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The Next Revolution? Negligence Law for the 21st Century

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Donoghue*'s neighbour is still the defining concept of Canadian tort law. Indeed, the whole history of modern negligence law can be reasonably understood as a concerted judicial effort to adapt and accommodate that principle to changing social, commercial and legal conditions. Now, 90 years later, it is perhaps time to recommend another revolution in negligence law. The* Donoghue*-inspired doctrine has done sterling work, but it is now weighed down with a bewildering range of conditions, clarifications and complications. When the duty analysis is complemented by other related requirements of causation and remoteness, the law of negligence has become something of a dog's breakfast. This is compounded by the fact that tort law has become the poster-child for a general shift in law away from traditional legal reasoning to a more openly acknowledged policy analysis. This is no bad thing. But the problem is that there exist multi-dimensional and multi-located doctrinal occasions for such policy work. This does not lend itself to a doctrinal product that is either readily accessible or easily understandable. As such, the time is ripe for transforming, if not revolutionizing negligence law. This essay seeks to engage in such a transformative analysis and prescription.*

L'arrêt Donoghue *établit toujours le concept déterminant du droit canadien de la responsabilité civile. En effet, toute l'histoire du droit moderne de la négligence peut être raisonnablement comprise comme un effort judiciaire concerté pour adapter et accommoder ce principe à l'évolution des conditions sociales, commerciales et juridiques. Aujourd'hui, 90 ans plus tard, il est peut-être temps de recommander une autre révolution dans le droit de la négligence. La doctrine inspirée de* Donoghue *a fait un travail remarquable, mais elle est aujourd'hui alourdie par une série déconcertante de conditions, de clarifications et de complications. Lorsque l'analyse de l'obligation est complétée par d'autres exigences connexes de causalité et d'éloignement, le droit de la négligence est devenu une sorte de « bouillie pour les chats ». Cette situation est aggravée par le fait que le droit de la responsabilité civile est devenu l'exemple type d'une évolution générale du droit, qui s'éloigne du raisonnement juridique traditionnel pour s'orienter vers une analyse politique plus ouvertement reconnue. Ce n'est pas une mauvaise chose. Mais le problème est qu'il existe des occasions doctrinales multidimensionnelles et multilocales pour un tel travail politique. Cela ne se prête pas à un produit doctrinal facilement accessible ou facilement compréhensible. Le moment est donc venu de transformer, voire de révolutionner le droit de la négligence. Cet article cherche à s'engager dans une telle analyse et prescription transformatrice.*

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"The law of torts is a battlefield of social theory."[1]

Introduction

In 1932, Lord Atkin famously introduced the "neighbour principle" into the law of civil obligations. Although not a revolutionary person by private disposition or professional inclination, he succeeded in throwing-over the established legal order of civil liability. Blessed with good timing, Atkin's judgment in *Donoghue* caught the mood of the times and was soon latched onto by other judges and legal commentators. Henceforth, the common law of contract law was no longer the exclusive or primary basis for the imposition of liability because it had to accommodate and even give way

1. William Lloyd Prosser & Page Keeton, *Prosser and Keeton on the Law of Torts*, 5th ed (St Paul: West Publishing Company, 1984) at 15.

to a more expansive version of tort law. Of course, Atkin did not claim to have proposed his neighbour principle as a matter of personal or political good sense, but made a game effort to defend it as being part of the developing common law, albeit previously unnoticed and unarticulated. As he expressed it, "there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."[2] Be that as it may, the neighbour principle has been accepted and remains the defining concept of Canadian tort law. Indeed, the whole history of modern negligence law can be reasonably understood as a concerted judicial effort to adapt and accommodate that principle to changing social, commercial and legal conditions.

Now, 90 years later, it is perhaps time to recommend another revolution in negligence law. The *Donoghue*-inspired doctrine has done sterling work, but it is now weighed down with a bewildering range of conditions, clarifications and complications. While there is now much more tort liability in more areas and for more types of harm than in 1932, what began as a doctrinal effort to extend civil liability has now become a judicial exercise in how best to limit the extent of that civil liability. When the duty analysis is complemented by other related requirements of causation and remoteness, the law of negligence has become something of a dog's breakfast. This is compounded by the fact that tort law has become the poster-child for a general shift in law away from traditional legal reasoning to a more openly acknowledged policy analysis. This is no bad thing. But the problem is that there exist multi-dimensional and multi-located doctrinal occasions for such policy work. This does not lend itself to a doctrinal product that is either readily accessible or easily understandable. As such, the time is ripe for transforming, if not revolutionizing negligence law.

But, most importantly, this should be done not for the sake of simplicity alone, but also to render negligence law more useful and conducive to the contemporary demands and social needs in contemporary Canadian society. As Lord Atkin himself maintained, the responsibility and task of the common law is to ensure that its central doctrines are in sync as best they can be with the moral purposes and social goals that it claims to serve and advance. As those purposes and goals change, so should the common law. Accordingly, this paper proposes how negligence law can be realigned so that it is both more straightforward and uncluttered in design as well as being more defensible and progressive in terms of social justice.

2. *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562 at 580 [*Donoghue* cited to UKHL].

In pursuing this agenda, I am not claiming a la Atkin that I am merely teasing out an already neglected or yet undiscovered "general conception of relations…of which the particular cases found in the books are but instances."[3] This is a conceit that flouts any critical and realistic understanding of the common law's operation and evolution.[4] On the other hand, I am not merely engaging in an indulgent piece of blue-sky theorizing through which I write on a blank and abstract canvas. My proposal tries to work with and from the existing structure and substance of negligence law (at least as extant in Canada). In so doing, I run the risk of falling painfully between two opposing stools of approach; these are an internal formalism (i.e. presenting existing legal doctrine as if it is a fully rational and just enterprise) and an external critique (i.e. tracing and revealing the political failings of legal doctrine as a vehicle for social justice). However, I maintain that my intermediate stance—a pragmatic and critical doctrinalism—offers considerable benefits that make those risks worth running.[5]

In the first part of the paper, I offer a brief account of negligence law as it stands today; the focus is upon the development of the general framework for determining liability and paints in broad strokes. The second part provides a critical appraisal of the existing scheme of negligence liability; the purpose is to demonstrate that the legal doctrine is densely contrived, based on antiquated social assumptions, and results in socially regressive outcomes. In the third part, I begin to sketch out the basis for an alternative model; it is recommended that the duty of care and remoteness components be abandoned and liability be based on causation and reasonable care alone. The fourth part develops a more extended policy account for such a revised approach to negligence liability; the challenge is to show that more will be gained than lost by such a streamlined proposal. In the fifth part, I put some more substantive flesh on the basic skeleton of liability proposed; this explores the workings of both recoverable losses and the standard of care. The sixth section comes to grips with the central construct of causation; a more expansive, policy-based and workable approach is defended. In the final section, I work through some of the difficult cases and suggest how they will be better dealt with under my proposal; the likely criticisms that will be made are surveyed and handled.

3. *Ibid*.
4. See Allan Hutchinson, *Evolution and the Common Law* (Cambridge, UK: Cambridge University Press, 2005).
5. For a fuller explanation and defence of pragmatic and critical doctrinalism, see Allan Hutchinson, *Hart, Fuller, and Everything After: The Politics of Legal Theory* (New York: Bloomsbury, 2023), ch 8.

I. *A six-step program*

Plaintiffs have a long and difficult path to travel if they are to succeed in a negligence claim. There are five phases to be handled—standard of care; duty of care; causation; remoteness of damages; and possible defences. Although separate in their concerns and focus, they are deeply connected by an often-confusing reliance on the same reasonableness thread. While the general strengths and weaknesses of reasonableness as a go-to measure are well-known (i.e. it is enables changing and responsive interpretation, but is thereby open and vague in its application), the challenge in negligence law is to ensure that its situational nuances and distinctions are respected in determining the stretch and variation of negligence liability. This is no simple or easy task.

Tort law's starting assumption is the old Holmesian doctrinal notion that "sound policy lets losses lie where they fall."[6] Plaintiffs must make the case that any losses that they have suffered are both the kind of losses that are recoverable and that they should be transferred, in whole or part, to the chosen defendants. Rather than tackle these issues head-on, the courts address these through a series of inquiries. It is the burden of plaintiffs to show that all the criteria for recovery are met. If they are not, the plaintiffs' claims will fail:

1. *Plaintiffs must have a compensable loss*

While this will not be contentious in many cases, it is and will be in others. Recovery for physical injury and property damage is reasonably settled,[7] but serious questions remain over whether pure economic loss, psychiatric harm, missed opportunity and "wrongful life" are not or are not recoverable. With a lack of clarity on these losses, plaintiffs are precariously placed to pursue negligence actions.

2. *Defendants must be acting below an appropriate standard of care*

The long-settled benchmark is to that of the "caution such as a man of ordinary prudence would observe."[8] Over the years, this standard has been developed not only in its basic understanding (i.e. to include all persons and corporations), but also in its reflection of changing values and attitudes. Reasonable defendants are not considered to be average actors who embody what most actors presently do; the standard is meant to be as much aspirational and judgmental as descriptive and statistical in

6. Oliver Wendall Holmes Jr, *The Common Law* (Boston: Little, Brown, and Co, 1881) at 50.
7. I do not intend to deal with the difficulties of assessing damages and the effect of collateral benefits. This is a topic for another paper.
8. *Vaughan v Menlove* (1837), 132 ER 490, [1835-42] All ER Rep 156 (Ct Com Pl (Eng)) [*Vaughan*]. See also *Blyth v Birmingham Water Works Co*, [1856] EWHC Exch J65, 156 ER 1047.

deciding what should have been done. Moreover, there has been a growing tendency to articulate this yardstick as being objective, but not universal; different standards have been introduced for different classes of defendants (e.g. experts, young persons and public bodies).[9] Accordingly, the standard of care does not expect a perfection that is tantamount to strict liability, but seeks to create a demanding bar that reflects social expectations and opinions.

3. *Defendants must owe a duty to take care to the plaintiffs*

As Lord Atkin's neighbour principle makes clear, there is no duty owed to the world at large. Such a duty only extends to those persons "who are so closely and directly affected by my act that I ought reasonably to have them in contemplation."[10] Much of the tort jurisprudence comprises an effort to map the extent of these relational neighbourhoods in different circumstances. While the Canadian courts have developed a more expansive set of criteria—reasonable foreseeability, proximity and policy considerations—for achieving that task, they remain committed to answering the question of "who is my neighbour?"[11] Although the range of answers has shifted from one particular context to another (e.g. personal injury, economic loss, psychiatric harm, etc.), the overall approach and application of the operating principles remains murky and, on occasion, mystifying.[12]

4. *Plaintiffs must show a sufficient causal connection between the defendants' acts and their own harm*

In many cases, this will not be significant or controversial matter. However, in a world of toxic torts and other complex interactions, this can be an acute challenge. Despite its obvious and acknowledged failings, the Supreme Court has stuck with the "but for" test—but for the defendants' actions would the plaintiff have been harmed?[13] While there are very limited exceptions to this general rule, this test is particularly negative towards plaintiffs' claims because in situations of uncertainty and a lack of adequate information (i.e. it might or might not have been the "but for" cause), the plaintiff will always lose. This seems particularly harsh when

9. See e.g. H Shulman, "The Standard of Care Required of Children" (1927–28) 37 Yale LJ 618. See also *Trident Construction Ltd v WL Wardrop & Assoc Ltd*, [1979] 6 WWR 481 at 533, 1 Man R (2d) 268 (heightened standard for engineers).

10. *Donoghue*, *supra* note 2 at 580.

11. See e.g. *Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19 [*Rankin*].

12. See e.g. *Cooper v Hobart*, 2001 SCC 79 at para 36 [*Cooper*]. The court canvasses somewhat discordant previous categories where "proximity has been recognized."

13. See *Clements v Clements*, 2012 SCC 32 at para 8 [*Clements*].

it is usually the defendants who are in the better position to correct any informational deficit.

5. *The damage suffered by plaintiffs must not be too remote*

Whereas the duty of care asks whether the relationship between the plaintiffs and defendants is reasonably foreseeable, remoteness asks whether the type of harm caused to the plaintiffs was reasonably foreseeable.[14] The courts' development and application of this rule has been disorienting. While they have watered down the requirement in most instances (i.e. only almost bizarre situations have been excluded), they have restricted its application in others. There has been a marked reluctance to extend liability for "intervening acts" except in the most compelling circumstances. As such, the judicial use of "reasonable foreseeability" in remoteness cases illustrates that the rules used function more as curtains behind which the real policy action occurs than as conduits for judicial guidance and decision-making.

6. *Plaintiffs must resist any defences offered by defendants*

Finally, even if plaintiffs can get this far (i.e. establishing the defendants' carelessness, a neighbourly relation with the defendants, a causal connection between their harm and the defendants' acts, and reasonably foreseeable harm), they will still have to *resist any defences that the defendants might have to offer*. Although not as disruptive and as sweeping as they used to be, these defences are not insignificant. While the courts have cut back on the force of *volenti* or consent claims, they have given considerable force to claims about the plaintiffs' contributory negligence.

Consequently, plaintiffs' path to making a successful negligence claim against defendants is strewn with a series of pitfalls, barriers, sharp turns and blockages. What began as a way in 1932 to alleviate the plight of ordinary litigants, like Mrs. Donoghue, and enable them to hold negligent manufactures to account has along the way become something very different. In 2022, despite some concerns that liability may favour the plaintiff in certain cases, the combined doctrine of negligence liability resembles more an obstacle-course than a streamlined path to justice. When the differential distribution of resources between plaintiffs and defendants is factored in, this becomes an even more daunting encounter for under-funded plaintiffs against wealthy and insured defendants.

14. See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*, [1961] UKPC 2, [1961] AC 388 [*Wagon Mound No 1*]. Lord Simmonds gave strong weight to the idea that fairness to the plaintiff must be balanced against fairness to the defendant.

II. *Pulling back the curtain*

Donoghue is obviously still of primary importance in mapping the landscape of contemporary negligence law. However, an important effect of the case that has been neglected is the way in which it established the paradigm and framework for thinking about how negligence law should develop and respond to changing social and economic conditions. By this, I mean that the paradigmatic situation for understanding negligence law and its challenges is that of an impoverished Mrs. Donoghue suing a small local manufacturer of a food product, Stevenson, that caused her personal injury. This is the ground-zero of negligence law and all other situations tend to be measured and analogized in terms of the similarities and dissimilarities to it. However, the reasons and rationales for imposing liability upon Stevenson for Donoghue's injuries are not necessarily applicable or convincing when examining other kinds of cases, especially in the very different social and commercial set-up that exists today. In short, whether other circumstances and scenarios are suitable for the imposition of tort liability will depend on the informing and controlling dynamics of a private individual interacting with a small commercial enterprise. In the most general terms, if different and new situations are comparable to the *Donoghue* dynamic, liability will tend to be imposed; if not, no liability will tend to be imposed.

For example, in utilising the *Donoghue* scenario in both form and substance as the default position for establishing liability, negligence law evaluates variations in light of that case's outcome and reasoning. So, whether different plaintiffs (e.g. corporations and public entities) can make successful claims, whether different kinds of activities (e.g. services, statements and inactivity) can give rise to liability, whether different defendants (e.g. private individuals, large corporations, professionals, parents and public bodies) can be liable, whether a large number of plaintiffs can prevail, and whether different kinds of harm (e.g. economic losses, lost opportunities, and unwanted pregnancies) can be recognised as grounding liability depends on how well they line up with and bear comparison to the contexts of the plaintiff, activity, defendant and harm that existed in *Donoghue*. Because the decision in *Donoghue* is simply taken for granted as being the essentially and necessarily right outcome, the merits and justice of extending that received wisdom to other more or less related settings and circumstances is the primary driving-force of negligence law. While this approach may once have had some minimal appeal and even cogency, it now no longer does so.

The basic paradigm of tort litigation has shifted to such an extent since 1932 (even if its representativeness then is questionable) that reliance

on the *Donoghue* template is both outdated and misleading. The bulk of litigation might well still involve a large number of Donoghue-like plaintiffs, but defendants are significantly different from the Stevensons of the world; the small and local family firm is not the main focus or target of tort litigation. It is now large corporations, municipal governments and professionals that comprise the great bulk of defendants. The logistics and economics of tort litigation strongly push towards plaintiffs only making claims against those with so-called "deep pockets" or those with substantial insurance coverage. Indeed, even though courts persist in insisting that "the existence of insurance is irrelevant to a determination of tortious liability,"[15] this institutional fact recommends that there is a substantial variance between Stevenson's status or position and those of modern-day defendants; insurance companies are the predominant decision-makers (e.g. when to settle, when to go to trial, etc.) in the tort litigation process and they tend to march to the beat of their own drum. As such, it seems misguided to compare and contrast the *Donoghue* litigation with that between multi-million dollar commercial enterprises, well-financed public bodies or heavily-insured professionals. Put bluntly and colloquially, it is never persuasive or helpful to treat small apples as large oranges.

Moreover, the world is not easily compressed into the kind of transaction that is characterised by *Donoghue*. While there is some vague consistency with the purchase and consumption of a beverage from a local (and actually down-the-street) manufacturer, the nature and range of interactions today spread across a much wider spectrum of relevant possibilities—global, technical, professional, family, governmental, technological, communal and others. Accordingly, it is both forced and distorted to determine the results in most instances of contemporary tort litigation by almost exclusive reference to the context and considerations that were in play in *Donoghue* in 1932. Indeed, reliance on the ethical force, moral imagery and evaluative calibrations of the "neighbour principle" is strained and unconvincing. While Donoghue and Stevenson might well have been neighbours of a sort (even if Donoghue was not from the Paisley district of Glasgow), the relations between multi-national corporations and private individuals cannot be usefully or fairly understood through the constrictive prism of Atkin's parochial rubric; the neighbour principle derived from virtual neighbours in *Donaghue* tends to obscure as much as illuminate the relevant and compelling features of modern interactions and transactions. This is especially so when trying to determine what might

15. *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753 at 796, 174 DLR (4th) 1, Cory J [*Dobson*].

count as just outcomes in such a very different world today than the goings-on in Thomas Minchella's Well-Meadow Café in 1928. A multi-faceted and insurance-pervaded society demands a more nuanced, sophisticated and richer analysis than that afforded by the neighbour principle.

Two cases can illustrate the central thrust of the points being made. The first is *Mustapha*. The facts are not so dissimilar from *Donoghue* itself. Indeed, within the Atkinian schema, there is much that might suggest that the two cases should be treated much the same. The plaintiff was something of a germaphobe and purchased purified water from the defendant manufacturer. There was a dead fly in the translucent flagon delivered. As a result of seeing the fly, the plaintiff suffered a serious and undisputed psychiatric breakdown. The Supreme Court found against the plaintiff because his injuries were too remote: "a person of ordinary fortitude" would not have suffered such injuries. To add insult to injury, the Court stated that "this is not to marginalize or penalize those particularly vulnerable to mental injury."[16] But this is exactly what the result does: Mustapha and others like him have to eat and drink at entirely their own risk. If the court was convinced, as it was, that the defendant was negligent, that it did owe a duty of care to its customers, and that the plaintiff's condition did result from seeing the dead fly, then why should the defendant escape liability and thereby marginalize the vulnerable? Looked at this way, the *Mustapha* decision was not even *remotely* fair.

However, the deeper and more important point is that the frame of analysis deployed by the Supreme Court relied on and perpetuated the limitations of the *Donoghue* approach and the neighbour principle. In her judgment for the Court, Chief Justice McLachlin emphasised that the basic justification for the decision against the plaintiff was that "the law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful."[17] Her judgment seems, at best, an odd appreciation of what counts as being "socially useful." If a large and now-global company caused a typical customer's injuries by its egregious negligence, it is not at all clear that a balanced approach to fairness between plaintiffs and defendants requires an outcome in favour of the defendant.[18] The Court's willingness to treat plaintiffs and

16. *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paras 15, 16, McLachlin CJC [*Mustapha*].
17. *Ibid* at para 16. See also *Wagon Mound No 1*, *supra* note 14.
18. After all, in *Mustapha*, Chief Justice McLachlin added the rider that "the ordinary fortitude requirement need not be applied strictly [because if]…the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant": *Mustapha*, *supra* note 16 at para 17. At the time when the plaintiff was using the product, the clientele did consist largely of people, like the plaintiff, who had such special sensibility and whom the defendant directly cultivated as a consumer.

defendants as abstract entities with presumptive social equality is perverse when they clearly are not; the plaintiff is a vulnerable person who did nothing wrong (and actually tried to guard against his vulnerability by using the defendant's hygienic product) and the defendant is a wealthy and successful corporation. The only difference from *Donoghue* is that the plaintiff suffered psychiatric harm, not physical harm. But Mustapha's harm was much more debilitating and long-lasting that the food-poisoning that happened to Mrs. Donoghue. Moreover, the corporate defendant's culpability went to the very core of what they claimed its product was (i.e. purified) and why vulnerable customers, like the plaintiff, should buy it. This is not so much a "socially useful" decision, but a socially harmful one; any sense of neighbourliness or even commercial fairness is entirely defeated.

The second case is *Childs*.[19] This concerned the potential liability of a private party host to a carload of young persons who were catastrophically harmed when a drunken guest from the party caused a road accident not far from the party-giver's home. Drawing a line between social hosts and commercial establishments (who would have been liable), the Court denied a tort claim because there was no duty of care owed by the defendant social host to the blameless plaintiffs.[20] Ironically, this was a situation where the willingness to differentiate between different kinds of defendants worked to the detriment of the injured plaintiffs. However, the judgments in the case operated within an entirely artificial and impractical context. As framed by the Court and drawing directly on *Donoghue*'s neighbour principle, the challenge was cast as being about the moral dimensions of the situation and, in particular, the moral rights of social hosts and guests: the focus was upon "risk enhancement and control, autonomy [of hosts and guests] and reasonable reliance."[21] Even if there was some moral cogency and force to the outcome reached (and I am not at all sure that there was), the Court failed to appreciate that the case was more about social instrumentalities than anything else. Indeed, it completely ignored such matters.

The entirely faultless plaintiffs did not pursue the defendants out of any sense of moral entitlement. The reasons were much more practical—their damages had exceeded the insurance limits of both their own and the drunken guest's auto insurance; there was still a very large amount outstanding and unpaid. For the plaintiffs, the question was whether

19. *Childs v Desormeaux*, 2006 SCC 18.
20. See *ibid* at paras 37-41. The Court distinguishes *Jordan House Ltd v Menow* (1973), [1974] SCR 239, 38 DLR (3d) 105.
21. *Childs*, *supra* note 19. A similar argument can be made about understanding *Dobson*, *supra* note 14.

it would be just and "socially useful" for them to be able to access the home insurance of the party-givers. Understood in this way, the effort to assume and impose a certain moral equivalence between the plaintiffs and defendants in terms of resources and needs is not helpful; a concentration on the host's (and drunken guest's) autonomy does not compare favourably with the claims, to use the phraseology of Atkin's neighbour principle, of blameless, catastrophically-injured and, importantly, neighbourly car-driving plaintiffs. A more "socially useful" approach would be to look at a comparative risk-assessment and risk-assumption—who is better able to carry the risk of a guest becoming drunk and driving away?; is it the drunken driver and insured party-giver or the blameless and oblivious nearby travellers?; what is so onerous about imposing duties to be reasonable on party-givers?; and, anyway, why would the supposed autonomy of hosts and guests trump that of the car-driver and her passengers?[22]

The upshot of this is that the existing legal doctrine of negligence law is densely contrived (i.e. the multiple tests to be navigated and met have become more congealed, inconsistent and confusing over time), based on other-worldly assumptions (i.e. that plaintiffs and defendants share a sufficient extent of moral or institutional correspondence that they can be evaluated independently and comparatively on equal terms as regards their abilities and interests) and results in socially regressive outcomes—isolated and vulnerable individuals who suffer real physical or psychiatric harm, not merely economic losses, are severely disadvantaged to the benefit of economic organisations and others who suffer only modest economic losses, if any at all. This is a state of affairs that needs to be fully appreciated and accepted before a suitable remedial response can be made. In what follows, I recommend a series of changes to negligence doctrine that can be implemented within the general scheme and parameters of existing negligence doctrines.[23]

III. *Cutting back the forest (to better climb the trees)*

So what can be done that will both clean up the doctrines of negligence liability and improve the quality of social justice achieved? Before putting

22. I do concede that, even if a duty of care was recognized, there would be important issues to resolve about the appropriate standard of care to be required of party-givers. However, this concession does not detract at all from my main point. See 15-16, below.

23. As I stated in the introduction, I am not engaging in a blue-sky exercise. See above at 1. I am operating critically and pragmatically within the general boundaries of the existing doctrinal framework; I am not offering an external critique. Without such a set of constraints, I would still recommend a complete abandonment of tort law in favour of more regulatory and compensatory administrative schemes. See Stephen Sugarman, "Doing Away With Tort Law" (1985) 73:3 Cal L Rev 555 and Allan Hutchinson, "Beyond No-Fault" (1985) 73:3 Cal L Rev 755.

forward any proposal, it is essential that it is recognised and accepted that all the rules and doctrines of negligence liability are based on and driven by policy concerns and preferences. In contrast, there still persists the belief in tort doctrine that the judicial task can and should be capable of completion within the confines of strictly legal concepts, doctrines and rules. I take a different view and maintain that "the truth is that…duty, remoteness and causation are all devices by which the courts limit the range of liability for negligence…. All these devices are useful in their way. But ultimately it is a question of policy."[24] This seems to capture both the nature and challenge of negligence liability. However, although many commentators and some judges have accepted this, they have also sought to show that there is some neutral expertise that judges can call upon to decide individual cases, to handle policy-analysis, and to develop the law. In short, many maintain that some deeper or systemic thread that sews together what appear to be unconnected observations and opinions. This is not the case.

First of all, Canadian judges have not accepted that the law, especially in its tort incarnation, is primarily an exercise in policy-making and policy-judgement. While they acknowledge that there are significant and unavoidable policy dimensions to legal doctrine, they refuse to concede that the core feature of legal decision-making in negligence law is the making of decisions based on policy. For them, it is a complementary facet, not a central component of the operative doctrines of negligence liability.[25] Secondly, Canadian judges remain in the grip of a traditional mind-set that suggests that they can finesse the entanglements of policy by hewing faithfully, if imaginatively, to the established rules and principles of the extant legal doctrines. There is a persisting belief that judges, at least appellate ones, do not make the law even as they claim to apply it, but also that there is some available, if elusive formula that will make the disarray of negligence law reasonably intelligible. As such, judges view themselves as readers as much as authors of the law's unfolding script and deeper plot.

The two primary policies relied upon by judges to fashion and justify negligence liability are compensation and deterrence. Although both guiding objectives might be disputed because they can be more the object

24. *Lamb v Camden Council*, [1981] 1 QB 625 at 636, [1981] EWCA Civ 7, Denning MR. Denning was strong on identifying the problem, but not on proffering a solution or appreciating the radical implications of this position.

25. See e.g. *Cooper*, *supra* note 12; *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021, 91 DLR (4th) 289 [*Norsk* cited to SCR]; *1688782 Ontario Inc v Maple Leaf Foods Inc*, 2020 SCC 35 [*Maple Leaf Foods*].

of lip-service than serious engagement or empirical verification,[26] they both nevertheless stand as important and defining elements in the universe of negligence liability. Whereas compensation looks to the position of plaintiffs and seeks to return them, as far as the payment of funds can do, to the position that they would have been in if their negligently-caused harm had not occurred, deterrence seeks to require defendants to internalize the costs of their own negligence and thereby discourage themselves and others from persisting in similar negligent and harmful behaviour in the future. Of course, conventional commentary sees them as checking each other and combining in a predictable and productive balance; the resulting legal doctrine is presented as being as "just and fair" as it can be.[27] But, as I have suggested, this kind of validating claim is not sustainable—the legal doctrines of negligence liability are as ramshackle and duplicative as they are unpersuasive and unjust. In short, negligence law is more a curtain to hide the real action as opposed to an explanatory guide for taking that action.

As things stands, there are six areas that plaintiffs must navigate to be successful. Although they are somewhat discrete in terms of focus and analysis, there is considerable overlap; there is a tendency to consider the same policies and factors more than once. For instance, if defendants owed a duty of care (based on reasonable foreseeability) and there was a breach of that duty (based on reasonableness), why would it matter that the damages were not reasonably foreseeable? In such circumstances, while someone has to carry the weight of such unexpected and unforeseen kinds of losses, it is not at all clear why that has to be an otherwise blameless plaintiff as opposed to an already-adjudged negligent defendant. Similarly, if plaintiffs suffer losses and harms that were caused by the defendant's unreasonable conduct, why should it matter whether those harms and losses were reasonably foreseeable or that the defendants owed a duty of care (based on reasonable foreseeability).

Pursuing this line of thinking, I propose that the time has come to dispense with both the need to establish a duty of care and the condition that the resulting damages are not too remote. This might be understood as a revolutionary proposition. But it is less revolutionary than Atkin's innovative neighbour principle was in 1932. However, whether it is or is not revolutionary is beside the point. I am recommending that such a

26. See e.g. *Clements, supra* note 13 at paras 19, 21. The court makes largely sweeping references to the "goals of […] compensation, and deterrence" without analyzing either in detail.

27. See *Cooper, supra* note 12 at para 34. For a short, but strong survey of tort law's objectives, see Philip H Osborne, "Negligence: Basic Principles" in Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 25-144.

transformative change is warranted both as a useful matter of doctrinal housekeeping and, more importantly, as a pressing consideration of social justice. All the work that negligence law should be doing can be done within the confines and contours of a judicious mix of causation and reasonable care. As regards negligence liability, it is very much a case of less is more.

If defendants have failed to meet the standards of prudence and care as measured against the appropriate peer group and if those actions have caused the plaintiffs' harm, it is entirely fair that the defendants should be held liable. Similarly, all other things being equal, if plaintiffs have been harmed by a negligent defendant, it is also entirely fair that they should be entitled to compensation. On both counts, the overriding gaols of compensation and deterrence will have been met—the plaintiff will be justly compensated for harm caused and the defendant will have been deterred from engaging in future behaviour of the same careless kind. Of course, whether the compensation will be adequate and whether deterrence will work are no more or less likely on this proposed different model of negligence liability than on the existing set of doctrines. Indeed, it can be argued that compensation will flow to more plaintiffs and deterrence will be more effective if defendants have less occasions on which to avoid liability. Moreover, defendants will be hard pressed to assert that they are being treated unfairly when they are the causes of plaintiffs' harm, when they have been acting out of line with community expectations by way of the standard of care, and when they are still able to avoid future liabilities by improving and changing their way of acting.

An overlooked dimension of existing negligence liability is the imbalance between the relative burdens placed upon plaintiffs and defendants by negligence liability. If found liable, defendants will only have to pay financial damages and make whatever financial investment is needed to correct future careless behaviour: this might not be an insignificant undertaking. However, the load placed on plaintiffs is much greater, particularly in personal injury actions, and the calculation is very different. Even if they are paid substantial and even adequate damages, they are still left with whatever physical or psychological harms they have suffered as a result of the defendant's actions. In other words, financial losses are the extent of the defendants' losses, whereas this is not the case for plaintiffs who must still live, often with debilitating pain, with the physical and psychological consequences of the negligent interaction. The very different consequences of negligent harm-causing (even if there is a successful claim by the plaintiff) cast a long, but often ignored shadow over negligence liability.

One of the dominant arguments for maintaining the existing regime of negligence liability is that to impose a greater and more extensive level of liability on corporate defendants will hinder economic growth and stifle innovation.[28] This was never entirely convincing in the late nineteenth century and early twentieth century, let alone in the twenty-first century. While these factors are not unimportant, it is not at all clear why injured or harmed plaintiffs should have to bear that burden. It will be the corporate defendants who benefit more directly from innovation and growth than plaintiffs; any benefits of economic growth and innovation to individual plaintiffs will be much more indirect and diffused. Moreover, my proposal simply asks defendants to meet reasonable standards of performance in pursuing their activities. If they do not (and this may be a choice on their part), they will have to internalize all the costs of those activities. Also, so understood and with a broader sweep of compensable harms, injured and vulnerable plaintiffs will not be held hostage to the social and economic fortune of careless defendants.

IV. *Causes and cares*

My basic argument, therefore, is that any policy concerns can be adequately and appropriately dealt with at both the causation and standard of care stages of inquiry. When properly understood, these tests engage the same kind and range of interests and concerns that are presently spread out and duplicated between and across the duty of care, the standard of care, causation and remoteness analyses—spatial and temporal dimensions, parties' expectations, representations made, reliance by plaintiffs, and the legal and social interests in play. If, as the Supreme Court is wont to remind us, the bottom-line is "whether it is just and fair" to impose liability,[29] then a more modern and socially-aware kind of justice and fairness is required to both energize legal doctrine generally and to measure the justness of outcomes reached.

In line with such a mandate, there is a strong argument that recommends that any actor who causes harm to another should be liable to pay compensation, regardless of whether there has been a lack of reasonable care. While this argument has some initial merit, it does not fit easily or well into the existing framework of goals and policies of negligence liability. While it would increase the situations in which injured persons received compensation, it would have little to no impact on the

28. For a critical study of the competing claims about the impact of tort law on social innovation and economic growth, see Frank B Cross, "Tort Law and the American Economy" (2011) 96:1 Minn L Rev 28.

29. See *Cooper, supra* note 12 at para 34.

deterrence of future conduct. Indeed, within existing assumptions, it could increase the number of incidents and harms because, while reasonable care is probably still correlated with fewer resulting harms, defendants would have less incentive to change their conduct; compensation would be payable whatever efforts they did or did not make to moderate their careless conduct. As such, a causal connection between a defendant's actions and a plaintiff's harms is a necessary, but not sufficient condition for imposing liability and transferring losses from where they have fallen (i.e. on the plaintiff). Negligence liability demands that there exists a negligent cause, not merely an innocent cause for the plaintiff's harms and losses.

As a related matter, it is also the case there are sufficient incentives for the defendant in the standard of care analysis. The need to comply with (sub-)community standards will work to guard against the notion that defendants will either be over- or under-whelmed with liability for their actions—if they act reasonably, they will have no liability to fear; if they do not (and there is the appropriate causation connection), they know that there will be liability. The requirement that plaintiffs show that the duty and remoteness tests are met only serves to confuse and reduce those incentives by ensuring that defendants do not fully internalize the costs of their harm-causing negligent conduct. In blunt terms, it is unclear why injured or harmed plaintiffs should have to shoulder the considerable burden of those vague and pro-defendant doctrines. Justice and fairness for *both plaintiff and defendant* can be achieved by this slimmed-down and socially-responsive version of negligence liability.

Basing negligence liability on "negligent cause" can also be readily explained and justified in terms of both corrective and distributive justice. From a corrective justice viewpoint, there is a definite and commensurate symmetry between the plaintiffs' losses and the defendants' conduct: the plaintiffs' unexpected and unwanted losses are the responsibility of the defendants' improper conduct that caused them. However, many corrective theorists seem to recommend that the duty of care requirement is justified and be maintained.[30] Apart from being more concerned with doctrinal coherence and intelligibility in tort than anything else, these theorists deliberately ignore the public, social and economic dimensions of the tort terrain; they see only private and self-directing citizens interacting in a decontextualized world. As such, they sacrifice the real-world interests

30. See, for example, Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) and Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016). Any legitimate concerns that such theorists raise can be adequately dealt with in a causation analysis. See below at 17-19.

of flesh-and-blood persons to the impersonal demands of philosophical abstraction and neatness. In particular, they offer no convincing explanation of why it should be injured plaintiffs who should shoulder the very real and debilitating costs of unforeseen harms.

From a distributive justice viewpoint, a "negligent cause" approach addresses directly the important effort to realign the competing interests of different and unequal parties: the more vulnerable plaintiffs' losses are to be remedied by the more advantaged and culpable defendants who caused them (and are likely better insured).[31] After all, many defendants are in a profit-seeking or otherwise rewarding activity; the likelihood of being held economically accountable for their negligent conduct is often priced into their activities or insured against. In traditional tort discourse, they are better able to spread the losses associated with their commercial or business enterprises. As such, defendants should be required to accept the considerable downsides (even if unforeseen and unanticipated) of their activities as much as reap its economic or other rewards. By taking a more expansive and public perspective, "negligent cause" can ensure a fairer balancing of the inevitable benefits and harms generated in contemporary society; it will contribute to reducing, not perpetuating any injustices in the status quo.

Moreover, as things stand, whether it is done more formally through a Learned Hand formula or the looser *Stone* approach, there is already a distinct bias in favour of the defendant when it comes to operationalizing the standard of care.[32] The plaintiff is at the whim of the defendant's decision-making about the level of risk undertaken, the severity of harm and the extent of precautions taken; the plaintiff has little input into whether or how the standard of care is met and, therefore, how the risk of injury to the plaintiff is decreased or increased. For defendants, it is about economic accounting; for plaintiffs it is about real and life-changing occurrences over which they have very little or no control. While the "negligent cause" change that I am proposing will not do away with that bias entirely, it will reduce it and ensure that more defendants will more often be found liable. Indeed, this result in itself may offer greater incentives for defendants to take better care to avoid risks that will result in injuries and harms to plaintiffs.

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31. See e.g. John Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) at 381-382.

32. For the Learned Hand approach, see *United States v Carroll Towing*, 159 F (2d) 169 (2d Cir 1947). For comparison, see *Bolton v Stone*, [1951] UKHL 2, [1951] AC 850 [*Stone*].

As with most things, the devil can be in the details. What might appear to be sensible and persuasive on the surface might become much less so when the specifics of a proposal are delved into more deeply and its theoretical claims are applied in a more concrete setting. However, it might also be the case that a deeper and more practical exploration of my proposal might reinforce rather than undermine its force and appeal. Consequently, it is important to look at how my general proposal can be put into operation and whether it can deal with some of its possible limitations. This entails unpacking the three central planks that are being relied upon—the kind of harms to be recognised; the standard of care to be imposed on defendants; and the character of the causal link between plaintiffs' harm and the defendants' conduct.

V. *Of devils and details*

First, it is necessary to determine precisely which harms suffered by plaintiffs should be recognised and compensated by the law of negligence liability. Physical injuries and property damages are well-established and undisputed heads of recoverable harm. However, although the courts are beginning to treat psychiatric harm on much the same terms as other personal injuries, there is not yet full or real equivalence. *Mustapha* remains a blot on the landscape.[33] Yet, notwithstanding the evidentiary challenges with establishing such harms, it is not a large or unreasonable leap to recommend that psychiatric harm be treated as simply one kind of physical injury. But that still leaves two contested categories of harm—pure economic losses and so-called wrongful birth or life.

As regards economic losses, the courts have included those economic losses that result from both negligent statements and those that are consequential on personal injury or property damage as being recognised heads of tortious harm.[34] However, there remains considerable confusion and disagreement over whether pure economic loss as a free-standing kind of harm is encompassed by negligence liability. Although there are limited circumstances in which such losses can be recovered, there is a clear recognition that pure economic losses are restricted within negligence liability: the controlling device is that of whether a duty of care is owed.[35]

33. *Supra* note 16.

34. See *Hercules Managements v Ernst & Young*, [1997] 2 SCR 165, 146 DLR (4th) 577 [*Hercules* cited to SCR]; *Spartan Steel & Allows Ltd v Martin & Co (Contractors) Ltd*, [1972] EWCA Civ 3, [1973] QB 27. It is not at all clear why pure economic losses that arise from negligent statements should be treated so differently and more generously than those which flow from negligent acts or omissions.

35. See *Norsk*, *supra* note 25; *Winnipeg Condominium Corporation No 36 v Bird Construction Co*, [1995] 1 SCR 85, 121 DLR (4th) 193 [*Winnipeg Condominium*]; *Maple Leaf Foods*, *supra* note 25.

The debate, therefore, is less about whether pure economic losses are recoverable, but when, where and against whom they can be claimed. This means that the issue of negligence liability for pure economic loss is concerned more with the extent and reach of negligence liability, not with the recoverability of economic losses as such. Although my proposals have no particular significance for the resolution of this issue, it should be dealt with directly, not by way of a duty of care analysis: the identity of the plaintiff (e.g. are they individuals or commercial entities) and their insurable interests will be crucial in dealing with this prickly issue).[36]

The question of whether any legitimate and recognisable harm flows from reproductive-related harms is confused and confusing. As things stand, it is accepted that an injured child can sue for pre-natal injuries if they are born alive.[37] However, the merit and value of claims for wrongful birth (i.e. a negligent act that resulted in the birth of a disabled child and where the action is brought by the parents), wrongful life (i.e. a similar claim, but by the child him or herself), wrongful pregnancy (i.e. a negligent act that results in the birth of a non-disabled child and the parents sue for the costs of raising the child) and pre-conception harms (i.e. a negligent act to a woman results in harm to a child that was not yet conceived at the date of the negligent act) remains unsettled. These are difficult issues that raise a host of challenging policy questions. Nevertheless, it is unclear why the courts have generally been averse to such claims and protective of health-care professionals.

As a general matter, the courts have tended to allow recovery in those situations where the child born was disabled. While there have been awards of damages to parents for those harms or costs associated with the pregnancy itself, there has been a marked reluctance to provide compensation for the birth and raising of non-disabled children.[38] Even in the case of disabled children, the courts have shied away from imposing liability on negligent doctors whose treatment of women has

36. See 22-23, below.

37. *Duval v Seguin*, [1972] 2 OR 686, 26 DLR (3d) 418 (ON H Ct J). However, this claim is not permitted where the mother is the tortfeasor: see *Dobson*, *supra* note 15. This seems wrong-headed when the mother is insured and will anyway have to care for the injured child. Although the decision is justified by the valid concern that allowing such actions would infringe upon the autonomy of pregnant women, it is not clear how this concern applies to traffic accidents (in which the pregnant woman already owes a duty of care to others) as opposed to lifestyle choices. See the dissenting judgment in *Dobson*, *supra* note 15 at 802, Major J.

38. This is a generalization that is adequate for present purposes. However, the courts have been very inconsistent in this area. See e.g. *MacFarlane v Tayside Health Board*, [1999] UKHL 50, [2000] 2 AC 259 [*MacFarlane*]; *Rees v Darlington Memorial Hospital*, [2003] UKHL 52, [2004] 1 AC 309 [*Rees*]. While *McFarlane* held that the parents' claim for compensation for raising an able-bodied child was disallowed, the court in *Rees* allowed a non-compensatory award

later resulted in congenital disorders suffered by their future children.[39] This all seems difficult to rationalize or justify when the negligent act was either purposefully done to prevent pregnancies occurring and unwanted babies being born or knowingly done to women of child-bearing age. Mindful of the huge imbalance between insured professional defendants and uninsured and devastated families and children, the decisions made and doctrines relied upon (i.e. duty of care and pure economic losses) are ill-suited to making negligence a more, not less just scheme of civil liability. Indeed, this judicial insistence on working within the formalistic confines of existing tort doctrines is strong evidence that those principles are outdated and unhelpful. Although the doctrinal argument has some initial plausibility (i.e. that an unwanted pregnancy and birth only gives rise to a pure economic claim, not a physical injury claim), it is crass and verging on offensive to treat such drastic and life-changing consequences in detached terms; there is much more than a financial accounting in play.

In contrast, a reasonable off-setting of compensation and deterrence rationales strongly encourages a much more plaintiff-oriented resolution that requires negligent doctors to carry these family costs. My proposal has the considerable benefits of being both more uncluttered and more just in addressing these situations where insurance and social inequality play such a disruptive and decisive role. As such, the shift towards recognizing these reproductive harms is warranted. Even if there might be limits placed upon recovery for wrongful life (especially if there is a successful claim by the parents for wrongful birth), there is a cogent and pressing case for recognising plaintiffs' right to pursue such actions for negligence liability.[40]

Secondly, the standard of care to be imposed on defendants must be clarified and fleshed out. Although the courts have moved from the "reasonable man" to the "reasonable person," the standard remains the same—that of an ordinary prudent person. While this standard is objective, it is not universal: what counts as ordinary prudence will go up or down depending upon whether the defendant is a member of a particular sub-group (e.g. professionals, children, and disabled persons). So, if the facts of *Vaughan* occurred today, the standard of the ordinary and reasonable man

39. *Paxton v Ramji*, 2008 ONCA 697. At paragraph 55, the court held that while a mother and fetus are in a proximate relationship, their relationship "is unique" and that the same policy considerations applying "to that relationship cannot be applied by analogy to the relationship of other persons with a woman's future child."

40. See e.g. *Cattanach v Melchior*, [2003] HCA 38, (2003) 215 CLR 1 [*Cattanach*]. In *Cattanach*, the parents' "wrongful birth" claim was allowed in regard to the costs of raising a normal, healthy child.

would give way to that of the ordinary and reasonable farmer/haystack-maker.[41] Also, the courts have rightly tried to be slightly more analytical by integrating magnitude of risk, gravity of injury, burden of precautions and utility of conduct into the test.[42]

While these are welcome developments, the courts still tend to talk about the reasonable person, even though the common defendant is a commercial corporation. It seems strange to measure the behaviour of a large corporate enterprise by the standards that would be applied to individuals. Although the courts do tend to look to relevant industry standards in product liability cases,[43] it would be better if a more upfront and transparent switch was made to appreciating the standard of care in the context of what is to be expected of large and profitable economic actors. Mindful that the standard of care is intended to be more an aspirational yardstick than an averaging device, the reference to the "reasonable corporation" (with reference to its market share, resources, etc.) would better suit the intended role for standards of care. This shift is particularly significant when considering the "lack of information" problem in both the present standard of care and causation analyses; large corporations have a much greater capacity and responsibility to generate more information about the effects of their products, especially when compared to the ordinary plaintiff.

Also, the problem of what standard of care to impose on public authorities demands attention. While it seems reasonable to maintain the kind of policy/operational approach to whether a standard of care applies,[44] it still leaves open the question of whether the same standard should apply to both commercial profit-seeking companies and public authorities. The short answer is a soft "no." While much will depend on the particular activity engaged in, municipalities and similarly-situated bodies might be accorded more leeway in how they go about fulfilling their public duties, especially in regard to the availability of resources. While a limited budget cannot operate as an available justification for a private corporation's reduced level of care, it is reasonable to allow some consideration of that fact in the case of public bodies.[45] It is very different

41. See *Vaughan*, *supra* note 8.
42. See *Stone*, *supra* note 32.
43. See *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205, 143 DLR (3d) 9. See also *Latimer v AEC Ltd*, [1953] UKHL 3, [1953] AC 643.
44. See *Nelson (City) v Marchi*, 2021 SCC 41 [*Nelson*]. The Court affirmed the policy/operational distinction and outlined a four-step analysis for determining the scope of policy immunity.
45. See *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689, Cory J ("the requisite standard of care must be assessed in light of all the surrounding circumstances including budgetary restraints and the availability of qualified personnel and equipment" at 1238). The Supreme Court in

to insist that a corporation maintains a fixed standard of care, even if it means it going out of business, than it is to do the same for a municipality. Competition concerns aside, whereas the former is a positive result (i.e. shoddy corporations and their products and services are out of the market), the latter is not (i.e. the public might be left not with a lower level of service, but with no service at all).

VI. *In a good cause*

The third and perhaps most controversial feature of a new liability regime is causation. Although the courts persist in talking about this requirement in negligence liability as a factual inquiry, it is very much framed and infused by policy considerations. In the leading case of *Clements*, the Supreme Court returned to a central reliance on the "but for" test—but for the defendant's actions would the plaintiff have been harmed? While they allowed for a limited exception when there are several tortfeasors who together were the exclusive cause of the plaintiff's harm, they eschewed a standard that drew upon whether the defendant had made "a material contribution to the risk of injury."[46] Although the "but for" test can work in many straightforward cases, its usefulness runs out at the very point when a reliable test is most needed (i.e. when it is unclear and unascertainable whether the defendant was or was not the cause of the plaintiff's harm). Indeed, as the burden of proof falls on the plaintiff, the plaintiff will always almost lose in circumstances where the cause might or might not have been the defendant's actions. This seems unfair even on its face. However, it becomes deeply unfair when it is appreciated that corporate defendants and others are by far and away in the best position to generate more and better information about the effects of their products and services: the asbestos and tobacco cases are the most disturbing example of this.[47]

As a general matter, it is important to re-phrase the challenge that the courts face in establishing causation. To begin with, it will be important for judges to accept that this involves making the causal link not in an abstract sense and in an isolated setting, but against the backdrop that the defendants' actions have already been determined to be careless and below the standard of care expected. If that assumption is relied upon, it should

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Nelson, *supra* note 44 at para 56, affirmed the *Just* consideration of the nature and extent of budgetary considerations.

46. *Clements*, *supra* note 13 at para 32, McLachlin CJC. For a more extensive explanation and critique of causation, see Allan Hutchinson, "Out of The Black Hole: Toward a Fresh Approach to Tort Causation" (2016) 39:2 Dal LJ 561, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2082& context=dlj> [perma.cc/GQR5-3Y6G].

47. See e.g. Michelle J White, "Asbestos and the Future of Mass Torts," (2004) 18:2 J Economic Perspectives 183.

be appreciated that, as Justice Sopinka put it, "[c]ausation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."[48] In short, the main issue to be determined is not whether the defendant caused the plaintiffs' harm as a matter of philosophical or scientific certitude, even if this is inquiry is performed in a less doctrinaire and more pragmatic way. The test should be whether the defendants' negligent activities are sufficiently connected to the plaintiffs' harm that the defendant should be required to make good the plaintiffs' losses. As Sopinka went on to state, the point of any inquiry is for the courts to be convinced that "defendants…have a substantial connection to the injury."[49] By its nature, this is not an on-off determination, but incorporates an unavoidable dimension of evaluation and policy—was the connection between the defendant's negligence and the plaintiff's harm substantial and sufficient to warrantthe negligent defendant compensating the harmed plaintiff as a matter of policy?

Against such an understanding, the "material contribution" test has much to recommend it. This is so not only in cases of multiple defendants, but also where there is only one defendant. For instance, even in *Clements* itself, the failure of the blunt "but for" test was evident and the benefits of a "material contribution" test were suitably available. In that case, when a crash occurred, a bike-driver was driving too fast in poor weather and was carrying too much weight on the bike; he was found to be driving negligently. However, one operating cause of the accident (that injured his pillion-riding wife) was a nail on the road that punctured the bike's tyre. The Supreme Court sought to apply the "but for" test and, as that was inconclusive on the evidence available, the defendant was likely to avoid liability.[50] But surely it was perverse to allow the negligent defendant to avoid liability when, notwithstanding the nail-punctured tyre, he would have been in a much better position to handle that occurrence if he had not been driving negligently: a slower and less weighty ride might have averted or, at least, reduced the severe effects of the accident on his wife. The "but for" test, even if applied in "a robust common sense fashion,"[51]

48. *Snell v Farrell*, [1990] 2 SCR 311 at 326, 72 DLR (4th) 289.
49. *Ibid* at 326-327.
50. *Clements*, *supra* note 13. The Supreme Court sent the case back to trial as the judge had applied a material contribution test to establish the defendant's liability.
51. *Ibid* at para 9. For a similar failing, see *Barnett v Chelsea & Kensington Hospital Committee* (1968), [1969] 1 QB 428, [1968] 2 WLR 422, where the defendant medical casualty officer owed a duty of care to the poisoned plaintiff and breached the standard of care by failing to examine the plaintiff sooner, but where the plaintiff could not prove the negligence had caused the death from poisoning on the "but for" standard.

has grave trouble accommodating such considerations; the "material contribution to the risk of injury" does not.

Accordingly, a fairer and better test for causation would be a "material contribution" test that operationalised the policy of finding liability if there was a sufficiently substantial connection between the defendant's negligent conduct and the plaintiff's harm to warrant compensation to be paid by the defendant to the plaintiff. Moreover, in some circumstances, it might also be fairer to adopt a further variation on the "material contribution" test. As outlined by Lord Wilberforce in *McGhee*, it would be enough for plaintiffs to demonstrate that their harm is consistent with the kind of harm that could result from the defendants' negligent conduct; the defendant would then have the task of showing that this was not the case in these particular circumstances.[52] This seems particularly apposite when there is a significant inequality and imbalance between the resources of the defendants and the plaintiffs. As opposed to the present doctrinal situation, this would place more of the burden of "ignorance" (i.e. there is no decisive evidence of whether the defendant's conduct might or might not have resulted in the plaintiff's harm) on the better-positioned and resourced defendant. Again, echoing Wilberforce, "as a matter of policy or justice…it is the creator of the risk who…must be taken to have foreseen the possibility of damage, who should bear its consequences."[53]

In recommending such an understanding of causation, I am not at all overlooking some of the policies and concerns that currently inform negligence liability under the separate headings of duty of care and remoteness of damage. Instead, I am recommending that many of these can be incorporated into the kind of causation analysis proposed. The "material" aspect of a causation test can accommodate a range of considerations about the fairness and justice of imposing liability (e.g. spatial and temporal dimensions, parties' expectations, representations made, reliance by plaintiff, and the legal and social interest in play). These considerations are part and parcel of the move towards treating causation as being about social responsibility as much as factual causation. Rather than use the doctrine of causation as a screen behind which policy analysis is hidden, my proposal insists that this activity be made more open and transparent. Apart from simplifying the doctrinal work of courts (and thereby, hopefully, reducing the amount and cost of litigation), it will require judges to focus and streamline policy-evaluation within a

52. See *McGhee v National Coal Board*, [1972] UKHL 7, [1973] 1 WLR 1 [*McGhee* cited to UKHL].
53. *Ibid* at 10.

larger appreciation of tort law's revised balancing and combination of compensation and deterrence.

One set of circumstances where a more expansive definition of causation would be beneficial is in claims for "missed chance." In the leading case of *Gregg*, the United Kingdom's Supreme Court denied liability where, as a result of a negligent doctor's incorrect diagnosis, a patient chances of recovering were reduced from 42 to 25 per cent in the nine months before a correct diagnosis was made.[54] The majority applied an all-or-nothing "but for" approach; recovery might have been allowed if the lost chance exceeded 50 per cent. However, as the minority argues, the distinction is "irrational and indefensible…[because] the loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery."[55] If the Supreme Court had adopted a less rigid and more flexible approach along the lines of a "substantial connection" or "material contribution" test, it would have allowed for a more nuanced assessment that would not have left the plaintiff with no recovery at all; some degree of damages apportionment might have been allowed.

As with any proposal (and even revolution), the proof of the pudding is in the eating—so how will such a realignment of negligence liability affect the resolution of particular cases? After all, my proposed changes are not simply done to clean up the doctrinal landscape so that it is more accessible and attractive, but are intended to improve the quality of social justice. Consequently, I will examine a series of leading cases and explore how they might be re-decided under a liability regime that organised itself around the revised components—recoverable kinds of harms; standard of care; and causation—that I am putting forward. In this way, I will be able to showcase the benefits of such a scheme as well as respond to possible criticisms and fill anticipated gaps. The cases to be dealt with include *Cooper*, *Rankin*, *Hercules*, *Maple Leaf Foods*, and *Arndt*.

VII. *Back to the future*

The case of *Cooper* is now considered the leading authority on determining whether a duty of care is owed by the defendant to the plaintiff. There, a large group of investors sued a public registrar whose task was to supervise the activities of mortgage brokers. The registrar was informed that a particular broker was acting improperly, but he did nothing. As a result, the over 3,000 investors collectively lost over $200 million from the broker's continuing malfeasance. It was undisputed that the registrar was negligent

54. *Gregg v Scott*, [2005] UKHL 2, [2005] 2 AC 176 [*Gregg* cited to UKHL].
55. *Ibid* at para 3, Nicholls LJ. There were some complications about the precise facts, but they do not affect the analysis here.

in not acting to suspend the broker and had caused the further losses to the investors, even though the broker was the prime culprit. Nevertheless, the Court decided that there was insufficient proximity between the registrar and the investors because the registrar's duty was to the public as a whole, not exclusively to the investors. Yet, as a general principle, it seems unconvincing to conclude that there was no proximity and, therefore, no liability. While there might well have been other persuasive reasons to deny liability,[56] the effort to do so based on a lack of proximity or "neighbourliness" between the defendant and the plaintiffs does not pass doctrinal muster; the relationship between them was close and direct. It is far from clear why blameless plaintiffs should be denied recovery against a negligent and loss-causing defendant simply because of their number or any other spurious reason; the fact that they were investment losses offers more promise as a limiting factor. The rationale of being fair to the defendant as well as the plaintiff does not seem to apply or work in these circumstances.

Another duty case that resulted in plaintiffs being denied recovery was *Rankin*. Two intoxicated teenagers were able to steal a car from a garage's lot because the garage-owner had left the car keys in the car. A short time later, both teenagers were injured in an accident which occurred as result on of the teenage driver's negligence. Again, the Supreme Court held that there was no duty of care owed because, while theft was reasonably foreseeable, "the type of harm suffered—personal injury—was [not] reasonably foreseeable to someone in the position of [the garage-owner] when considering the security of the vehicles stored at the garage."[57] Not only is this empirical assumption dubious (i.e. many teenagers who illegally joy-ride are involved in serious accidents), but there is also no policy argument as to why defendants who could have easily and cheaply avoided being negligent should not be held liable. Of course, the fact that the car was stolen and that the plaintiffs were intoxicated is not irrelevant, but that does not speak to whether there is an initial case made out against the defendant. Instead, these factors may influence, for instance, the apportionment of damages.

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56. *Cooper*, *supra* note 12 at para 55. The Supreme Court would have held, as a matter of public policy, that a public authority should not be put in a position of acting as an insurer for investors for indeterminately large amounts. This is a sound idea, but does not speak to whether a prima facie duty of care was owed.

57. *Rankin*, *supra* note 11 at para 26, Karakatsanis J. The issues of criminality and contributory negligence are separate from whether the defendant owed a prima facie duty to the plaintiffs. See 20-22, below. In their dissenting reasons in *Rankin*, *supra* note 11 at para 70, Gascon and Brown JJ would have upheld the trial judge's findings that a duty of care was owed because the physical injury to the plaintiff "was a reasonably foreseeable consequence of [the defendant's] negligence."

A difficult issue for the courts has been the scope of liability for negligent statements. In *Hercules*, the question arose of whether auditors could be liable to plaintiffs who made money-losing investment decisions based upon a negligently-prepared annual audit-report. The Supreme Court held that no duty of care existed because the purpose for which the reports were prepared (i.e. supervision by shareholders of management) was not the purpose for which they were used (i.e. a range of persons using the audit-report for investment strategy).[58] This makes sense, but the case is less about the defendants' responsibilities than those of plaintiffs. This fits within my suggested schema because, in regard to causation, it was as much the unreasonable reliance by the plaintiffs on the report as the negligence of the defendants that caused the harms. Mindful that these are economic losses, not personal injuries and that the investors as a privileged class are fully capable of insuring against their speculative losses, it makes both doctrinal and policy sense to deal with these kinds of occurrences under the general rubric of causation. What might be recommended is a division of responsibility between plaintiffs and defendants. After all, the defendant auditors could include within their reports a caution that the audit is only to be used for the purposes of managing the company, not investing in it.

Hercules also raises the broader issue of how to factor in a plaintiff's conduct in determining the defendant's liability. Within a negligence regime based only on carelessness and causation, this is a challenge. But it is not an insurmountable one. Even a basic sense of equivalence or balance recommends that the plaintiff's conduct cannot be ignored. Nevertheless, as things stand, the defences of illegality, consent and contributory negligence need to be re-worked so that they complement, not go against the basic dynamic. In the scheme that I am proposing—a defendant's negligence plus (a revised) causation are adequate to establish liability —such a stance is supported by the larger policy forces in play. Consequently, the plaintiff's own conduct must be integrated into a "fair and just" scheme of liability in a way that respects and advances the fundamental transformation from a more defendant-oriented system to a more plaintiff-sensitive structure. Plaintiffs are already struggling to cope with their injuries or harms even when they receive full compensation, let alone when their recovery is further reduced.[59]

58. *Hercules*, *supra* note 34 at 172.
59. See e.g. *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229, 83 DLR (3d) 452. The total damages award was reduced by a range of contingencies.

As regards illegality and consent, the courts have already made significant headway in making these full defences (i.e. they exonerate negligent defendants completely) of only marginal significance. After a brief flirtation with it, the Supreme Court has sidelined the defence of illegality so that it is only available when allowing a plaintiff to recover would "reflect adversely on the administration of justice."[60] Furthermore, the fact that the plaintiff might be engaged in an illegal activity when harmed can be dealt with through contributory negligence and in the calculation of damages generally (e.g. no income loss while in prison).[61] Similarly, the defence of consent has been narrowed down. Requiring not only knowledge of risk, but also a willingness to accept its legal consequences, the defence has become much less accepted by courts.[62] This seems right because, apart from the frequent imbalance of power between plaintiffs and defendants, it is difficult to see why a plaintiff would genuinely waive a legal claim that might result from the defendant's negligence. Accepting and agreeing to runs risks is one thing, but accepting and agreeing to run negligently-created risks as a basis for tort liability is entirely another thing.

The most favoured and still problematic defence is centred on the plaintiff's negligence; it allows for an apportionment of loss between plaintiffs and defendants. The same factors—extent of risk, costs of precautions, gravity of harm, etc.—are relied upon to determine the plaintiff's fault as the defendant's fault. This is a particularly punitive defence because, while plaintiffs will remain injured regardless of any compensation paid and, therefore, should be adequately deterred from future misconduct by that fact alone, they will also be deprived of some of the compensation for the harms suffered. This amounts to a twofold blow. Consequently, the defence needs to be handled sensitively and forbearingly (e.g. a modest deduction for failure to wear protective gear).[63] A crucial distinction needs to be made between whether plaintiffs contributed to the cause of the accident or whether they contributed to its effects; the former is a much more serious and weighty matter than the latter and warrants a more immodest reduction in the plaintiffs' recovery. In a world in which

60. *Hall v Hebert*, [1993] 2 SCR 159 at 192, 101 DLR (4th) 129, Sopinka J. See also the majority judgment of McLachlin J, who likewise limited the availability of the defence of illegality at 177.

61. *British Columbia v Zastowny*, 2008 SCC 4 at para 22.

62. See e.g. *Crocker v Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186 at 1201-1203, 51 DLR (4th) 321.

63. See e.g. *Galaske v O'Donnell*, [1994] 1 SCR 670, 112 DLR (4th) 109. The damages for personal injury resulting from an automobile accident were reduced because of the plaintiff's failure to wear a seat belt.

insurance is not equally distributed between plaintiffs and defendants (i.e. plaintiffs have less available insurance), this approach is defensible in terms of fairness and justice.

Another testing topic is claims for pure economic loss. This is a fraught area of tort law that has become larded with a slew of judicial distinctions, inconsistencies and exceptions. The challenge is that, unlike with personal injuries, most claims are made by large economic units. However, there are also some claims that involve individuals, albeit often of the investing kind, professionals and Stevenson-like traders. The general thrust of the pertinent legal doctrine is that, while pure economic loss is a recoverable head of damage, there are only limited circumstances in which successful claims can be made. The received wisdom is that such losses are more easily and genuinely distributed and passed on by plaintiffs than personal injuries and so should not receive similar treatment. The focus of debate has been on whether a duty of care exists between a negligent defendant and a loss-enduring plaintiff. As such, this area presents a strong test of the approach that I am recommending.

A timely example of the challenge and its possible resolution is the recent case of *Maple Leaf Foods*. The franchise agreement between Mr. Sub and its franchisees required them to purchase meats from Maple Leaf Foods ("MLF"); there was no contractual relationship between the franchisees and MLF. Due to MLF's negligence, some tainted meats had to be recalled and the franchisees were left without supplies for almost two months. As a result, many franchisees were forced out of business and made claims against MLF for lost future profits as well as the much-reduced capital value of the franchises. In a sharply divided 5-4 decision, the Supreme Court found that the franchisees could not recover for their pure economic losses (i.e. those losses that there were unconnected to any personal injury or property damage); the relationship between MLF and the franchisees was not considered to have the degree of proximity that was needed to establish a duty to avoid such losses.[64] The crux of the majority's decision was the rather precious distinction that any undertaking by MLF about the quality or fitness of its meat products was made to the ultimate consumers, not the franchisees. Moreover, it was noted that the franchisees could have contracted out of the exclusive supply agreement with MLF as the franchise agreement with Mr. Sub permitted.

The minority agreed with the majority's general exposition of the general reasons for limiting recovery for pure economic losses, but they

64. *Maple Leaf Foods*, *supra* note 25 at para 127. The Court allowed the cost of cleaning up the stores to be recovered, but this was a relatively minor amount.

disagreed strongly about its application in the circumstances of *Maple Leaf Foods*. Instead, it placed considerable weight on the vulnerable position of the franchisees and that it would be "just and fair" to recognize a sufficiently proximate relationship between MLF and the franchisees. Eschewing the formalism of the majority, the minority were insistent that "the parties' actual circumstances, including their commercial sophistication and bargaining power" meant that "the prospect of the franchisees protecting themselves by contract was illusory, placing them in a particularly dependent and vulnerable relationship with MLF."[65] As such, they would have held that MLF should be held responsible for the "direct economic consequences" that flowed from MLF's negligence.

In many, but not all ways, the minority in *Maple Leaf* Foods is much more aligned with the approach that I advocate. As well as the non-formalistic recognition of the relative inequalities that existed between the parties, there is an understanding that a defendant should be responsible for the direct consequences of its negligent actions. However, the minority still felt that they were constrained by the more restrictive thrust of the proximity analysis in terms of a duty of care. A more transformative approach along the lines that I encourage would recommend that, as a general rule, only vulnerable parties (i.e. those who would have had relative difficulty in covering themselves against such harm by contract or insurance) would be able to recover pure economic losses that are the direct consequences of a defendant's negligent actions. This would put them more on a par with plaintiffs who suffer property damage. There are no compelling reasons why a property owner should be in a more or less advantageous position that those suffering economic harms; both are able to spread their losses in a way that injured plaintiffs are not. Other less or non-vulnerable parties would be capable of anticipating such losses and deciding whether to run that risk, insure against them or re-distribute them generally through contractual arrangements.[66] Accordingly, I am suggesting that there is no general right to recover for pure economic loss except where the plaintiff is in a vulnerable position and is not realistically able to spread or insure against such losses.

A final issue that can be explored is that of wrongful birth. For instance, in *Arndt*, the pregnant plaintiff contracted chickenpox, but her negligent

65. *Ibid* at paras 145, 150, Karakatsanis J. Whether the franchisees were sufficiently vulnerable was a matter of dispute between the majority and minority.

66. Under this approach, the plaintiffs in *Norsk* and *Winnipeg Condominium* would not be permitted to recover in tort. See *Norsk*, *supra* note 25; *Winnipeg Condominium*, *supra* note 35. However, there are related situations where contract remedies might still be available. See *Queen v Cognos Inc*, [1993] 1 SCR 87, 99 DLR (4th) 626.

doctor failed to inform her of the small risk of her child being born with disabilities as a result.[67] The child was born with serious impairments from the mother's chickenpox. The plaintiff claimed that, if she had been informed of the risk, she would have terminated the pregnancy. The Supreme Court decided against the mother's claim for child-rearing costs and loss of income (e.g. modest deductions for failure to use protective gear). Applying a "modified objective" test, the majority held that, despite her evidence to the contrary, the specific plaintiff would not have terminated the pregnancy because she had wanted children, the risk of harm was small and she was skeptical of much mainstream medicine. This raises some very difficult questions that lend themselves to no easy or obvious answers. However, a more expansive understanding of causation can at least frame the appropriate analysis better.

It seems silly to maintain, as Chief Justice McLachlin did, that the question entailed "a purely factual inquiry."[68] Answering a counter-factual question of the "what if" variety does not lend itself to any kind of exclusively factual probe; reference to a range of contestable assumptions about personal behaviour and social context are unavoidable. Further, rather than understanding the causation inquiry in relational terms and being more about deciding if there was a "substantial connection" between the negligent defendant and the harmed plaintiff, the Court isolated the causation enquiry by only considering the position of the pregnant plaintiff; it made very light of the fact that all this could have been avoided if the doctor had given reasonable and expected advice to the pregnant patient. Although the evidence in *Arndt* might have pointed decisively to the plaintiff not terminating her pregnancy, she was at a minimum denied the opportunity to make such a choice. Allowing a claim for this kind of harm would have done much more to effect a suitable balance between compensation and deterrence than simply having to settle a zero-sum and all-or-nothing outcome. As the Supreme Court (and former Chief Justice McLachlin in particular) often reminds lawyers and society, the ultimate question is one of what is "just and fair."[69]

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67. *Arndt v Smith,* [1997] 2 SCR 539, 148 DLR (4th) 48 [*Arndt*].

68. *Ibid* at 564. This is particularly difficult to sustain where the judges divide over exactly what personal factors of the plaintiff should modify the applicable objective standard of a "reasonable pregnant woman." McLachlin maintained a similar "factual" stance in the leading case of *Clements*, *supra* note 13.

69. *Cooper*, *supra* note 12 at para 34. My comments are relevant to the related counter-factual questions in the so-called rescue cases—if an easy rescue had been attempted would the plaintiff have been rescued? As well as imposing a varying standard of care depending on the relationship between the plaintiff and defendant (i.e. a higher standard for relatives through to a much lesser one for strangers), the causation inquiry involves similar policy-based considerations. See 17-19, above.

Conclusion

If "the law of torts is a battlefield of social theory,"[70] then negligence liability is at the very heart of the action. Unfortunately, that battle is being fought with a battery of weapons that are both outdated and unsuited to modern circumstances and contexts: the social theory relied upon is no longer in synch with the social conditions within which tort actions arise and must be resolved. Because today's society is not yesterday's, today's law ought not to be based on yesterday's society; fresh social demands deserve fresh and responsive legal rules. With this in mind, I have recommended a new approach that is simpler in structure and more just in outcomes—negligence liability should be imposed when a negligent defendant has a sufficiently substantial connection to the plaintiff's harms that would warrant the defendant paying compensation to the plaintiff. Of course, this is not a straightforward or easy test to apply. But that is its strength, not its weakness. Judges will not be able to hide their policy choices behind ostensibly objective rules and principles but will be required to incorporate and defend those choices as involving inevitable and contested values. Let the revolution begin!

70. Prosser, *supra* note 1.