Fischer suggested this principle in the context of the *Merged Fire Case*.¹⁵⁷ According to Fischer: "[f]rom a fairness perspective, imposing liability for harm duplicated by non-tortious forces is undesirable because it would give the plaintiff a windfall. Corrective justice requires no more than that the plaintiff be restored to the position that he would have occupied if the tort had not occurred."¹⁵⁸

Fischer argues where a tortiously set fire and an innocently set one both destroy a property, an award to the plaintiff would be a windfall, and so, inconsistent with tort's goal of achieving corrective justice.¹⁵⁹ If a plaintiff received compensation for her lost property, she would

154. See Green, *supra* note 90, at 688.

155. See 2 DOBBS, *supra* note 1, at 466.

156. Fischer, *supra* note 13, at 1127.

157. *Id.* at 1136.

158. *Id.*

159. *Id.* at 1145.

obviously be placed in a better position than she would have been had the defendant not acted tortiously because, absent defendant's conduct, she would have suffered an uncompensated loss. Likewise, with respect to lost wages, it seems that fairness only requires that a plaintiff who is permanently disabled as a result of a tort receive compensation equal to the value of the wages earned up to, but no further than, the time the plaintiff probably would have stopped working due to some nontortious cause, as predicted by actuarial tables. The No-Windfall Principle seems to imply that in the Doomed Steamer Case, any recovery of lost wages by P would be a windfall he is not entitled to since awarding compensation on these grounds would put P in a better position than he would have been absent D's negligence. Indeed, Fischer appears to support a reduction of plaintiff's recovery in the Doomed Steamer Case as well.¹⁶⁰

The No-Windfall Principle is strongly suggested by the core tort doctrine of factual causation.¹⁶¹ In typical cases where the requirement of factual causation is not satisfied, awarding damages would give plaintiffs a windfall in the sense of placing them in a better position than they would have been absent the defendant's tortious conduct. For example, P, who suffers from back pain, goes to D to have her lower back x-rayed. In such circumstances, D has a duty to ask P whether she might be pregnant before x-raying her.¹⁶² D, however, negligently fails to ask and x-rays P. As a result, P, who was pregnant, suffers a miscarriage. It is subsequently determined, based on P's testimony, that she erroneously believed that she was not pregnant and that, if asked, she would have replied that she was not pregnant. Thus, even if she had been asked, she still would have been x-rayed. In this case, P will not be able to recover damages

160. Fischer offers the qualification that in matters of preempted threats, proof must be of "sufficient clarity." *Id.* at 1146. Fischer never states, however, that proof required in matters of preempted threats be any higher or more clear than proof with respect to any other issues. *See generally id.*

161. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 26-27 (2005).

162. *Compare* *Deutsch v. Shein*, 597 S.W.2d 141, 145 (Ky. 1980) (finding breach of duty where doctor failed to determine if patient was pregnant before performing numerous diagnostic x-rays on her), *with* *Cox v. Dela Cruz*, 406 A.2d 620, 622 (Me. 1979) (finding radiologist not negligent for failing to ask patient who was child-bearing age if she was pregnant when the risk of fetal abnormality resulting from x-rays was so low that he would have performed the x-ray even if he had known she was pregnant).

because D's negligence was not a factual cause of her loss.¹⁶³ In this case, recovery would place her in a better position than she would have been had it not been for D's negligence, and so would be a windfall. Core tort cases thus illustrate the No-Windfall Principle.

The No-Windfall Principle, however, is too broad to account for the full range of tort cases. First, the case law with respect to merged fire cases has been mixed. Consistent with the No-Windfall Principle, some courts have reached the conclusion that plaintiffs should not recover.¹⁶⁴ Others, however, have not.¹⁶⁵ Second, many courts allow plaintiffs who suffer a miscarriage as the result of a defendant's negligence to recover full damages for pain and suffering despite the fact that had it not been for the defendant's negligence they almost certainly would have experienced pain and suffering during normal childbirth.¹⁶⁶ Thus, these plaintiffs get a "windfall" in the sense that, all things considered, their position as a result of the negligence—pain and suffering from miscarriage and *full compensation*—is better than it would have been—pain and suffering from childbirth *without compensation*—absent the defendant's negligence. Third, in wrongful death actions brought by spouses seeking damages for lost support, lost companionship, and lost society, courts generally bar evidence of remarriage,¹⁶⁷ despite the fact that if the new marriage provides equally valuable companionship, an award would provide a

163. See 1 DOBBS, *supra* note 115, at 411 n.2 (citing *Salinetto v. Nystrom*, 341 So. 2d 1059 (Fla. Dist. Ct. App. 1977)). Because this is not a case involving multiple tortfeasors, courts would apply the basic but-for test for factual causation.

164. See *Kingston v. Chi. & Nw. Ry. Co.*, 211 N.W. 913, 915 (Wis. 1927) (dicta); *Cook v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 74 N.W. 561, 567 (Wis. 1898). See also *Dep't of Env'tl. Prot. v. Jersey Cent. Power & Light Co.*, 351 A.2d 337, 341–42 (N.J. 1976) (finding no factual causation where nuclear power plant's discharge of unheated water into stream, in conjunction with cold weather, merely allowed stream to reach its natural temperature, which was fatal to fish); *Geuder, Paeschke & Frey Co. v. City of Milwaukee*, 133 N.W. 835, 841 (Wis. 1911) (approving *Cook* and holding defendant not liable where the bursting of its sewer merely added to the flooding of a basement from extraordinary rain).

165. See *Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 179 N.W. 45, 49 (Minn. 1920); *Kyriss v. State*, 707 P.2d 5, 8 (Mont. 1985) (upholding liability for medical malpractice when preexisting arteriosclerosis and alleged mistreatment of toenail were each sufficient to cause plaintiff's gangrene). See also FLA. STANDARD JURY INSTRUCTIONS 5.1(b) (1978) ("Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].").

166. See *supra* note 57.

167. *Marks, supra* note 13, at 1414 n.136.

windfall to plaintiffs in the sense of putting them in a net better position.

The final, and possibly the most significant set of cases that do not appear to be consistent with the No Windfall Principle, are the “later career” cases. If a person is injured, he may seek damages for his loss of earning capacity.¹⁶⁸ If a plaintiff’s injury prevents him from practicing dentistry, but permits him to maintain his high income level only by becoming a salesman, a court may find a loss of earning capacity and allow full recovery for lost wages.¹⁶⁹ Since the plaintiff receives compensation in addition to the wages from his new career, he has realized a windfall relative to his expected earnings absent the defendant’s tortious conduct. However, the cases here too are mixed. If a victim’s injury prevents him from being a cosmetologist, but permits him to work as a receptionist, a court may not find a loss of earning capacity and deny recovery for lost wages.¹⁷⁰

B. Identity and Loss

The No Windfall Principle should be qualified based on considerations of identity. A painting of a seascape hangs above my desk. If the water were turquoise colored rather than aquamarine, it still would be the same painting, just with slightly different tones. Likewise, if one of the gulls were repositioned, it would be the same painting, just with slightly modified elements. But if the artist had painted an abstract nude, it would not be the same painting. It would not even be a modified version of the same painting—it would be a different painting. In general, some attributes of an item may be changed, and the item retains its identity. If too many change, or if

168. See generally 2 DOBBS, *supra* note 1, § 8.1(2) (discussing earning capacity and lost income); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982).

169. *Philippe v. Browning Arms Co.*, 395 So. 2d 310, 317 (La. 1980). A similar case is *Fruge v. Hebert Oilfield Constr., Inc.*, 856 So. 2d 100 (La. Ct. App. 2003). In *Fruge*, the plaintiff injured his back in an auto accident. *Id.* at 102. As a result, he could no longer perform strenuous work as a machinist. *Id.* at 103. His employer “made up” a job for him as a night supervisor, and a year later Fruge was retrained to work as a computer numerical control operator. *Id.* With the new job, plaintiff earned over twice as much as he previously did as a machinist. *Id.* The court found no abuse of discretion in an award based for lost machinist wages. *Id.* at 106.

170. *Alferoff v. Casagrande*, 504 N.Y.S.2d 719, 721 (N.Y. App. Div. 1986).

the attributes that change are too core, then the item no longer exists; another different but similar one does. How fragile the item is, i.e., how many hypothetical changes it can endure before it can be said that the item did not exist, depends on the nature of the item and the context of the inquiry.¹⁷¹

The importance of identity issues in tort law may be illustrated by the doctrine of proximate causation. One way to formulate that doctrine is that defendants are liable for the realization of only the risks their conduct creates, not the realization of risks that already exist. Thus, when determining whether an injury is within the scope of a defendant's liability, it is important to determine whether the risk that was realized was the same as a previously existing risk—even if slightly modified by the defendant's negligence—or whether it is a different risk created by the defendant's negligence. For example, P, a hiker, asks D, a ranger, whether Trail T1 or Trail T2 is the safer trail. As D knows, on T1 there is a risk of injury from lightning strikes and black bears; on T2 there is a risk of injury from lightning strikes, grizzly bears, and quicksand. D also knows that the total risk to hikers on T2 is greater than on T1. D, however, thoughtlessly replies that T2 is safer. D thus commits an act of negligence. P takes T2. On one hand, if P is harmed by the lightning strikes, the injury will be found outside the scope of D's liability because the risk to P of being struck by lightning existed independently of D's conduct. If P had taken T1, he would have been exposed to the very same risk—the risk of being hit by lightning—as the risk that materialized. On the other hand, if P is injured by the quicksand, there will be liability because this risk to P was created by D's negligently recommending Trail T2 to P. The risk of quicksand was a different risk than P would have been exposed to in the absence of D's negligence. But what if P is injured by a grizzly bear? This seems a closer case because on T1 there was a risk of black bears. One way of framing the issue is to ask whether the risk to P of injury from grizzly bears is a new risk created by D's negligence, in which case there would be liability, or

171. See generally Teresa Robertson & Philip Atkins, *Essential vs. Accidental Properties*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 21, 2013), <http://plato.stanford.edu/entries/essential-accidental/>.

whether it is the same risk that P would have been exposed to anyway (the risk of bears) just in a slightly modified form due to the different type of bear, in which case there would be no liability. Judgments about identity thus play a central role in the application of the proximate causation requirement.

Considerations of identity can explain the exclusion of evidence of remarriage in wrongful death actions brought by spouses seeking damages for lost support, lost companionship, and lost society.¹⁷² The theory is that the support, companionship, and society that the new spouse provides, even if equally fulfilling, are fundamentally different from those that would have been provided had the original spouse lived. As the law sees it, in cases of wrongful death of a spouse and remarriage, there is a loss of one thing (the companionship of the deceased spouse) and a gain of something distinct (the companionship of the new spouse), rather than an annulment of loss by a later replacement of the same thing.¹⁷³ The remarriage rule of evidence thus reflects the law's rejection of the fungibility of people coupled with the principle that only where a later gain is identical to one which would have been received but-for the negligence will recovery be limited. Likewise, in miscarriage cases, the absence of a set-off based on the preempted potential pain from childbirth can be explained on the ground that the pain caused by the miscarriage and the pain of child birth preempted are not the same pain. Spatio-temporal location, as well as intensity and quality, are identity criteria for pain. Only where a harm is identical to one that would have occurred absent the defendant's negligence will recovery be reduced.

The later career cases also can be usefully viewed through the prism of identity. The issue of whether income from a new job will offset losses from the termination of the job held at the time of a plaintiff's tortiously caused injuries may be framed as the question of whether the plaintiff's new job constitutes a new career or whether it is just a different manifestation of the same career. In the former

172. Marks, *supra* note 13, at 1414 n.136.

173. *Id.* at 1414 n.135.

case, the plaintiff has suffered the loss of a career, and the loss is compensated through damages based on what she would have earned in that career. In the latter case, the plaintiff enjoys the same career and no compensation is due. For this reason, courts have tended to award damages in cases where the plaintiff's new job involves a new type of work, such as a change from dentistry to sales, but not where the plaintiff may continue work at what may seem like a more fungible position, such as being a cosmetologist and a receptionist.¹⁷⁴ As in the remarriage cases, only where a later gain is identical to one that would have been received but-for the negligence will recovery be limited.

The mixed results in merged fire cases are also consistent with an identity analysis of harms. When determining damages for a loss, the relevant question is whether, but for defendant's negligence, the very same harm would have occurred. This is the "identity of harm test." Whether the plaintiffs in the Merged Fire Case would have suffered the same loss but for the defendant's negligence may turn on the degree to which items of property like houses are anthropomorphized. People care greatly about when they die. When it comes to death, time is relatively important when it comes to identity judgments. If a person had died on a day other than the day he actually died, we would likely say that a different death occurred, rather than the same death just on a different day. Some items of property, such as cars, are easy to think of as persons. Like people, they have—or may be imbued with—individual characteristics that identify them and make them distinct. Those who think of homes analogously to people will therefore tend to judge that had it not been for D's fire, P's house would not have suffered the harm it did. It is plausible to think that the combined fire traveled more quickly than the smaller naturally occurring fire would have on its own. It is also plausible to think that the combined fire, being larger and more intense, consumed P's house in a shorter period than the naturally occurring one would have on its own. Thus, by advancing the time of the destruction of P's home, D's tortious conduct caused a different

174. *See supra* notes 169–70.

harm than would have occurred otherwise. Under this view, D, who is entitled to compensation for the harm to his property, would receive damages based on the full value of the property at the time of its destruction.

In contrast, it is also possible to think of items of property as having an identity defined entirely by the utility they produce for their owners. Viewing a home in this way, there would be less of a tendency to view the destruction of P's home by the merged fire as a different destruction than would have occurred anyway. Rather, there would be a tendency to see it as the same destruction, only occurring slightly later in time. This is so because the destruction of the core property of a home—its ability to provide shelter for its owner—would not be altered greatly if there had been no tortiously set fire and the natural fire had destroyed the property not much later than the combined fires would have. Viewed in this way, P's damages might be nominal or limited to the rental value of the house for interval between the time it was destroyed and the time it would have been destroyed.

The concept of identity, admittedly, is a malleable one. Criteria for identity vary with the type of object or event at issue and may depend upon the context in which a particular question about identity is raised. This Article's claim is that despite its malleability, identity is a useful concept for analyzing issues of damages. It is flexible enough to accommodate well-established cases, such as the companionship and later career cases, and is contestable enough in application to explain areas where courts have not reached consistent results, such as the merged fire cases.¹⁷⁵

175. A similar approach is taken by Arno C. Becht and Frank W. Miller in their work *The Test of Factual Causation in Negligence and Strict Liability Cases*. ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 28–32 (1961). Becht and Miller take the position that there should be no liability in cases where but-for the defendant's tortious conduct, the victim would have suffered an injury that might be "equated" with the injury he actually suffered. *Id.* at 28–32. For Becht and Miller, the critical question is whether the injuries that would have happened are "substantially the same" as those that actually happened or are different enough from those that actually happened. *Id.* at 29–30. Becht and Miller discuss the issue solely in the context of cases where a tortfeasor negligently causes a force, like a moving car, to impact a victim and where, but-for the negligence, the same force would have impacted the victim. *See id.* at 28–31. They do not consider cases like the Doomed Steamer Case where alternative forces—the taxi, the iceberg—are at

C. *The Doomed Steamer Case Revisited*

Considerations of identity allow for a more refined analysis of the Doomed Steamer Case. In the Doomed Steamer Case, P's lawsuit against D would likely seek damages for pain and suffering, medical expenses, and lost wages. The pain and suffering produced by the taxi accident seems to be a different harm than the one that would have been produced by the iceberg. Although an important feature of pain is its intensity, spatio-temporal location as well as a pain's psychological and qualitative features are relevant to its identity. Accordingly, P will have a strong claim for damages from pain and suffering.¹⁷⁶ Furthermore, if D had not driven negligently and if P had drowned on the steamer, P would not have incurred any medical expenses. Accordingly, D's negligence was a but-for cause of P's medical expenses and P has a strong claim to recover them.

In contrast, P's claims for lost wages are considerably weaker. The identity of wages is likely determined by their amount, payment time, and source. As a result of D's negligent driving, P did not earn wages in a specific amount that would have been paid at a specific time, by a specific employer. If D had not driven negligently and if P had drowned on the steamer, P would have been deprived of those very same wages. D's negligence was not a but-for cause of P's loss of the wages he actually lost. He would have lost the same wages in any case.

As a general matter, the identity conditions for nonevents, such as the failure to receive wages, seem weaker than for events. The impact of a force on an object, such as one that might cause injury or produce a pleasant sensation, is naturally described as an event. Its salient conditions are the time of the impact, the nature and strength of the force, etc. In contrast, the failure of force to impact an object, such as the failure of wages to be delivered to a person, is naturally

play. They offer no guidance regarding when injuries should be equated beyond noting that question is a factual one. *Id.* at 30, 52–67.

176. Hart and Honoré take the position that where, absent an actor's tortious conduct, a victim suffering pain would have experienced an alternative nontortious pain, "there is an argument" for taking the preemption of the nontortious pain into account. HART & HONORÉ, *supra* note 16 at 251. They neither elaborate nor seek to refute the argument. *Id.*

described as a nonevent. It is significantly less clear what the identity conditions are since they are not defined by specific forces and objects that occur at specific time and manners, but rather are defined by the absence of specific forces and objects. Consequently, it is more difficult for P to establish that the loss of wages he experienced as a result of the taxi accident is distinct from the loss of wages he would have experienced had he taken the steamer. P has a very weak case for holding D responsible for his actual failure to receive wages.¹⁷⁷

One implication of this analysis is that in cases like the Doomed Steamer Case, plaintiffs will receive a windfall in the sense that, all things considered, they have obtained a better result due to the defendant's negligence. Consider a variation of the Doomed Steamer Case in which P is only injured as a result of the taxi accident and does not work for six months. In such a case, D's negligence, all things considered, produced an advantage for P because it preempted a life-ending accident. Nevertheless, under the analysis advanced here, P would still recover damages to compensate him for the harm D's negligence actually caused—pain and suffering on the day of the accident and medical expenses that otherwise would not have been incurred. There would be, however, no recovery for lost wages because, but for D's negligence, the very same wages would have been lost as a result of P's presence on the doomed steamer. There should be no recovery for the loss of a benefit that, due to the threat of an innocent force, would never have accrued.

177. Alternatively, we may note that the law treats cases of harms offsetting benefits and cases of no harm differently. If D takes a vase from P and later gives an equally valuable vase as a gift—a harm/benefit case—there will be liability for conversion. If P never takes the vase—a no-harm-caused case—there will be no liability. Likewise, if D does not act and allows P to die—a no-harm caused case—there will be no liability. If D saves P's life and later kills him—a harm/benefit case—there will be liability for wrongful death. Turning to the Doomed Steamer Case, we might say that with respect to pain and suffering, D's negligent driving caused P the harm of pain and suffering in a taxi accident and caused P the offsetting benefit of avoiding the pain and suffering that would have occurred had the steamer been taken. As in the other harm/benefit cases, there will be liability for the harm. In contrast, with respect to lost wages, D's negligent driving caused no loss at all because if D had driven reasonably P, drowning on the steamer cruise, still would not have received the wages. Like the other no-harm cases, there will be no liability. The weakness of this argument is that it attempts to extend principles from cases involving two acts by a defendant, such as a taking and a giving, to cases like the Doomed Steamer, which involve only one act by the defendant.

CONCLUSION

Simple questions do not always permit simple answers. This Article has attempted to answer the simple question of whether a negligent act's preemption of an innocent threat should be taken into account when calculating a plaintiff's recovery. Arriving at an answer necessitated consideration of a wide range of tort doctrines—from proximate causation to the Thin Skull Rule to but-for causation to damages in cases of miscarriage, remarriage, and changed careers. Perhaps unsurprisingly, the passage through these swathes of law yielded the paradigmatic legal answer: It depends. It depends on whether the loss that actually occurred was the very same one that would have occurred had the innocent threat been realized. And whether an actual loss and a loss in a counterfactual world are the very same depends on knotty questions of identity. This result, however, should not be a cause for concern. Alternative approaches turning on notions of foreseeability, avoidability, and the like are equally contestable, less intuitive, and lack the doctrinal support identity offers. When it comes to threat preemption, their preemption should be viewed as no threat.