

## Normativity, Fairness, and the Problem of Factual Uncertainty

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This article concerns the problem of factual uncertainty in negligence law. We argue that negligence law's insistence that fair terms of interaction be maintained between individuals—a requirement that typically manifests itself in the need for the plaintiff to prove factual or “but-for” causation—sometimes allows for the imposition of liability in the absence of such proof. In particular, we argue that the but-for requirement can be abandoned in certain situations where multiple defendants have imposed the same unreasonable risk on a plaintiff, where the plaintiff suffers the very sort of harm that rendered the risk unreasonable, and where the plaintiff cannot prove which of the defendants was the but-for cause of her loss. This approach provides one way to understand the Supreme Court of Canada's recent decision in *Resurface Corp. v. Hanke*. We find support for our approach in various concepts that underlie negligence liability quite generally. These underlying concepts are normative in nature, and manifest core notions of justice and fairness. We argue that approaches to the problem of factual uncertainty that appeal to such normative principles to make sense of atypical cases of causation are in no way inconsistent with the nature and structure of negligence law. Rather, the opposite is true: in taking negligence law seriously as law, such approaches are instead reflective and supportive of it.

Le présent article porte sur le problème de l'incertitude de fait en droit de la négligence. Nous faisons valoir que l'insistance du droit de la négligence sur le fait que des modalités équitables d'interaction doivent être maintenues entre les personnes, exigence qui se manifeste habituellement dans le besoin pour le/la demandeur/demanderesse de prouver la causalité de fait ou l'absence de lien de causalité, permet parfois d'imposer une responsabilité en l'absence de cette preuve. Nous soutenons en particulier que l'absence d'exigence peut être abandonnée dans certains cas lorsque plusieurs défendeurs ont imposé le même risque déraisonnable au/à la demandeur/demanderesse, lorsque celui-ci ou celle-ci subit exactement le genre de préjudice qui a rendu le risque déraisonnable et qu'il ou qu'elle ne peut prouver celui des défendeurs qui a été la cause déterminante de sa perte. Ce point de vue fournit un moyen de comprendre la décision récente que la Cour suprême du Canada a

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rendue dans la cause *Resurfice Corp. c. Hanke*. Nous fondons notre point de vue sur divers concepts qui sous-tendent de façon très générale la responsabilité en matière de négligence. Ces concepts sous-jacents sont de nature normative et manifestent des notions fondamentales en matière de justice et d'équité. Nous faisons valoir que les façons d'aborder le problème de l'incertitude, problème qui utilise de tels principes normatifs dans le but de trouver un sens à des cas atypiques de liens de causalité ne sont aucunement incompatibles avec la nature et la structure du droit de la négligence. Bien au contraire, en prenant le droit de la négligence au sérieux comme loi, de pareils points de vue ont plutôt pour effet de refléter ce droit et de l'appuyer.

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**IT IS UNCONTROVERSIAL THAT FACTUAL CAUSATION**—not to be confused with legal or “proximate” causation—plays a central role in typical negligence cases. In such cases, a defendant is liable for a plaintiff’s injuries only if those injuries were in fact caused by the defendant’s careless action.<sup>1</sup> As it is sometimes put, “[t]he standard rule is that it is not enough to show that the defendant’s conduct increased the likelihood of damage being suffered... . It must be proved on a balance of probability that the defendant’s conduct *did* cause the damage in the sense that it would not otherwise have happened.”<sup>2</sup> This counterfactual test has become known as the “but-for” test for factual causation: a defendant is said to have caused a plaintiff’s injury if that injury would not have occurred but for the defendant’s negligence. In linking the defendant’s careless action to the plaintiff’s injury, the requirement of factual causation “attest[s] to the dependence of the plaintiff’s claim on a wrong suffered at the defendant’s hand”<sup>3</sup> and

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1. See e.g. *Barnett v. Chelsea & Kensington Hospital Management Committee*, [1968] 1 All E.R. 1068 (Q.B.D.).
  2. *Barker v. Corus UK Ltd.*, [2006] 2 A.C. 572 at 579, Hoffman L.J. (H.L.) [*Barker*].
  3. Ernest J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) at 2.

forms a core part of the reasons for which liability should be imposed on a defendant in a given case.<sup>4</sup>

It is also uncontroversial that certain situations create problems for the but-for test. These are situations where considerations of justice and fairness incline us towards the view that liability should not be negated simply because factual causation cannot be established. We will call these *atypical* cases. For example, suppose A and B each shoot carelessly in the direction of C, and suppose that while C is injured by one of the shots, it is not possible to determine which shot in fact caused C's injury. This presents an obvious evidential problem, since C cannot say which of A or B in fact injured him. Nonetheless, it is very plausible to suppose that C's suit in negligence should not be dismissed simply because but-for causation cannot be established on the balance of probabilities.

But this surface plausibility masks an underlying puzzle: why *shouldn't* liability be negated in such a case? Therefore, the problem of factual uncertainty in one of its guises is this: what distinguishes *typical* cases, in which proof of factual causation is required, from *atypical* cases, in which the requirement of factual causation is waived? That is, what justifies dispensing with the requirement of factual causation in some cases, but not in others?

In this article, we sketch a general approach to resolving the puzzle that gives rise to these questions. We do so in four parts. First, we clarify the problem and consider some different approaches to it. Second, we reject some previous attempts to solve the problem. Third, we turn to a consideration of the underlying concepts of negligence law and indicate how we think they might bear on the problem at hand. And, finally, we outline and defend our own solution.

Our approach to the problem of factual uncertainty is in the spirit of some recent remarks made by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*.<sup>5</sup> In a brief discussion of factual causation, the Court suggested that the but-for test might be set aside where it is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury "due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge."<sup>6</sup>

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4. Indeed, some have gone so far as to say that factual causation "is the principal foundation of liability in the law of torts." See J.C. Smith & Peter Burns, "*Donoghue v. Stephenson*: The Not So Golden Anniversary" (1983) 46 Mod. L. Rev. 147 at 148.

5. [2007] 1 S.C.R. 333 [*Resurfice*].

6. *Ibid.* at para. 25. This is one of two requirements articulated by the Supreme Court. The other requirement is that "the defendant breached a duty of care owed to the plaintiff,

Concerning atypical or exceptional cases in which liability may be imposed, notwithstanding that the but-for test is not satisfied, the Court then remarked that the imposition of liability in such cases is justified on the grounds that to do otherwise “would offend basic notions of fairness and justice.”<sup>7</sup>

To anticipate, one of our goals is to offer an account of what the Supreme Court of Canada might have meant by its reference to “basic notions of fairness and justice.” We will argue that to resolve various problem cases, attention should be paid not to the nature and structure of the concept of causation, but rather to the underlying normative principles on which tort law is based. We will focus on what are sometimes called “reciprocal norms of conduct.” These reciprocal norms of conduct impose obligations on individuals to maintain fair terms of interaction with one another. Our claim is that tort law’s commitment to maintaining fair terms of interaction between individuals, a commitment that *typically* requires a plaintiff to establish causation using the but-for test, sometimes allows, in *atypical* cases, for the imposition of liability absent but-for causation.

In particular, we will argue that the but-for requirement should be abandoned in situations where multiple defendants impose the same unreasonable risk on a plaintiff, where that plaintiff suffers the very sort of harm that rendered the risk unreasonable, and where the plaintiff cannot prove which of the defendants was in fact the but-for cause of her loss. Our goal is not to discuss every possible situation that gives rise to a problem of factual uncertainty. Rather, we aim to articulate a framework for addressing the problem of factual uncertainty, and to explain why the particular approach to the problem that we outline in what follows is preferable to other approaches.

## I. THE PROBLEM

We begin with some distinctions. In our view, it is important to recognize that there are two sorts of ways in which but-for causation fails in atypical cases. Consider the following two cases:

*Desert Trek:* Phil is setting out on a trip through the desert. He arranges to have a water barrel placed at the trek’s halfway point. Billy puts poison in the water barrel,

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thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.”

7. *Ibid.*

intending to poison Phil. Keith subsequently empties the barrel, intending that Phil die of thirst. Upon reaching the halfway point of the trek, Phil finds the barrel empty and dies of thirst.<sup>8</sup>

*Hunters:* Bob, Jerry, and Mickey are hunting quail. Jerry and Mickey shoot simultaneously, and both fail to take reasonable care to ensure that they are not shooting in the direction of Bob. Bob is hit and injured by one pellet, although it is impossible to tell from whose shotgun it was fired.<sup>9</sup>

Note their surface similarity: in both cases we are faced with (1) an intuition that one or both of the defendants is—or should be held—liable for the plaintiff's injury, together with (2) an inability to say who is the “but-for” cause of the injury. It is this combination of intuition and failure that makes such cases *atypical*.

Notwithstanding this surface similarity, however, at bottom, the cases are quite different. In *Desert Trek*, we cannot say that Billy is the but-for cause of Phil's injury. Phil would still have died even if Billy had not poisoned the barrel, since the barrel was empty thanks to Keith. The same argument can be made with respect to Keith: Phil still would have died even if Keith had not emptied the barrel because it would have been full of poisoned water. Note that the problem is not limited to the legal context. Rather, the problem has to do with our very concept of causation.<sup>10</sup> The facts of the case are not in dispute, and,

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8. See J.A. McLaughlin, “Proximate Cause” (1925) 39 Harv. L. Rev. 149 at 155; H.L.A. Hart & Tony Honoré, *Causation in the Law*, 2d ed. (Oxford: Oxford University Press, 1985) at 239.
  9. See *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) [*Summers*]; *Cook v. Lewis*, [1951] S.C.R. 830 [*Cook*]. For a similar set of facts leading to a different outcome, see *Lange v. Bennett*, [1964] 1 O.R. 233 (H.C.J.). Situations of historical uncertainty arise with various combinations of candidate causes: both potential causes might be tortious, or only one might; one potential cause might be the plaintiff's own negligence; or there may be more than two potential causes. We will, by and large, discuss only the paradigm case of two tortious candidate causes. The other variations are discussed, briefly, at the end of this article.
  10. See *e.g.* David Lewis, “Causation as Influence” (2000) 97 J. Phil. 182. Lewis's examples make clear the importance of causal uncertainty in these types of situations in a way that does not often arise in the legal arena. Consider a situation in which two bullets are shot at a glass and in which the first breaks the glass a millisecond before the second. Lewis argues that such examples create problems for many general accounts of causation quite apart from any problems such examples pose for legal causation in particular. In the legal realm, causal indeterminacy occurs in several forms: overdetermination cases and duplicative or successive causation cases. For overdetermination cases, see *e.g.* *Corey v. Havener*, 65 N.E. 69 (Mass. Sup. Jud. Ct. 1902) [*Corey*]. For the two most common duplicative or successive causation

while we know exactly who did what to whom, and when, we are still unable to say who in fact caused Phil's injury. This sort of case is one of *causal indeterminacy*.

*Hunters*, however, presents a different problem. That problem is traceable to a lack of knowledge about exactly what occurred when the plaintiff was injured. A pellet hit Bob, but it is impossible to tell whether the pellet came from Jerry's gun or from Mickey's gun. In this situation, we are again unable to establish on the balance of probabilities which shot was the but-for cause of Bob's injury. However, the difference in this case is that the problem is not with our concept of causation. Rather, the problem in cases such as *Hunters* involves a lack of knowledge concerning the underlying facts. For this reason, *Hunters* is a case of *historical uncertainty*.<sup>11</sup>

Presented this way, the differences between cases of causal indeterminacy and cases of historical uncertainty seem relatively clear: one set of cases involves a puzzle that is traceable to our concept of causation; the other set of cases involves a puzzle that is traceable to our (lack of) epistemic access to certain facts. But, as we noted, the two sorts of cases also share an important similarity: in both situations, we are unable to say on the balance of probabilities whether a particular defendant in fact caused the plaintiff's injury. This similarity is brought into sharper focus when we turn to the legal context.

Courts, when faced with cases that fit into one of these two categories, have often evinced concern that an application of the normal but-for test for causation would result in unfairness, since, in both *Desert Trek* and *Hunters*, neither defendant would be found liable, and the plaintiff would be left without a rem-

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cases, see e.g. *Baker v. Willoughby*, [1970] A.C. 467 (H.L.) [*Baker*]; *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.) [*Jobling*].

11. The term is owed to Jane Stapleton. See Jane Stapleton, "Perspectives on Causation" in Jeremy Horder, ed., *Oxford Essays on Jurisprudence*, 4th Series (Oxford: Oxford University Press, 2000). As we noted above, the uncertainty in cases of historical uncertainty usually arises out of a lack of scientific knowledge. Moreover, while the fact patterns of *Cook*, *supra* note 9, and *Summers*, *supra* note 9, would seem to be extremely rare, the same problem arises on other facts. Litigation involving mesothelioma caused by exposure to asbestos raises the same issues: the disease is caused by exposure to asbestos, but the most up-to-date epidemiology of the disease cannot determine, as between two sets of exposure to asbestos, which of them caused the disease. See *Fairchild v. Glenhaven Funeral Services*, [2003] 1 A.C. 32 (H.L.) [*Fairchild*] and, more recently, *Sienkiewicz v. Greif (UK) Ltd.*, [2009] EWCA Civ 1159 [*Sienkiewicz*].

edy for an injury that seems clearly to have resulted from *somebody's* wrongdoing. In light of this concern—and consistent with the normal methods of common-law reasoning—courts try to describe, in the abstract, the reasons for thinking that the but-for test may be inappropriate in these situations.

Notwithstanding these *legal* similarities, it should be clear that the underlying *conceptual* issues at play in the two sorts of cases are essentially very different, and that the imposition of liability on the defendants in the two sorts of atypical cases might require different explanation and justification. It is notable that many of the existing attempts to understand the problem of factual causation centre on cases of causal indeterminacy, such as *Desert Trek*. Unfortunately, such analyses fail to provide a solution to the problem posed by cases of historical uncertainty exemplified by *Hunters*. We, therefore, propose to focus our analysis on such cases, since, in our view, the relevant normative issues are presented more starkly there.

That said, set aside for the moment the distinction between cases of causal indeterminacy and cases of historical uncertainty, and consider the class of atypical cases as a whole. The question to be answered is: what distinguishes atypical cases from typical cases? It is obviously not to the point to call a case atypical simply to account for the possibility that but-for causation is not required for liability to be imposed on the defendant. That ignores the crucial issue, namely *why* but-for causation is not required in such a case. Nor is it sufficient to simply enumerate the categories of cases in which the requirement of but-for causation has been abandoned, or has otherwise proven to be inadequate or problematic (a list that would include not only cases like *Desert Trek*<sup>12</sup> and *Hunters*,<sup>13</sup> but also learned intermediary cases,<sup>14</sup> informed consent cases,<sup>15</sup> simultaneous causation cases,<sup>16</sup> and, more generally, cases where broad considerations of fairness and justice dictate that normal rules of causation should be suspended<sup>17</sup>). Such an enumeration again leaves us wondering why *those* sorts

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12. *Baker*, *supra* note 10; *Jobling*, *supra* note 10.

13. See *e.g.* *Cook*, *supra* note 9; *Summers*, *supra* note 9; and *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980) [*Sindell*].

14. *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647.

15. *Hopp v. Lepp*, [1980] 2 S.C.R. 192; *Reibl v. Hughes*, [1980] 2 S.C.R. 880.

16. *Corey*, *supra* note 10.

17. Such cases state that a “material contribution test” should be used instead. See *e.g.* *Athey v.*

of cases should be treated differently from typical cases, in which but-for causation *is* required. What leads us to think that such cases ought to be classified as atypical and abnormal?<sup>18</sup> The problem, in short, is that while courts appear to be prepared to set aside a core determinant of negligence liability in some cases, the explanation for doing so remains unclear.

## II. SOME OPTIONS

Faced with this problem, four options present themselves. The first and least attractive option is to do nothing and proceed as if the problem identified above requires no explanation. We will ignore this option in what follows.

The second option is to resolve the puzzle in favour of the atypical case by rejecting the centrality of factual causation altogether, and arguing that factual causation should *never* be a requirement for the imposition of negligence liability. Thus, a defendant's unreasonable imposition of risk on a plaintiff, together with the materialization of that risk in injury to that plaintiff, should always and everywhere suffice for the imposition of liability on the defendant. This option might be justified by endorsing an account of tort law that emphasizes, from the point of view of both plaintiffs and defendants, certain principles of fairness.<sup>19</sup> Or it might be justified instead by appeal to an account of tort law that emphasizes the importance of extrinsic policy goals related to deterrence and compensation, rather than by reference to the actual relationship between a particular plaintiff and defendant. This latter sort of account is characteristic of certain instrumental approaches to negligence liability.

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*Leonati*, [1996] 3 S.C.R. 458; *Wardlaw v. Bonnington Castings Ltd.*, [1956] A.C. 613 (H.L.); *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.) [*McGhee*]; *Fairchild*, *supra* note 11; *Sienkiewicz*, *supra* note 11; and *Barker*, *supra* note 2 [material contribution cases].

18. There are obvious echoes here of Lord Atkin's famous judgment in *Donoghue v. Stevenson*. One reason why that case has the status that it does is because Lord Atkin purported to identify an underlying conceptual structure to negligence law by subsuming under a general principle—the neighbour principle—disparate categories of cases where negligence-like liability had previously been imposed. See [1932] A.C. 562 (H.L.) [*Donoghue*]. For a similar judgment, see also *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916).
19. See *e.g.* Jeremy Waldron, "Moments of Carelessness and Massive Loss" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (New York: Oxford University Press, 1995) 387; Christopher H. Schroeder, "Corrective Justice, Liability for Risks, and Tort Law" (1990) 38 UCLA L. Rev. 143.

A third option is to resolve the puzzle in favour of the typical case by accepting that factual causation is a *sine qua non* of negligence liability, and by arguing that there should be no liability where factual causation cannot be established.<sup>20</sup> This view might seem to be suggested, or even entailed, by corrective justice approaches to negligence liability, which require the defendant and plaintiff to be linked via the mechanism of factual causation as doer and sufferer of the same wrong.

A fourth option is to find a way to reconcile the role played, or not played, by factual causation in typical and atypical cases. Such a reconciliation can be pursued in different ways. One way—the more familiar way—is to critically evaluate the concept of causation at work in negligence law with an eye towards reforming the concept, or possibly replacing it altogether. According to proponents of this view—which we call the “Reevaluate Causation” view—the problem of factual uncertainty is traceable to instability or incoherence in our underlying concept of causation.<sup>21</sup> Therefore, according to proponents of this view, perhaps an alternative account of causation might allow us to see how the requirement of factual causation can be met even in atypical cases.

The Reevaluate Causation view is an intriguing strategy, and much interesting work has been done to articulate and defend it.<sup>22</sup> It is not, however, our strategy. There are several reasons for this. First, we believe that the strategy we do pursue—which concentrates on the normative structure of negligence law—is the more promising strategy in the long term. Second, it is far from clear that the Reevaluate Causation strategy can provide a justification of liability that applies to *all* atypical cases. This point should be particularly clear in light of the distinctions drawn above. That is because there is no sensible notion of causation according to which we can say that both defendants in *Hunters* caused the plaintiff's injury, and, so, no sensible notion of causation that can underlie the

20. See Brian T. Hogan, “*Cook v. Lewis* Re-examined” (1961) 24 Mod. L. Rev. 331.

21. Richard Wright's efforts on this front have been the most sustained and influential. See Richard W. Wright, “Causation in Tort Law” (1985) 73 Cal. L. Rev. 1735 [Wright, “Causation”]; Richard W. Wright, “Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts” (1988) 73 Iowa L. Rev. 1001 [Wright, “Pruning”]; and Richard W. Wright, “Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility” (2001) 753 Vand. L. Rev. 1071. Wright's work follows from the influential treatment of causation by Hart & Honoré, *supra* note 8. Also useful in this regard is the work of Stapleton, *supra* note 11.

22. *Ibid.*

imposition of liability on both defendants. In *Desert Trek*, on the other hand, such a strategy does seem fruitful because there does seem to be a sense of “cause” according to which the defendants *did* cause the plaintiff’s injury. Nonetheless, because it is clear in *Hunters* that one and only one defendant caused the plaintiff’s injury, no amount of massaging the concept of causation will be sufficient, we think, to solve *Hunters*. We say more about this below.

In our view, a better way to reconcile the typical and atypical cases is to think harder, not about the nature and structure of the concept of causation, but, rather, about the normative underpinnings of negligence liability quite generally. Pursuing this strategy requires articulating an account of negligence liability that can explain the following: (1) the insistence on the requirement of but-for causation in typical cases; (2) the abandonment of the requirement in atypical cases; and (3) a principled distinction between the two types of cases. This is a challenge. Nonetheless, we will argue that there is some plausibility to the idea that underlying normative considerations make room, in a principled manner, for the importance of factual or but-for causation in typical cases, while also allowing us to dispense with it in certain atypical ones. Our thought is this: just as the general reasons for imposing negligence liability in a given case ought also to be reasons for limiting that liability, so too ought the reasons for insisting on the requirement of factual causation in typical cases be reasons for limiting or dispensing with it in atypical cases. This is one thing that might be meant by the claim that, in atypical cases, principles of justice and fairness permit abandoning the requirement of but-for causation. Or so we will claim.<sup>23</sup>

### III. SOME FAILED APPROACHES

It is useful to consider some examples of unsuccessful approaches to the problem of factual uncertainty to help further clarify the issues at play. One early and interesting attempt is visible in the work of Wex Malone. Malone is a proponent of the second way of resolving the problem of factual uncertainty set out above: he favours abandoning the but-for causation requirement entirely, or at least subsuming it under the broader policy goals of tort law. Here is the heart of his argument:

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23. We are not alone in claiming this. For a similar approach to the problem of factual uncertainty, see Arthur Ripstein & Benjamin C. Zipursky, “Corrective Justice in an Age of Mass Torts” in Gerald J. Postema, ed., *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 214.

All rules of conduct, irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks... The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises.<sup>24</sup>

Thus:

Whenever it can be said with fair certainty that the rule of conduct relied upon by the plaintiff was designed to protect against the very type of risk to which the plaintiff was exposed, courts have shown very little patience with the efforts of defendant to question the sufficiency of the proof on cause.<sup>25</sup>

The picture that emerges is something like the following: the task of defining the scope of a particular risk-proscribing legal rule is a policy matter that must be undertaken anew each time a case comes before the courts. As a result, where a legal rule proscribes a very particular sort of risk, and where that risk materializes in harm, courts will not scrutinize the factual causation inquiry too carefully. This is because such a decision is a policy matter having to do with the purposes that the legal rule was designed to serve. The ultimate consequence of this approach is that the factual causation inquiry becomes part of the proximate cause inquiry, making the determination of a particular defendant's liability almost entirely a matter of policy. In this respect, Malone's position prefigures that of many contemporary law and economics scholars, such as Ronald Coase and Guido Calabresi.<sup>26</sup>

Another approach to factual causation can be extracted from Coase's famous article, "The Problem of Social Cost."<sup>27</sup> Consider, as Coase does, *Bryant v. Lefever*.<sup>28</sup> The defendant built up an exterior wall and piled timber on his roof in a manner that interfered with the wind that, for years, had blown over the plaintiff's chimneys. As a result, when the plaintiff lit a fire in any of his fireplaces, the smoke stayed in his house. The plaintiff brought an action against

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24. Wex S. Malone, "Ruminations on Cause-in-Fact" (1956) 9 Stan. L. Rev. 60 at 62. For criticism, see Wright, "Causation," *supra* note 21 at 1806.

25. Malone, *ibid.* at 73.

26. Calabresi famously called causation a "weasel" word that masks the cost-benefit calculations that properly underpin negligence law. See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970) at 6-7.

27. Ronald H. Coase, "The Problem of Social Cost" (1960) 3 J.L. & Econ. 1.

28. [1879] 4 C.P.D. 172 (Eng.).

the defendant for nuisance, claiming that the defendant, in building up his wall, had detrimentally affected the plaintiff's use and enjoyment of his property. At trial, the plaintiff was awarded damages, but, on appeal, the judgment was reversed on the ground that the defendant had not caused the nuisance complained of. Bramwell L.J., in the Court of Appeal, said:

No doubt there is a nuisance, but it is not of the defendant's causing. . . . It is the plaintiff who causes the nuisance by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall, that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance.<sup>29</sup>

Or, as Cotton L.J. said: "The plaintiff creates the smoke, which interferes with his comfort."<sup>30</sup> Coase criticized this conclusion, arguing that it is "fairly clear" that the "smoke nuisance was caused both by the man who built the wall *and* by the man who lit the fires," and that "[i]f we are to discuss the problem in terms of causation, both parties cause the damage."<sup>31</sup> Since the plaintiff and defendant both caused the nuisance, Coase concluded that both the plaintiff and the defendant ought to "be forced to include the loss of amenity due to the smoke as a cost in deciding whether to continue the activity which gives rise to the smoke."<sup>32</sup> The causal inquiry was therefore replaced by a comparative analysis of burdens and benefits, which, in Coase's view, were to be shared equally by plaintiff and defendant.

There are two ways to read Coase here. On the one hand, we might understand Coase's argument to be an extreme form of the Reevaluate Causation view. In this interpretation, Coase is arguing that, while causation has a role to play in tort law, the but-for approach to causation should be abandoned. On this reading, Coase keeps company with those whose have sought to solve the problem of factual causation in law by trying to re-evaluate the idea of causation. Richard Wright, the most prominent proponent of this approach, has argued that, rather than understanding factual causation using the but-for test, we ought to understand it, instead, through the lens of what he called the NESS test. On this view, a defendant satisfies the factual causation requirement if his

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29. *Ibid.* at 179.

30. *Ibid.* at 181.

31. Coase, *supra* note 27 at 13.

32. *Ibid.*

conduct is a Necessary Element of a Sufficient Set of circumstances that led to the plaintiff's loss.<sup>33</sup> Wright unpacks this as follows: "[A] particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result."<sup>34</sup>

To illustrate Wright's analysis, consider how it applies to *Desert Trek*: both Billy's poisoning of Phil's water barrel and Keith's emptying of it are elements of a set of events that is sufficient to ensure Phil's death. And both Billy's and Keith's acts are necessary elements of that set, since the set would be different if either were removed. Therefore, both Billy's poisoning and Keith's emptying are NESS causes of Phil's death. Wright's approach can be questioned either on the ground that it is confusing (for judges and juries, as well as for legal philosophers) or on the ground that, by relying too heavily on general causal laws, it does not capture a real notion of causation.<sup>35</sup> From our point of view, however, the real problem with the NESS proposal is that it cannot explain *Hunters*. There is no general causal principle that yields the conclusion that two different individuals must shoot at a third in order for the third to be hit by the shot of one of the shooters. So it appears that the Reevaluate Causation strategy cannot explain *Hunters* or other historical uncertainty cases. This is an important strike against it, and an important reason to pursue a different strategy.

Returning to Coase, we said that there are two ways to understand his argument in "The Problem of Social Cost." The first way is to view him as pursuing a version of the Reevaluate Causation strategy. But a second reading of Coase is possible. Rather than viewing him as a proponent of the Reevaluate Causation strategy, Coase might instead be seen as making the same sort of argument as Malone, given that the upshot of Coase's argument is that issues having to do with the cost of precautions ought to determine liability. On this interpretation, Coase is not proposing to re-evaluate the concept of causation at work in negligence law. Rather, he is proposing to do away with it entirely.

If the arguments of Coase and Malone were compelling, they would give us reasons for dispensing with the requirement of factual causation altogether. But these arguments are not compelling. The problem with these sorts of arguments

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33. See Wright's major works on causation, *supra* note 21.

34. Wright, "Pruning," *supra* note 21 at 1019.

35. See *e.g.* Antony Honoré, "Causation in the Law," online: Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/causation-law>>.

is a simple one: insofar as they seek to efface various entrenched legal concepts, they fail to take law seriously as law. As Ernest Weinrib has argued:

When economic analysis is presented as the key to understanding tort law, the point of the analysis is not to take the fundamental concepts seriously as concepts used in legal practice, but to render them otiose. Economic analysis has its own stock of ideas that operate without reference to the legal concepts. The result is that ideas about economic efficiency replace rather than illuminate the legal concepts. Instead of functioning as vehicles of thought, the legal concepts are at most labels pinned to conclusions once economic analysis has done all the work.<sup>36</sup>

That the law of negligence relies on the concept of factual causation to determine the existence and scope of liability is not in doubt. To be sure, it may turn out that to resolve problems of factual uncertainty, we need to re-evaluate or replace our concept of causation, and reflect on the normative assumptions that underlie it. But such replacement should be the conclusion of an argument, not a premise in one. For this reason, we propose to set aside approaches that seek to replace the concept of factual causation with something else—such approaches being, in our view, antithetical to understanding negligence law on its own terms.

#### IV. TAKING TORT LAW SERIOUSLY

To this point we have posed a problem and described different possible solutions to it. We have suggested that two familiar responses to this problem, the Reevaluate Causation strategy of Wright (and, on one reading, Coase), and the strategy of Malone (and, on another reading, Coase) that dispenses with the requirement of factual causation altogether, are unsatisfactory because they either fail to offer a solution in cases in which a solution is required, or fail to take tort law seriously as law. Ernest Weinrib and Arthur Ripstein are two scholars who accept the notion that any attempt to understand negligence law must take its component concepts seriously. Turning to their views, we can begin to construct an account of factual uncertainty that attempts to understand tort law on its own terms.

“A Step Forward in Factual Causation” is, by no means, a recent article,

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36. Ernest J. Weinrib, “Can Law Survive Legal Education?” (2007) 60 Vand. L. Rev. 401 at 407. For similar arguments that a proper understanding of tort law requires taking seriously its key concepts, see Jules L. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001); Benjamin C. Zipursky, “Pragmatic Conceptualism” (2000) 6 Legal Theory 457.

having been published in 1975,<sup>37</sup> but it remains instructive all the same. In it, Weinrib makes two suggestions regarding the nature of factual causation. First, he suggests that, in light of various (then recent) developments in the law of negligence, a return to first principles is needed in thinking about factual causation. Second, he suggests that having returned to first principles, we must be sensitive to the way in which normative considerations can be relevant to the factual causation inquiry. In connection with the House of Lord's decision in *McGhee v. National Coal Board*,<sup>38</sup> Weinrib states:

[T]he very existence of the cause in fact inquiry is the expression of certain more abstract considerations of fairness. At stake is a balance between the innocent victim's claim to be compensated and the freedom of the defendant to be as wicked as he likes as long as no injurious consequences flow from that wickedness. The weighing of these competing interests is, of course, not a value-free process. Accordingly, while in easy cases an automatic application of the factual approach will satisfactorily resolve the competing factors and reflect the balance inherent in the approach itself, we must always be prepared to test the cause in fact process against the underlying policies and purposes that it embodies, and to adjust the ordinary method of dealing with cause in fact if it fails adequately to reflect our more basic notions of fairness.<sup>39</sup>

Weinrib's point is not that the cause in fact inquiry is irreducibly value-laden. To the contrary, as he points out, "[g]iven the existence of the cause in fact requirement, denial of its essentially value-free nature would be as futile as attempting to prove the internal inconsistency of a tautology."<sup>40</sup> Instead, Weinrib's point is that the cause in fact inquiry does not take place in a vacuum. It is, rather, part of a larger inquiry into liability and responsibility that presupposes and rests on various normative considerations. Thus, although the cause in fact inquiry may not be explicitly normative in the way in which the duty of care or proximate cause inquiries are normative, broader normative issues may still be implicated in the analysis of factual causation.

We are in general agreement with Weinrib's idea that, even if the factual causation inquiry is value-free, certain normative principles are implicated in that inquiry all the same. However, this idea needs further elaboration and development. Weinrib's discussion of factual causation was written in a period in

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37. Ernest J. Weinrib, "A Step Forward in Factual Causation" (1975) 38 Mod. L. Rev. 518.

38. *McGhee*, *supra* note 17.

39. Weinrib, *supra* note 37 at 530.

40. *Ibid.*

which he had yet to fully develop his current views on tort law, and, so, stands apart from them. Consequently, it is not clear whether, when Weinrib said that “we must always be prepared to test the cause in fact process against the underlying policies and purposes that it embodies,” he had fully worked out the nature of those policies and purposes.<sup>41</sup> Without such an account, Weinrib’s treatment of the factual uncertainty problem would seem to be incomplete. Of course, Weinrib now famously has just such an account—one anchored in Aristotle’s theory of corrective justice and Kant’s conception of the will—and, so, perhaps his previous treatment of the problem of factual uncertainty can now be completed.<sup>42</sup> However, rather than investigate whether Weinrib’s current views about negligence liability are consistent with his past views about the role played by cause in fact, we will, in what follows, base our analysis on a different account of the underlying nature of tort law—that of Arthur Ripstein.<sup>43</sup>

We adopt Ripstein’s view here, largely because we believe that Ripstein presents the clearest account of tort law available that takes seriously its underlying concepts. As such, it brings out important aspects of tort doctrine on which we wish to ground our analysis.<sup>44</sup> Very briefly, Ripstein defends the idea that tort

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41. Indeed, it is doubtful that Weinrib would use the words “policies” and “purposes” here at all anymore. As he has remarked more recently, “[p]rivate law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.” See Weinrib, *supra* note 3 at 5.

42. See Weinrib, *ibid.*

43. See especially Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999) [Ripstein, *Equality*]; Arthur Ripstein, “Philosophy of Tort Law” in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford: Oxford University Press, 2002) 656 [Ripstein, “Tort Law”]; and Arthur Ripstein, “As If It Had Never Happened” (2007) 48 *Wm. & Mary L. Rev.* 1957 [Ripstein, “Happened”]. See also Jules Coleman & Arthur Ripstein, “Mischief and Misfortune” (1995) 41 *McGill L.J.* 91.

44. Both Weinrib and Ripstein are appropriately characterized as rights-based theorists of negligence law. Where they diverge is in their understanding of the basis or justification of the underlying normative principles involved. As noted above, Weinrib seeks to ground negligence law’s normative structure in Aristotelian notions of corrective justice and Kantian ideas about the ability of rational agents to determine their own ends; Ripstein appeals instead to the notion of the representative reasonable person. For further discussion, see Ripstein, *Equality, ibid.* at 53.

law seeks to enforce a system of reciprocal norms of conduct.<sup>45</sup> On Ripstein's view, to say that the defendant should be liable for the plaintiff's loss is to say that the defendant did something that the plaintiff had a *right* to be free from. Ripstein is concerned, in part, with rebutting the suggestion made by Holmes in *The Common Law* that the "moral phraseology" in which the law abounds should not be taken at face value.<sup>46</sup> Ripstein begins by noting that tort law is primarily concerned with rights and wrongs rather than with harms or losses. The point is a familiar one: many situations in which individuals suffer harms or losses are not situations where the law takes an interest, and, at other times, the law takes an interest in situations where individuals have suffered no harms or losses at all.<sup>47</sup> However, because tort law is primarily concerned with wrongs, it must embody a normative approach to liability. It must be capable of distinguishing wrongful interferences with the rights of others that lead to losses from harms that result from non-wrongful, but perhaps otherwise lamentable, conduct.

How do these observations bear on the problem of factual uncertainty? Consider cases of successive tortious causation, which are a subset of the category of causal indeterminacy set out above. It might be thought that these are cases in which normative considerations entail that the plaintiff should recover, on the grounds that it would be contrary to principles of justice and fairness to hold otherwise. Since an innocent plaintiff has been harmed, it would be unfair to allow one defendant to benefit from another defendant's wrongdoing. However, while embracing the conclusion that the plaintiff should recover, Ripstein takes issue with this too-easy analysis. The problem, as he sees it, is that, if the grounds for liability are located solely in the relationship between the wrongdoers, the plaintiff would become a bystander or "'vicarious beneficiary' of the distaste a court rightly has for [the] wrongdoers' claim of advantage from each other."<sup>48</sup> Instead, returning to tort law's underlying normative principles, Ripstein reminds us that rights survive wrongs, and that this fact can explain cases of successive causation.

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45. For this view's inspiration, see John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); John Rawls, *Political Liberalism*, 2d ed. (New York: Columbia University Press, 2005). A similar approach can be found in Gregory C. Keating, "Reasonableness and Rationality in Negligence Theory" (1995) 48 *Stan. L. Rev.* 311.

46. See O.W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881) at 79.

47. For an extended discussion of the latter, see Arthur Ripstein, "Beyond the Harm Principle" (2006) 34 *Phil. & Pub. Aff.* 215.

48. Ripstein, "Happened," *supra* note 43 at 1988.

The argument is seen most easily if we consider another example:

*Car Crash:* Jesse is injured by George's negligent driving and sues George for lost income resulting from the injury. Before trial, Jesse is injured again, this time as a result of Lloyd's negligent driving. Jesse loses his leg. George claims that he is not liable for the lost income after Jesse's second accident.<sup>49</sup>

According to Ripstein's analysis, Jesse can still recover against George because Jesse continues to have a right against George: that George take due care with respect to Jesse's safety. Jesse has that right even if George fails to take due care. And since rights survive wrongs, Jesse continues to have that right, even if Lloyd also fails to take due care with respect to Jesse's safety. So where the second of two successive causes of injury is tortious, the plaintiff will be able to anchor his right to recover from the first tortfeasor in an instance of wrongdoing rather than in an instance of mere harm. Consequently, where we have successive and simultaneous tortious causes, Ripstein states:

[E]ach defendant is liable because the only respect in which either one can point to the other is as a subsequent wrongdoer. Defendant cannot say that plaintiff's horse already was startled, but only that it would have been startled anyway—that is, that plaintiff would have been wronged anyway. That is exactly the claim that plaintiff's right does not survive wrongdoing.<sup>50</sup>

On the other hand, this argument will not succeed in cases where the second cause of injury is non-tortious, since the defendant *can* say that, because the plaintiff would have been injured anyway—but not as a result of his or anybody else's wrongdoing—such injury is not something that the plaintiff had a right to be free from. In such cases, the defendant should not be held liable for the plaintiff's additional injuries.

Another example may help here:

*Lightning:* Jesse is injured by George's negligent driving and sues George for lost income resulting from the injury. Before trial, Jesse is injured again, this time as the result of a lightning strike. Jesse loses his leg. George claims that he is not liable for the lost income after Jesse's second accident.<sup>51</sup>

In this case, Jesse cannot recover from George for the lost income consequent on the lightning strike, because the use of his leg after the strike is not something

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49. These are roughly the facts of *Baker*, *supra* note 10.

50. Ripstein, "Happened," *supra* note 43 at 1990.

51. This is a modification of *Jobling*, *supra* note 10.

to which he has a right. In other words, George can legitimately point to the intervention of a non-tortious cause of injury to insulate him from (full) liability. The upshot is that, according to Ripstein, it makes a difference whether the cause of plaintiff's injury was something that he or she had a right to be free from, or whether it was something that simply happened to him or her. This distinction is normative in nature, having to do with rights and wrongs rather than with harms and benefits.

The foregoing has been rather quick, but it serves to illustrate our general point: the arguments that Ripstein advances, and the principles on which he relies, generate the correct resolution in cases of duplicative or successive causation. Moreover, these principles are normative through and through, focusing on rights and wrongs rather than on benefits and harms. Still, in our view, there is more to be said about cases of historical uncertainty (exemplified by *Hunters*). This is, perhaps, not surprising, given that the problem in those cases is that we do not know enough about what happened to the plaintiff. Still, we would like to fill in what we perceive to be a gap in this general approach to the problem of factual uncertainty. Consequently, in Part V, below, we draw on Weinrib and Ripstein's accounts of tort law to provide a set of principles to which we should return when dealing with cases of historical uncertainty.

## V. EXTENDING THE PROPOSAL

We have argued that, to resolve the problem of factual uncertainty, we must return to and reconsider the underlying normative principles of negligence law. We have suggested that the proper way to approach the problem is not to tinker with the concept of causation, nor to replace the cause in fact inquiry with some other form of investigation, such as a comparative analysis of the overall benefits and burdens shared by plaintiff and defendant. Rather, what require consideration are the basic rights or entitlements that underlie the imposition of liability in negligence quite generally. Since, however, these rights or entitlements manifest themselves differently in typical and atypical cases, what is required for justice to be done will differ in corresponding ways. It would therefore be a mistake to conclude that atypical cases, in which the requirement of factual causation is altered or dispensed with, constitute exceptions to the basic structure of negligence law. Instead, atypical cases represent situations in which the typical normative principles at work in negligence law are worked out in atypical fashion. Therefore, such cases call for "a sensitive and pragmatic approach in the elaboration and modification of the pro-

cedures through which [negligence law's] normative structure is applied."<sup>52</sup> The argument to be made in this section is this: the underlying principles of negligence law require that, in a case like *Hunters*, both defendants should be held liable for the plaintiff's injuries, even though neither of them can be found, on the balance of probabilities, to be the but-for cause of the plaintiff's loss.

To make this argument out, we first need to say more about the "underlying principles of negligence law." According to Ripstein's analysis, tort law concerns, at bottom, two sorts of principles or norms: first, norms of reciprocal conduct, according to which people accept reciprocal limits on their freedom and attempt to guide their behaviour with principles of fair interaction; and second, norms of liability or repair, according to which people agree to bear the costs that their (unreasonable) conduct imposes on others when that conduct materializes in harm.<sup>53</sup> Again, norms of conduct are the norms governing behaviour that reasonable people would accept as binding on themselves in a democratic society. Norms of liability are the flip-side of norms of conduct: when a defendant breaches a norm of conduct and a plaintiff is injured as a result, the defendant is required to repair the wrong by making the plaintiff whole.

By way of illustration, consider again the case of duplicative or successive causation. To resolve the sorts of problems that arise in those contexts, we first ask whether the plaintiff had a right to be free from the defendant's interference. This is a question about norms of conduct, since we are asking whether the defendant was under a duty to exercise care with respect to the plaintiff. If the answer to this first question is yes, then the plaintiff has a right to recovery that is good against the defendant, even where a second defendant does something that the plaintiff also has a right to be free from. Again, this is part of what it means to say that rights survive wrongs. So, in *Car Crash*, the reason Jesse is entitled to recover from George, even though Lloyd has subsequently infringed Jesse's right, is that the second injury in no way altered the norm of conduct that entailed that Jesse had a right against George.<sup>54</sup> In typical cases, it is clear that factual causation is a manifestation of these underlying normative

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52. Ripstein & Zipursky, *supra* note 23 at 244.

53. Ripstein, "Tort Law," *supra* note 43 at 660-61. Some authors (possibly including Ripstein in his later work) suggest that the two norms are essentially identical. Other authors suggest that they are distinct—norms of conduct or rights of non-interference being primary, and norms of liability being secondary or derivative. We take no stand on this issue here.

54. See *Baker*, *supra* note 10.

principles—as Weinrib puts it, “in easy cases an automatic application of the factual approach will satisfactorily resolve the competing factors.”<sup>55</sup> Additionally, as Ripstein convincingly argues, in certain atypical cases—such as those involving successive and duplicative causation—those same normative principles allow us to resolve certain difficulties.

In our view, however, those same considerations suggest that defendants in other atypical cases, namely cases of historical uncertainty, such as *Hunters*, ought also to be held liable for the plaintiff’s loss, even though but-for factual causation cannot be proved on the balance of probabilities. The general reason is that imposing liability in such cases more fairly preserves the terms of interaction between the parties set by the associated norms of conduct, and more fairly allocates the costs that a defendant imposes on a plaintiff. In other words, the imposition of liability in cases of historical uncertainty reflects nothing more than a different manifestation of the general normative principles that warrant the imposition of negligence liability in typical cases.

More specifically, to allow defendants to escape liability in situations of historical uncertainty would permit those defendants to unilaterally set the terms of interaction between themselves and a given plaintiff. Defendants would be allowed to put their interests in liberty ahead of the plaintiff’s interest in security, without having to bear the costs that their risks impose on others. This would violate both norms of reciprocal conduct and norms of liability, and would entail that, while the defendants would have done something that they were not entitled to do, they would be absolved from liability, even though their careless action resulted in harm to the plaintiff. Holding defendants liable in such cases, therefore, preserves fair terms of interaction because it does not impose on those defendants new or further restrictions of their liberty, and, at the same time, better preserves the security interests of the injured plaintiff.

Let us apply the argument to *Hunters*. By failing to take reasonable care with respect to Bob’s safety, Jerry and Mickey violated the norms of reciprocal conduct that governed their relationship with him. Had either of them been the sole defendant, and had Bob been injured as a result of their carelessness, the norms of conduct in play would have required them to pay damages to Bob. In the case at hand, both Jerry and Mickey have breached the terms of interaction that were set independently of considerations of factual uncertainty. Thus, to

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55. Weinrib, *supra* note 37 at 530.

hold them liable in such an atypical case imposes no further restriction on their liberty than those already imposed in the typical case. On the other hand, to allow Jerry and Mickey to insist on the centrality of factual causation and let the losses lie on Bob would allow Jerry and Mickey to, in effect, set the terms of their interaction with Bob unilaterally.

## VI. SOME OBJECTIONS

Viewed in this way, our proposal flows naturally from very general, and in our view, very plausible, principles about the nature of negligence liability.<sup>56</sup> This is not to say, however, that it is free from criticism. So let us briefly discuss some possible objections.

One worry is that, like functional or instrumental approaches to tort law that we earlier said we were not going to take seriously, our approach is, at bottom, simply a matter of balancing benefits and burdens, and it is therefore susceptible to the same criticisms we levelled against such approaches. This would be a mistake, however. Our approach, while it does involve some balancing, differs from such instrumental approaches in two important ways. First, what are being balanced are norms of conduct and liability, rather than overall burdens and benefits. Second, in balancing norms of conduct and liability, we are explicitly appealing to negligence law's own normative concepts.<sup>57</sup> We are not trying to replace them with something else. Thus, unlike functional or instrumental approaches, our approach takes negligence law seriously as law and seeks to understand it on its own terms.

A second objection to our view is that we have not succeeded in doing what we set out to do. Recall the challenge we set for ourselves, namely to articulate an account of negligence liability that can simultaneously explain: (1) the insistence on the requirement of but-for causation in typical cases; (2) the abandonment of the requirement in atypical cases; and (3) a principled distinction between the two types of cases. We have suggested that (1) and (2) are both manifestations of various underlying normative principles having to do with fair terms of interaction. But it might be objected that we have yet to articulate a principled distinction between what we have been calling typical and atypical cases. For example, how are courts to determine whether a case is a typical case, in which but-for causation must be

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56. Compare Ripstein & Zipursky, *supra* note 23.

57. For a similar argument, see Coleman & Ripstein, *supra* note 43.

established, or whether it is instead an atypical case, in which the cause in fact inquiry can be dispensed with, and the underlying normative principles met in another manner?

This criticism also misses the mark because it asks too much.<sup>58</sup> To see why, it helps to consider the relationship between cases of factual uncertainty and the doctrine of negligence in general. Our proposal is equivalent to the way in which the “neighbour principle” set out in *Donoghue v. Stevenson* has been worked out in negligence law.<sup>59</sup> A law of negligence according to which each case before a court had to be decided according to a bare-bones and ahistorical application of the neighbour principle would be inefficient and unproductive, and would likely involve the court in a series of contradictions. The common law solves this problem by using case law to contextualize legal rules, and by appealing to that context to give content to the nature of the duties we owe one another. The same is true here. The question to be answered is this: does allowing a defendant who has failed to take reasonable care to escape liability because of the presence of a similar defendant upset the terms of interaction between defendants and plaintiff? We think that, in *Hunters*, the answer is clearly yes. Other atypical cases will need to be analyzed on a case-by-case basis.<sup>60</sup> If, in a given case, the imposition of the but-for test seems unfair—because to impose it would upset the terms of interaction between the parties—that case is at least a candidate for the account we are offering.

The third objection to our view is that, in cases of historical uncertainty, our view improperly forces one defendant to bear a loss that may have arisen as a result of someone else’s careless behaviour. Recall that, in cases of historical uncertainty, it is agreed that the plaintiff’s injury was in fact caused by the negligence of at least one of the careless defendants, but not by all of them.<sup>61</sup> Take a case where there are two careless defendants. In such a case, holding both defendants liable is guaranteed to impose liability on a party whose carelessness

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58. It pays here to remember Aristotle’s dictum: “We must not expect more precision than the subject-matter admits.” See Aristotle, *Nicomachean Ethics*, trans. by David Ross, rev. by Lesley Brown, Book I.3 at 1094b.

59. *Donoghue*, *supra* note 18.

60. We attempt to analyze some similar cases below. See text accompanying notes 64-71.

61. In *Hunters*, for example, the plaintiff’s injury was caused by one, but not both, of the careless hunters. In *Sindell*, *supra* note 13, the plaintiff’s injury was caused by one or more of the careless drug manufacturers, but not by all of them.

did not materialize in any harm or injury. Such a proposal might, therefore, seem to fly in the face of the idea that “negligence in the air, so to speak, will not do.”<sup>62</sup> Again, our reply to this objection is based on a particular conception of the general principles underlying negligence liability. We return to Weinrib’s observation that tort law sometimes calls for “flexibility with respect to entrenched doctrine.”<sup>63</sup> We interpret this to mean that there are times when considerations of justice and fairness are not sufficiently served by positive doctrine itself, and that, in such cases, appeal must be made to underlying principles to achieve a just and fair result. This in fact seems to be the attitude taken by most courts in dealing with these difficult matters.<sup>64</sup> This observation, however, is not demonstrative, and we do not want to rest our argument on the mere recitation of the need for such flexibility. Rather, our goal is to set out a defensible account of why an approach to tort law based on norms of reciprocal conduct and liability is consistent with the imposition of liability in cases of historical uncertainty—that is, in cases where proof of causation is absent.

So, consider, finally, the objection that imposing liability on defendants in cases of historical uncertainty is unfair, and is unfair in the same way in which we have argued that a failure to impose such liability is unfair, since imposing liability allows the plaintiff to unilaterally set the terms of interaction between the parties. Thus, it might be argued, contrary to what we have suggested, that the *refusal* to impose liability on defendants in cases of historical uncertainty more fairly comports with the fundamental principles of tort law. We have two general responses to this objection. Our first response is that imposing liability on defendants is not unfair to defendants in the same sense in which a refusal to impose liability is unfair to plaintiffs. Our second response is that, if imposing liability on defendants *is* unfair to defendants, then this is an unproblematic form of unfairness.

To suppose that imposing liability on defendants in cases of historical uncertainty is unfair to defendants, in the same way in which a failure to impose such liability is unfair to plaintiffs, misconstrues what it means to unilaterally set the terms of interaction between parties. Simply put, by claiming in cases of

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62. The quote is from Sir Frederick Pollock, but it is most famously associated with Cardozo C.J., who cited it in *Palsgraf v. Long Island R.R. Co.* See 248 N.Y. 339 (1928) at 341. See Sir Frederick Pollock, *Torts*, 11th ed. (London: Stevens and Sons, 1920) at 455.

63. Weinrib, *supra* note 37 at 534.

64. See *Resurfice*, *supra* note 5.

historical uncertainty that the defendant ought to be liable for an injury that he may not have in fact caused, the injured plaintiff is *not* unilaterally determining how her security and liberty interests should be balanced against those of the defendant. That is because the defendant's careless conduct has already imposed an unreasonable risk on the plaintiff, and has, thus, already disturbed the terms of interaction between the parties in a normatively significant way. Consequently, the situations of plaintiffs and defendants in cases of historical uncertainty are not analogous.

Even if it is granted that there is some unfairness in imposing liability on defendants in cases of historical uncertainty, this in our view, is an unproblematic form of unfairness. It pays to remember that tort law is not bound to produce results that leave all parties happy. The fact is that many tort doctrines involving liability and compensation seem unfair. Take the thin skull principle: it might be thought to be unfair to hold a defendant liable for the full extent of a plaintiff's injuries, even when those particular injuries were not foreseeable. And yet the law insists that, where a defendant has unreasonably imposed a risk on a plaintiff that materializes into harm, the defendant is responsible for the full extent of that harm, notwithstanding a lack of foreseeability. Why? Plausibly, because to hold otherwise would be to allow the defendant to unfairly determine the scope and limits of his liberty interests, and so, by extension, would allow the defendant to unfairly determine the scope and limits of the *plaintiff's* security interests. Similarly, our thought is that, in atypical cases where a defendant has unilaterally imposed a risk of a particular sort of harm on a plaintiff, and where a harm of that sort ensues, the defendant should not be relieved of responsibility for that harm simply because it cannot be established using the traditional but-for test that he harmed the plaintiff. In short, the sense—if there is a sense—in which the imposition of liability on defendants is unfair seems to be no different than the unfairness associated with the thin skull principle. It is the sense in which a child who has been denied candy claims: "It's not fair!" Such a claim is not about unfairness understood as a normative concept, but, instead, about unfairness as not getting what you want. In our view, that is not a problematic kind of unfairness.

The important fact to keep in mind here is that tort law has already set the fair terms of interaction between the parties by way of its duties of care—duties

that are independent of any considerations of historical uncertainty.<sup>65</sup> Thus, it seems to us that situations of historical uncertainty take us back to what we earlier called norms of liability. If we hold that both defendants ought to be liable for a plaintiff's injury, we do nothing to change the terms of interaction between the parties. In *Hunters*, the duties of care that applied to Jerry and Mickey set the standard against which their behaviour must be measured in order to ensure a proper balancing of their interests in liberty and Bob's interest in security. They failed to meet that standard and Bob was injured. But to hold them liable for Bob's injury would not infringe their interests in liberty, since it is clear that they have already exceeded the standard that makes that determination. Conversely, if we were to let the loss lie where it fell (on Bob), the fair balance between liberty and security that tort law polices and preserves would be disturbed. Bob's security interests would not be protected, notwithstanding the fact that, by failing to act reasonably, Jerry and Mickey improperly favoured their liberty interests over his security.

In this sort of case, it is not only clear that both defendants created a risk of harm to the plaintiff, it is also clear that the plaintiff suffered exactly the kind of injury that made the imposition of risk wrongful in the first place.<sup>66</sup> In these limited circumstances, imposition of liability on both defendants is the only way to maintain fair terms of interaction between the parties, and to fairly allocate the risks associated with their careless conduct. To this extent, we find ourselves in agreement with Malone's conclusion noted earlier—namely, that where a legal rule proscribes a very particular sort of risk, and where that risk materializes in harm, courts will not, and should not, scrutinize the cause in fact inquiry too carefully. We part company, however, when it comes to his arguments for that conclusion. In our view, this conclusion should not rest on broad, policy-based considerations. Rather, the conclusion should be based on normative principles and should be justified on the grounds that a refusal to impose liability on defendants in cases of causal uncertainty would unfairly promote the liberty

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65. Ripstein briefly addresses the issues that we are concerned with here, and we are in broad agreement with what he says. Ripstein's argument, however, relies on the notion of unclean hands. We think that our argument makes clearer the underlying normative concerns that make reliance on such an idea plausible. See especially Ripstein, *Equality*, *supra* note 43 at 75.

66. This may explain the inclusion by the Supreme Court of Canada of the second requirement for the imposition of liability absent but-for causation in cases of historical uncertainty. See *Resurfice*, *supra* note 5 at para. 25.

interests of defendants at the expense of the security interests of plaintiffs. To echo Weinrib: we must be prepared to test the cause in fact process against the underlying policies and purposes that it embodies, and to adjust the ordinary method of dealing with cause in fact if it fails to adequately reflect our more basic notions of fairness.<sup>67</sup>

In short, we believe that in circumstances of historical uncertainty, imposition of liability better preserves the fair terms of interaction between parties, provided that (1) all defendants acted negligently towards a given plaintiff, and (2) that the plaintiff suffered the very kind of harm that the imposition of the duty of care was supposed to guard against in the first place.<sup>68</sup> The fair terms of interaction are best preserved by imposing liability in this case, even if there is no workable concept of cause according to which it can be said that both defendants caused the plaintiff's injury. Nevertheless, the imposition of liability does not limit the liberty of the defendants any more than it is already limited by the acknowledged duty of care that they both already breached. Conversely, to allow the loss to lie where it has fallen, namely on the plaintiff, would be to unjustly limit his or her security interest by imposing on him or her harm that falls within the ambit of already acknowledged duties. As a result, preserving the fair terms of interaction requires imposing liability in cases of genuine historical uncertainty.<sup>69</sup>

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67. Weinrib, *supra* note 37 at 530.

68. See *Fairchild*, *supra* note 11.

69. A further objection that might be raised here is that liability is being imposed on the basis of the defendants' breach of the plaintiff's 'remedial right to establish liability.' This was the argument made by Rand J. in his concurring opinion in *Cook*, *supra* note 9. As Rand J. wrote (at 831-32):

But if the victim, having brought guilt down to one or both of two persons before the court, can bring home to either of them a further wrong done him in relation to his remedial right of making that proof, then I should say that on accepted principles, the barrier to it can and should be removed.

For a similar argument made on an economic basis see Ariel Porat & Alex Stein, *Tort Liability Under Uncertainty* (Oxford: Oxford University Press, 2001). Although the issue is complicated, we incline towards the view that the remedial right argument is insufficient to ground liability in cases of historical uncertainty. The reason was first pointed in Hart & Honoré, *supra* note 8 at 423. They argued that, because the destruction of the means of proof was something that happens in many tort cases, it is not limited to cases of historical uncertainty. Consequently, the destruction of the means of proof is not something that sets those cases apart from cases in which we *do* apply the but-for test. The same problem with

Some final qualifications are in order. First, while we have been speaking in terms of imposing liability for a plaintiff's injuries on both defendants, some may prefer to think about the practice of shifting the burden of proof from the plaintiff to the defendants, as certain courts and commentators have done.<sup>70</sup> In the end, however, this seems like an unimportant detail. In a civil case, both parties lead evidence regarding the facts, and, if the plaintiff can produce evidence that suggests that it was one defendant's shot, rather than another's, that hit and injured her, and if that evidence is accepted by the trier of fact, then that particular defendant might, on the balance of probabilities, be held liable. In this sense, issues related to burden shifting seem to be of secondary importance.

Another complication arises when there are more parties to the dispute. As unlikely as it may seem to have ten defendants in the position that Jerry and Mickey find themselves in *Hunters*, we believe that our approach would require us to impose liability on all ten in that case.<sup>71</sup> The key question remains the balancing of the liberty and security interests of the parties, and increasing the number of parties does not change the fact that the conduct of the defendants has resulted in an injury to the plaintiff of exactly the type that the duty of care was meant to prevent. Refusing to hold all defendants liable in such a case would fail to adequately protect the very interests that the norms of reciprocal conduct were put in place to protect.

Second, our argument also resolves cases where one potential cause of the plaintiff's injury was non-tortious.<sup>72</sup> If it turns out that Mickey was *not* careless in shooting his gun, but that Jerry was, and that Bob was hit by exactly one pellet, although it cannot be determined who shot the pellet, then it becomes less clear that considerations of reciprocity lead to the conclusion that liability

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the remedial right argument was noted by the Supreme Court of Canada in *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491 at 501. The Court rejected the lower court's holding that held liable a defendant whose negligence made it impossible to establish the cause of the plaintiff's injury—a holding that seemed to rely on Rand J.'s remedial right argument in exactly the problematic way suggested by Hart & Honoré.

70. See *Cook*, *supra* note 9; Porat & Stein, *ibid.*

71. Whether the liability thereby imposed would require *joint* liability for all defendants to all plaintiffs is another question. An argument can be made that the liability ought to be joint, on the grounds that the norm of reciprocal conduct that is violated is the same regardless of the defendant's economic or market position. But this conclusion is controversial, and, indeed, it is rejected by Ripstein and Zipursky. See *supra* note 23 at 239-40.

72. See *Fairchild*, *supra* note 11. See also *Barker*, *supra* note 2.

ought to be imposed on both Mickey and Jerry. The reason for this takes us back to the idea that rights survive wrongs. If Mickey was not careless in shooting his gun, then there is a good chance that Bob's injury was not something that Bob had a right to be free from, but was merely something that happened to him. Consequently, in such a case, it seems to us to be entirely appropriate for Mickey to argue that, because Bob cannot prove on the balance of probabilities that he (Mickey) fired the pellet that injured Bob, imposing liability on him would unfairly limit his interest in freedom and would unduly favour Bob's interest in security. At the very least, such an argument is not precluded by anything we say here.<sup>73</sup>

## VII. CONCLUSION

Our goal in this article has been to make plausible the idea that there exist certain normative principles underlying negligence law that explain both why factual causation is required in typical cases, as well as why its abandonment in atypical cases is defensible, and that also make plausible the idea that a principled distinction between the two types of cases can be drawn. Our argument has rested on a conception of negligence law that asks, first and foremost, whether a given plaintiff had a right against a particular defendant to be free from certain forms of interference. On the account articulated here, such rights of non-interference are derived from underlying norms of reciprocal conduct, and are intimately linked to associated norms of liability or repair. The requirement of factual causation is, in typical cases, a manifestation of these underlying norms: the plaintiff has a right to be free from injury caused by the defendant's carelessness. This is part of what it means for the plaintiff's injury to be linked to a wrong suffered at the defendant's hand. We have argued, however, that abandoning the requirement of factual causation in atypical cases *also* manifests negligence law's underlying normative structure. In cases of causal indeterminacy, such as *Desert Trek*, *Car Crash*, and *Lightning*, the inquiry focuses on the plaintiff's right against a given defendant to be free from certain forms of interference. Consequently, the fact that the plaintiff suffers a further harm at the hands of another defendant in no way negates the status of the plaintiff's prior right against the first defendant. To hold otherwise would be to allow the first defendant to benefit from the wrongdoing of another.

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73. See also *Kingston v. Chicago and N.W. Ry.*, 211 N.W. 913 (Wisc. Sup. Ct. 1927).

Similarly, in cases of historical uncertainty, exemplified by *Hunters*, the focus remains on the plaintiff's right to be free from certain interferences. Our claim is that, in these admittedly difficult cases, fair terms of interaction between the parties are better preserved if liability is imposed on defendants, notwithstanding the fact that factual causation cannot be established using the traditional but-for test. Doing so is consistent with underlying principles of fairness because it does not restrict the defendants' liberty interests any more than they are already limited by the duty of care to which they are subject. The explanation here parallels the one given above in connection with cases of causal indeterminacy: to refuse to impose liability on defendants in cases like *Hunters* would enable each defendant to benefit from the wrongdoing of the other(s), thereby violating the associated norms of conduct.

There is much more that could be said about this, and related, problems. For instance, we have said nothing about the so-called material contribution test for factual causation.<sup>74</sup> We have also remained silent about the controversy surrounding what has become known as the loss of chance doctrine.<sup>75</sup> Those are important topics to be sure. However, while related to the problem of factual uncertainty, these topics are, in our view, distinct from it, and, so, lie beyond the scope of this article.

The approach to the problem of factual uncertainty argued for in this article agrees in many respects with the approach of Ripstein and Zipursky, who remark that "it is only when we understand how the concepts of tort law are structured that we can evaluate its capacity to serve our favoured goals, and we can decide how, in a changing world, these concepts are to be given content."<sup>76</sup> Our proposal suggests that the content given to the concepts and principles of tort law can be manifested differently in different situations. Our approach is also in broad agreement with recent jurisprudence on the nature of, and the role played by, factual causation in the negligence inquiry. As the Supreme Court of Canada stated in *Resurfice*, the requirement of factual causation can be abandoned in certain types of cases, provided that two requirements are met:

First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to

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74. See material contribution cases, *supra* note 17.

75. See *Gregg v. Scott*, [2005] 2 A.C. 176 (H.L.).

76. Ripstein & Zipursky, *supra* note 23 at 246.

factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.<sup>77</sup>

The argument of this article can be seen as providing one explanation and justification for this decision, and also for other recent decisions reaching similar results.<sup>78</sup> The idea motivating these decisions is that, in atypical cases, liability may be imposed on a defendant, notwithstanding the plaintiff's inability to prove factual causation. In our view, the justification for such an approach can be seen to derive from reflection on the basic normative concepts and principles that underlie negligence liability quite generally. As a result, approaches to the problem of factual uncertainty that appeal to such normative concepts and principles to make sense of atypical cases are in no way inconsistent with the nature and structure of negligence law. Indeed, the opposite is true: in taking negligence law seriously as law, such approaches are instead reflective and supportive of it.

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77. *Resurfice*, *supra* note 5 at para. 25.

78. See *e.g.* *Fairchild*, *supra* note 11.