EXPANDING LIABILITY FOR NEGLIGENCE PER SE

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INTRODUCTION

A breach of a statutory duty that results in harm often gives rise to tort liability for the injurer toward the victim under the doctrine of negligence per se. Under this doctrine, not all victims can recover and not all types of injuries are compensable. For the tort suit to succeed, the victim must fall within the class of persons protected by the statute and the injury must be of the type that the statute was intended to prevent.[1] These two conditions, which I call "the limiting liability conditions," generate controversy and litigation since it is not always clear which victims or which injuries the legislature intended to address when enacting the particular statute in question.

The *normative* argument this Article makes is that the weight given to the limiting liability conditions should be dramatically decreased. Whenever noncompliance with the statute increases the risks to the class of persons to which the victim belongs or of the type of injury the victim suffered and those risks are foreseeable, there is a strong prima facie case for recognizing liability. This should hold true even when the risks that materialized are usual, or background, risks that *in themselves* would not justify the enactment of the statute.

The *positive* argument made here is that many court decisions that apply the limiting liability conditions to exclude tort liability reach the right outcome but for the wrong reason. These are cases in which the breach of the statutory duty did not increase the risk to the victim's class or of the type of injury that resulted. This lack of

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1. *See infra* Part I.

increased risk is what in fact makes imposing tort liability unwarranted.

To clarify the normative argument, let us consider an illustration used by the *Restatement (Third) of Torts: Liability for Physical Harm*:

> [I]f a statute designed to prevent falls by persons with disabilities requires elaborate railings on the side of stairways, and if a person who is able-bodied is then injured in a fall that such a railing, if present, would have prevented, this fall can be seen as not the type of accident the statute is considering.[2]

Under the normative argument advanced in this Article, there is a strong prima facie case for liability in this example, even if it is clear that in the absence of a disabled person there is no duty to install a railing. The reason for this is as follows: installing a railing could benefit able-bodied people as well. That benefit in and of itself, however, is probably not great enough to warrant imposing a duty to put in a rail. The presence of disabled people at the given site, per se, could make railings cost justified; however, it is also possible that this is not sufficient and that the risks to able-bodied people are also necessary to justify the costs of installing railings. In other words, it is possible that only the aggregation of both the background risks (to able-bodied people) and the unusual risks (to disabled people) persuaded the legislature to impose a duty to install railings. Liability for risks to both classes of victims is therefore justified.

More importantly, as this Article seeks to show, under certain conditions, *not* imposing liability for background risks will result in under protection against unusual risks. Specifically, this would occur if the costs of both risks together are greater than the costs of preventing them but the costs of the unusual risks alone are lower than the cost of preventing them. My suggestion is therefore to interpret statutes that promote safety as referring prima facie to all potential classes of victims who are expected—as a positive matter—to benefit from the given statute and to all types of injury that are expected—again, as a positive matter—to be reduced or prevented if the statutory duty is upheld.

The normative argument can easily be extended beyond negligence per se to common-law negligence. Under the latter, the negligent injurer bears liability only for those risks that made her behavior wrongful, which I will refer to as "the wrongful risks condition."[3] The concepts of duty of care and proximate cause are used by courts to determine the extent of the injurer's liability and to exclude it whenever the victim or injuries do not fall within the

2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 14 cmt. g (Proposed Final Draft No. 1, 2005).

3. *See infra* Part I.B.

scope of the wrongful risks created by the injurer.[4] As a result, even if the injurer's negligence was a "but-for" cause of the victim's injury and even if it increased the foreseeable risks to the class of persons to which the victim belongs or of the type of injury suffered by her, as long as those risks are not deemed wrongful, liability will not be imposed. As in negligence per se cases, in common-law negligence cases, courts tend to define only unusual risks created by the injurer as wrongful, impose liability accordingly, and ignore background risks that alone do not give rise to tort liability. But this approach is completely wrong, since occasionally the aggregation of background and unusual risks makes the injurer's behavior wrongful. Moreover, as this Article demonstrates, not imposing liability for background risks could encourage injurers to create risks even though the costs of those risks exceed the costs of preventing them. Therefore, again, as in negligence per se cases, there is a strong prima facie case for recognizing liability when *any* foreseeable risk that was increased by the injurer's negligence materialized into harm, regardless of whether it was an unusual or background risk.

The Article is organized as follows: Part I presents the normative argument and its justifications. It begins with its application to negligence per se and extends the argument to common-law negligence. Part II makes the positive argument that, in many cases, the right outcome is reached by courts that apply the limiting liability conditions, but for the wrong reason. Consequently, I show that the discrepancy between court decisions—in outcome rather than reasoning—and the normative argument made in Part I of the Article is not as great as it would seem.

I. THE NORMATIVE ARGUMENT

A. Negligence Per Se

Under the negligence per se doctrine, in order to recover his losses, the victim must be a member of the class of persons protected by the statute in question and his injury must be of the type that the statute was intended to prevent.[5] Thus, even when those victims and injuries were foreseeable by the injurer, victims who were not intended to benefit from the statute's protection cannot recover and injuries that were not intended to be prevented by the statute are not compensable. Example 1 below, a variation on the illustration from the *Restatement (Third)* presented above,[6] exemplifies how the

4. *See infra* Part I.B.

5. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 14 cmt. g (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 286 (1965); DAN B. DOBBS, THE LAW OF TORTS § 137 (2000).

6. *See supra* note 2 and accompanying text.

negligence per se doctrine is currently applied by courts, and the ensuing discussion explains why this application could be misguided.

> *Example 1*, *The Stairway Railings*: A statute requires employers to install railings alongside stairways at the workplace if they have five or more disabled employees. An employer fails to install such railings, and an able-bodied employee is injured in a fall that would have been prevented by a railing. Should the employer be found liable for the employee's injury under negligence per se?[7]

Applying the negligence per se doctrine, courts would likely not impose liability on the employer in this example.[8] Clearly, the *Restatement (Third)* makes this same assumption.[9] The apparent reason for rejecting liability would be that the statute was not designed to protect able-bodied employees such as the plaintiff, and thus he is not entitled to recover for his injury.[10] To understand why

7. I assume for simplicity that worker's-compensation statutes do not apply.

8. *Cf.* Anderson v. Turton Dev., Inc., 483 S.E.2d 597 (Ga. Ct. App. 1997) (rejecting appellant's claim that the negligent design of the handicap ramp, which was the cause of appellant's fall, constituted a violation of the Georgia Handicap Act because appellant was not handicapped or elderly, but finding appellee liable for appellant's damages on grounds of common-law negligence); Carman v. Dunaway Timber Co., 949 S.W.2d 569 (Ky. 1997) (refusing to define appellee's violation of the safety act as negligence per se because the purpose of the act was to protect employees only, and appellant did not belong to this group).

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 14 cmt. g (Proposed Final Draft No. 1, 2005).

10. *See Anderson*, 483 S.E.2d at 600. But there are also examples in which courts interpreted the relevant statute as encompassing a very broad range of victims, even though a narrower reading could have been given. In *Cappa v. Oscar C. Holmes, Inc.*, 102 Cal. Rptr. 207 (Ct. App. 1972), for example, a boy was injured while crossing an area of a parking lot being constructed by the defendant. *Id.* at 208. The trial court ruled in favor of the boy, basing the defendant's liability on a breach of the duty imposed by the Construction Safety Orders. *Id.* at 208–09. The appellate court affirmed, noting that although it has been held that safety orders are primarily intended for the benefit and protection of workmen, as long as a safety order does not indicate to the contrary, persons consensually on the premises to which the safety order applies also fall within its protection. *Id.* at 209–11. In *Porter v. Montgomery Ward & Co.*, 313 P.2d 854 (Cal. 1957), a woman fell on a stairway in a department store and sued the store owner for compensation for her injury. *Id.* at 854–55. She based her claim on a breach of a safety order issued by the Division of Industrial Safety, according to which a center handrail should have been installed along the stairway. *Id.* at 855. The court dismissed the defendant's argument that the plaintiff was not a member of the class for whose protection the order was designed. *Id.* at 855–56. It held that the safety orders and the provisions of the California Labor Code were intended not only to protect employees but also to safeguard the public generally against injury or loss of life. *Id.* at 856.

this conclusion might be wrong, let us assign some numbers to Example 1. Assume that the average cost of installing railings is 80, and on average this reduces risks to able-bodied employees by 30. Under these conditions, in the absence of disabled employees, installing railings is not cost justified (30 < 80). Assume, however, that railings reduce risk on average by 60 for five disabled employees present at the workplace. Under these conditions, installing railings is cost justified (30 + 60 > 80). But note that even while the lack of disabled employees makes installing railings not cost justified, it is the presence of *both* able-bodied and disabled employees that makes it cost justified. Indeed, in this example, were it not for the disabled employees *as well as* the able-bodied employees, railings would not be cost justified. Assuming the statute is welfare enhancing, a plausible interpretation would be that it was intended to benefit both the disabled and able-bodied, and therefore both types of victims should recover under negligence per se when the statute is breached.

If able-bodied employees are not entitled to recover for their injuries in this example, social welfare will not be enhanced, and moreover and more importantly, disabled employees will not be adequately protected from the risk of falling. The reason is straightforward: absent liability towards able-bodied employees, a self-interested, rational, wealth-maximizing employer might prefer not to spend 80 on railings and instead to shoulder liability of 60 towards disabled plaintiffs. This would clearly be socially inefficient and impair social welfare. No less significantly, it would prevent the full protection of disabled employees indisputably sought by the statute: without railings, their risk of falling will not be reduced. Although disabled employees will be compensated if injured, it is commonly accepted that compensation for bodily injury is rarely equivalent to being uninjured in the first place. Thus, it seems quite obvious that the primary goal of the statute would be the installation of railings—not ensuring compensation for injuries due to their absence.

It is true that under a different numerical scenario, the lack of liability toward able-bodied employees would lead to neither inefficiency nor an undermining of the statute's goal in Example 1. Thus, if the risk to disabled employees were 100 rather than 60, the employer would have sufficient incentive to install a railing even without being liable to her able-bodied employees (since 100 > 80). But we (or the courts) do not really know what the numbers are, and there is always the possibility that they could indeed work out similarly to the first numerical assumptions for Example 1. Furthermore, there are definite advantages to a doctrine of negligence (and negligence per se) that can uniformly be applied to all cases, regardless of the numbers. This is precisely how the general doctrine of negligence works: the injurer bears liability for risks he or she could have reasonably prevented, even if lower

liability would be sufficient to incentivize him or her to take adequate precautions.[11]

Why, then, do courts tend to disallow recovery in cases like Example 1? Perhaps because they focus on the unusual risks (to disabled employees) and disregard the background risks (to the able-bodied), ignoring the possibility that sometimes it was the aggregation of both types of risks that led the legislature to impose a duty on employers.[12]

Let us now consider another example that illustrates a possible misapplication of the negligence per se doctrine.

> *Example 2, The School-Zone Speed Limit*: A statute restricts the speed limit in school vicinities to 15 mph. The regular speed limit is 25 mph. A car travelling 25 mph hits a pedestrian, who would not have been injured had the driver been travelling 15 mph. The pedestrian is an adult who is unconnected to the school and did not know about the presence of a school in the vicinity or the special speed limit. Should the driver be liable under negligence per se?[13]

As in Example 1, the argument can be made that the victim

11. Thus, a liability threat equivalent to costs of precaution plus would be sufficient to create efficient incentives. Accordingly, if costs of precaution are 2 and expected harm is 100, liability of 2% of harm plus 1 would be sufficient to incentivize the injurer to take the precautions.

12. Compare Example 1 to an analogous case where a statute obliges employers to hire someone trained in first aid for each workplace where the number of employees exceeds 100. Suppose now that in a specific workplace the number of employees is 100 and no one trained in first aid is provided. At a certain point of time, the 101st employee is hired, but nevertheless the employer fails to provide someone trained in first aid, and one of the first 100 employees suffers harm which could have been prevented if someone trained in first aid had been present at the workplace. Would the employer be released from liability, since the 101st employee, but not the plaintiff, was the reason the employer's statutory duty arose? The answer is of course "no." The reason the duty arises is the presence of all 101 employees at the workplace, regardless of the order in which they were hired. The fact that before the 101st employee was hired there was no duty to provide someone trained in first aid is irrelevant to the question of whether the employer is liable under negligence per se.

13. *See* Grant v. McKiernan, 60 S.E.2d 794 (Ga. Ct. App. 1950). In this case, a thirty-five-year-old woman was injured in a car accident near a school when the driver had exceeded the school-zone speed limit. *Id.* at 795–96. The court held that the woman was not included in the class of people to be protected by the special speed limit in a school zone but that children and others on their way to and from the school would be. *Id.* at 797. In contrast, see *Whitley Construction Co. v. Price*, 79 S.E.2d 416 (Ga. Ct. App. 1953), where the plaintiff was injured while sitting as a passenger in a trolley that stopped at a bus stop for the purpose of picking up passengers, including school children. *Id.* at 418. The defendant had exceeded the speed limit in a school zone and collided with the trolley, resulting in the plaintiff's injury. *Id.* at 418–19. The court found for the plaintiff, stating that speed limitations in school zones are set for the protection of all persons using the highway within such zones. *Id.* at 422.

does not fall within the class of persons the statute was designed to protect. I suspect, however, that in the circumstances of this example, courts would be more hesitant to accept this claim.[14] Indeed, a court might conclude that the rationale for the lower speed limit is the density of pedestrians in a school zone, regardless of their age (children or adults) or whether they are coming from or going to the school. But some courts might accept the argument and not impose liability on the driver, especially if pedestrian density was low at the time of the accident (for example, if it occurred during classroom time and no pupils were on the street). Either way, it is my claim that liability should be imposed in the circumstances of Example 2 for the same reason that the employer in Example 1 should bear liability. The special speed limit reduces risk to everyone, pupils and others alike. Perhaps the reduction in the risk to others alone or to pupils alone does not warrant a 15 mph speed limit, but it is justified in light of the diminished risk to everyone. To illustrate, assume the cost of slowing down from 25 mph to 15 mph is 80, the reduction of risk to nonpupils (background risk) 30, and the reduction of risk to pupils (unusual risk) 60. The aggregate of the two risks is the reason for the 15 mph speed limit, and liability towards both types of victims will foster compliance with the statute.

Does this argument justify abandoning the limiting liability conditions? Section D, the final section of this Part, explains why it does not.

B. Common-Law Negligence

The limiting liability conditions inherent in the negligence per se doctrine have a counterpart in common-law negligence. Under the latter doctrine, an injurer's liability is limited only to wrongful risks, that is, those risks that made his behavior wrongful.[15] The concepts "duty of care" and "proximate cause" are applied to determine this liability.[16] Other limitations on liability under common-law negligence, also applied by way of these two concepts, further limit tort liability on public-policy grounds.[17] The focus here, however, is on the specific limitation of liability to only wrongful risks. Example 3 illustrates this condition.

14. *Compare Grant*, 60 S.E.2d 794, *with Whitley Constr. Co.*, 79 S.E.2d 416.

15. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005); DOBBS, *supra* note 5, § 187 n.1; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 273 (5th ed. 1984); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107 (2001).

16. The *Restatement (Third)* refers to what courts often term "proximate cause" as "the scope of liability." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, special note on proximate cause (Proposed Final Draft No. 1, 2005).

17. *See infra* Part I.D.

> *Example 3, Delivering a Baby*: A doctor delivered a baby vaginally, even though the large size of the baby warranted a C-section. A knot of the umbilical cord caused the baby's death. There was no indication prior to delivery of any unusual risk relating to the umbilical cord, and that risk is not related to the baby's size. Nevertheless, a C-section would have saved the baby's life. The parents bring a wrongful death action against the doctor for her negligent failure to deliver by C-section. Should she be held liable?[18]

A court may find no liability in this example, reasoning that the doctor is not considered negligent with regard to the risk that actually materialized and, therefore, her negligence was not a proximate cause of the injury.[19] The doctor's negligence was in ignoring the risk related to the baby's size or failing to adequately estimate its size, whereas the risk that materialized into injury emanated from a knot in the umbilical cord.[20] This reasoning, however, is erroneous. If a C-section reduces the risk of a baby's death due to a knot of the umbilical cord, this risk should be included among the risks for which a doctor is considered negligent. In this context, too, courts tend to focus on the unusual risks and disregard the usual, or background, risks, holding injurers liable only for the former and not for the latter. In so doing, they miss the simple point explained above, that often the aggregation of both the unusual and the background risks mandates a certain course of action on the injurer's part that in the absence of the background risks would not be required.

To better understand this argument, let us again assign numbers to the example. Suppose that a C-section costs 80 and reduces background risks by 30. Those background risks include all types of risks reduced by a C-section, including the risk emanating from a knot in the umbilical cord. These risks in and of themselves, however, given the costs of a C-section, are not great enough to justify a C-section ($30 < 80$). Now further assume that vaginal delivery entails an unusual risk—say one relating to the baby's large size—that a C-section reduces by 60. In these circumstances, given the combined reduction of the two types of risks, a C-section is cost justified ($30 + 60 > 80$); thus, both the background risks and the

18. This example is based on an Israeli Supreme Court decision that dismissed a suit for lack of proximate cause. C.A. 2717/02 Plonit v. Bnei Zion Med. Ctr. Haifa [2003] IsrSC 58(1) 516.

19. Or in the terminology of the *Restatement (Third),* the harm is not within the defendant's scope of liability. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, special note on proximate cause (Proposed Final Draft No. 1, 2005).

20. Note that there is no problem of foreseeability here, since doctors are aware of the existence of this risk as a usual (background) risk, which materializes on average once every given number of vaginal deliveries. For a discussion of foreseeability, see *infra* Part I.D.

unusual risks are "but-for" causes of the doctor being negligent. Furthermore, a failure to impose liability for the background risks could impair social welfare. A doctor or medical-care provider that bears the costs of a C-section and liability for the unusual risks if a C-section is not performed but not for the background risks could find it more profitable to deliver vaginally (because 60 < 80) even when a C-section is socially cost justified.[21]

This numerical example often reflects reality. One could imagine how an impartial and professional care provider would issue guidelines as to when to prefer a C-section over vaginal delivery. The care provider would certainly calculate the usual (background) risks of vaginal delivery that C-sections reduce (and increase) and define the circumstances in which those risks *combined with some unusual risks* reduced by a C-section warrant the procedure. There is no reason to assume that only the unusual risks will be taken into account. Both background and unusual risks are relevant in setting the guidelines, as well as in setting the standard of care.

C. Causal Link

The argument, which this Article seeks to refute, that injurers should not be held liable for the materialization of certain risks increased by their negligence, should not be confused with the "causal-link" argument. While this Article does not question the validity of the latter argument, it is essential to distinguish it from the former. This distinction is vital to understanding the claim made in Part II of this Article, that many court decisions that apply the limiting liability conditions to reject claims brought under negligence per se would be better grounded were they based on the causal-link argument.

According to the causal-link argument, the fact that the wrongdoing in question was a "but-for" cause of the harm that actually materialized is not sufficient to establish a causal relationship between the act and the harm. Rather, the causal-link condition must also be satisfied, namely, that a recurrence of the wrongdoing must increase the chances of the same injury

21. One possible counterargument is that doctors tend to prefer C-sections to vaginal deliveries for other reasons, reasons that more than offset the incentives described in the text in favor of vaginal delivery. *See* Robert D. Cooter & Ariel Porat, *Liability Externalities and Mandatory Choices: Should Doctors Pay Less?*, 1 J. TORT L. 1 (2006). Another complication arises from the fact that much of the cost of C-sections is borne by the mothers, not the doctors or medical-care providers. This in itself could be a reason for reducing physician liability for negligently choosing a vaginal delivery to a C-section. *See* Ariel Porat, *Offsetting Risks*, 106 MICH. L. REV. 243 (2007) (arguing for reducing damages when, alongside an increase in certain risks, injurer's negligence also led to a reduction in other risks).

occurring.[22] Put differently, to establish liability for the materialization of a particular risk, it is essential to show that that risk was increased by the wrongdoing.[23]

To illustrate how this condition is applied, assume that in Example 3 (Delivering a Baby), the magnitude of the baby's risk emanating from a knot in the umbilical cord is not contingent on the method of delivery, even though this risk could materialize differently depending on method of delivery. The doctor chooses vaginal delivery and is considered negligent because other risks to the baby and mother warranted performing a C-section. The baby dies during delivery due to a knot of the umbilical cord. There was no indication prior to delivery of any unusual risk relating to the umbilical cord. Assume now that a C-section would have saved the baby's life since the specific way in which the risk materialized would have been avoided had the doctor performed a C-section. Under these circumstances, the doctor should not be found liable because there was no causal link between her negligence and the harm that materialized: her negligence did not increase the risk relating to a knot in the umbilical cord.[24]

The causal-link argument can also be well illustrated by a modified version of Example 2 (The School-Zone Speed Limit). Suppose the road accident could not have been prevented even if the driver had been travelling 15 mph when he hit the pedestrian. However, had he been driving 15 mph instead of 25 mph *prior* to the reaching the site of the accident, he would not have been there when the pedestrian was crossing the street, and the accident would not have occurred. In such a case the driver should not bear liability even though the negligent per se fast driving prior to the accident was a "but-for" cause of the accident. The reason is that this negligence per se did not increase the risk to pedestrians that they would be hit even at the permitted speed limit. Or, in other words, there is no causal link between the fast driving prior to the accident and the harm that materialized.[25]

Imposing liability for harms in which there is no causal link to the wrongdoing could create incentives for injurers to overinvest in

22. Berry v. Sugar Notch Borough, 43 A. 240 (Pa. 1899); DOBBS, *supra* note 5, § 187; RICHARD A. EPSTEIN, TORTS § 10.7 (1999); H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 121–22 (2d ed. 1985); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975).

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 (Proposed Final Draft No. 1, 2005).

24. It is possible, of course, to concretize the risk and argue that the specific risk we should consider is not the baby's risk emanating from a knot of the umbilical cord but its risk emanating from a knot in the umbilical cord *that is typical to vaginal delivery*.

25. *Cf.* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 30 cmt. a, illus. 1–2 (Proposed Final Draft No. 1, 2005).

precautions inefficiently. To understand why, assume precaution costs to be 80 and risk reduction if precautions are taken to be 30. Assume also that a risk of 60 would remain regardless of whether these precautions are taken. If the injurer expects to be held negligent and found liable for *all* harms if he fails to take precautions, he will take the precaution at a cost of 80 to avoid an expected liability of 90. This would be inefficient from a social perspective, since the precautions would reduce risks by only 30; the risk of 60 would, inevitably, not be affected by the precaution taking. In order to provide the injurer with efficient incentives, then, the materialization of the latter risks should not trigger liability. Note that, in this example, the inefficiency resulting from liability for the risk of 60 could also be prevented were the court to decide that the injurer who did not take precautions of 80 was not negligent (as opposed to holding him negligent but not finding him liable for the resulting harm). In fact, this is precisely the conclusion that the court should reach, since precautions of 80 would result in risk reduction of only 30.

The injurer would be rightly considered negligent whenever the risks that *increased* due to the injurer's failure to take precautions exceeded the costs of those precautions. However, in these circumstances as well, the risks that *were not* increased by the failure to take precautions should not trigger liability. Indeed, in an ideal world, without court error in setting the standard of care and without injurer error in complying with that standard, there would be efficient incentives for injurers even if they were to be held liable for the materialization of risks that were not increased by their wrongdoings. In fact, any liability equal to or higher than the harms resulting from risks created by a wrongdoing would provide injurers with efficient incentives. But as conventional law and economics teaches us, under a negligence rule with risk of errors, liability in excess of the harms caused by a wrongdoing could result in inefficiently excessive precaution taking.[26]

In sum, the understanding of the causal-link argument helps to explain why risks that the injurer could not impact through precautions should not have any weight when determining whether the failure to take said precautions was reasonable or not and therefore should not trigger liability. This understanding does, however, also imply that other risks, those that the injurer could have reduced through precautions, should be a factor in determining

26. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 80–83 (1987); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986). I ignore here inefficiencies relating to victims' incentives: overcompensation could create a huge moral-hazard problem, manifested in the most extreme way, if victims tried to induce others to injure them in order to trigger tort liability.

the injurer's negligence and therefore should, prima facie, trigger liability.

D. Where the Problem Is and What the Limits of the Argument Are

As we have seen, under both negligence per se and common-law negligence, only risks that define the injurer's negligence should trigger liability. In negligence per se, these are the risks whose prevention (or reduction) was the purpose of the statute. The argument made here, rather, is that while the theory is right, its implementation by courts is sometimes wrong. Courts, in tending to focus on the unusual risks and ignoring the usual or background risks, fail to grasp that often it was the aggregation of both types of risks that motivated the enactment of the given statute (in negligence per se cases) or undergirded the determination that the injurer was negligent (in common-law negligence).

Why do courts disregard the background risks and consider only the unusual risks? This may be the result of a cognitive bias that some people—judges and jurors included—share, whereby focus is placed on the unusual to explain causal relations.[27] Alternatively, perhaps it is the false belief that background risks are never impacted by precautions, which, if correct, would justify no liability for these risks, since the causal-link condition would not be met.[28]

Either way, it is not my assertion that *all* harms emanating from risks that the injurer could have prevented or reduced had he behaved reasonably should give rise to liability. To begin with, I do not suggest abandoning foreseeability as a precondition for liability,

27. It may relate to the salience bias identified by the cognitive-psychology literature and summarized in David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 760 (2001) ("[A]s regards either personal experience or secondhand information, . . . vivid, dramatic, and "showy" events (sudden death from explosions, hurricanes) are more psychologically available than more subtle, less-easily visualized, less dramatic information events (long-term risks from poor diet, global warming). And, for that reason, at least on some accounts, people respond to (and get politicians to respond to) dramatic threats to well-being aggressively, while essentially ignoring long-term, sometimes much more serious but less vivid threats."). *See also* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 654–72 (1999) (discussing salience and other biases). *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982).

28. A different answer (which, I believe, contradicts the practice of American tort law) could be that many judges oppose the aggregation of risks across persons in applying tort law—an aggregation that is at the center of the argument made in this Article. *Cf.* Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171 (2008) (discussing the question of whether, and under what circumstances, deontologists would allow aggregation of risks across persons).

a requirement with valid justifications.[29] Moreover, in common-law negligence, policy considerations occasionally dictate that negligent injurers not be held liable for harms caused by their negligence. The chilling effect on the injurer's desirable activity and excessive litigation costs are typical of such considerations. I am not arguing against this.[30] Limiting liability for policy considerations, however, is completely unrelated to the argument that risks that do not define the injurer as negligent should not result in liability. Indeed, harms that are not recoverable or victims who cannot recover for policy considerations are, and should be, taken into account when courts determine whether an injurer was negligent or not. The fact that some of the harms will not generate liability or some of the victims will not recover is completely consistent with the need to take them into account when setting the standard of care. But in the absence of any policy considerations to support excluding liability, liability should be imposed for all foreseeable harms that ensue from risks increased by the injurer's negligent behavior. It is for these foreseeable harms that the injurer is considered negligent, and as has been shown, a failure to impose liability for them could be welfare reducing.

Negligence per se is more complicated in this context. Some statutes impose affirmative duties on defendants, which common-law negligence usually refrains from doing.[31] Thus, the legislature could seek to limit injurer liability, even if this would not be welfare

29. For a thoughtful discussion of the role of foreseeability in tort law presenting the argument that it should not be examined as a "duty" question but rather as a "breach" question, see generally Jonathan Cardi, *Purging Foreseeability*, 158 VAND. L. REV. 739 (2005); Jonathan Cardi, *Reconstructing Foreseeability*, 146 B.C. L. REV. 921 (2005). *See also* EPSTEIN, *supra* note 22, § 10.12, at 270 (arguing that in cases of "freakish events," the bizarre consequences could never have influenced a defendant's primary conduct and, hence, should not generate liability for the defendant, whose negligence is defined with reference to some standard, nonfreakish set of consequences).

30. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005); R.A. BUCKLEY, THE MODERN LAW OF NEGLIGENCE 15–23 (3d ed. 1999) (discussing different kinds of considerations that can justify limiting liability, such as the "floodgates" concern and the plaintiff's conduct being illegal or antisocial); DOBBS, *supra* note 5, § 223 (discussing policy considerations); KEETON ET AL., *supra* note 15, § 53, at 358 (stating that "'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection"); Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105, 109 (2003) (describing several kinds of public-policy considerations that are used by courts to limit liability for negligence); Stephen D. Sugarman, *A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada*, 17 SUP. CT. L. REV. 2D 375, 387–89 (2002) (Can.) (same).

31. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmt. b (Proposed Final Draft No. 1, 2005); RESTATEMENT (SECOND) OF TORTS § 314 (1965); EPSTEIN, *supra* note 22, § 11.1; Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 247 (1980).

enhancing, even beyond the policy considerations that apply in common-law-negligence contexts. Such limitations could take the form of allowing only a restricted set of people the right to sue or making only some types of harm recoverable in the event of a breach of the statutory duty. Given this, a breach of a statutory duty should amount to no more than a strong prima facie case for liability. Let us return to Example 1 (The Stairways Railings) to clarify this point. Suppose the victim who fell on the stairs was a visitor at the site and not an employee. The legislature might have imposed a duty on the employer to install railings since common-law negligence would never impose such a duty. Yet the legislature might have also wanted to ease the employer's burden, independent of welfare-enhancing considerations, by releasing him from any liability toward visitors when in breach of the duty and making him liable only toward employees. There could be a legitimate concern underlying this desire to lessen the burden of liability. The legislature might be driven by the view that breaching the statutory duty is not reprehensible enough to justify imposing unlimited liability on the employer. Of course, it might also be motivated by the same policy considerations that lead courts to limit liability in common-law-negligence cases, such as the chilling effect on the employer's activity.

Accordingly, exempting the employer from liability in the variation of Example 1 (when the victim is a visitor) would reduce his incentives to install a railing, in some circumstances to the point where he would find installation unprofitable. This would lead to less protection for his employees, as well as his visitors. The employer would then have to compensate injured employees for their injuries if she were to fail to install a railing, which might sometimes be the best compromise from the legislature's point of view. This reasoning, however, has far less force—if any at all—when the victim is an employee, even an able-bodied one, as in original Example 1. For in such circumstances, courts should be alert to the possibility that the aggregation of risks, both to able-bodied and disabled employees, was the motivation for the enactment of the statute. The same awareness is required with respect to Example 2 (The School-Zone Speed Limit).

A typical case in which it makes sense to exempt the injurer from liability for negligence per se toward a particular class of victims is when the precautions required under the statute are taken separately toward the potential victims.[32] In such cases, even

32. *Cf.* Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984). In this case, the appellant was injured from falling off a ladder while working at the appellee's plant on behalf of his employer. *Id.* at 801. The appellant claimed that the appellee had failed to provide a safe place to work, safe equipment, or proper safety devices. *Id.* The trial court found the defendant liable but did not discuss the question of whether the failure to

a prima facie case for recognizing liability is not warranted. To illustrate, suppose a statute obliges employers to provide safety equipment to people on the workplace premises. One possible reading of the statute would be that only employees are to benefit from its protection. The justification for this could be either that employees are exposed to higher risks than nonemployees (thus it is cost justified to provide them with the safety equipment but not others) or that the employer is expected to protect her employees more than others. What characterizes such cases is that allowing non employees to recover for injuries would in no way serve the interests of employees. In this respect, such cases differ from those represented by Example 1 (The Stairways Railings). In the latter cases, allowing able-bodied employees to sue for their injuries could serve the interests of the disabled employees too. Furthermore, failure to provide safety equipment to nonemployees—under the assumption that employees are intended as the statute's only beneficiaries—does not constitute a breach of the statutory duty. This diverges from all the other cases discussed in this Article, where there was no question that the statute had been violated and at issue was only whether the victim should be entitled to recover under the doctrine of negligence per se.

II. THE POSITIVE ARGUMENT

The aim of this Part is to demonstrate how courts apply the limiting liability conditions in negligence per se cases in practice. Using three illustrative cases, I will show that courts often refuse to impose liability because the limiting liability conditions are not satisfied, when in fact a lack of causal link between the negligence and the harm that materialized should be the grounds for dismissal.

The first illustrative case is *Rauh v. Jensen*.[33] The plaintiff, while riding his motorcycle, swerved to the right in order to avoid colliding with a car, but in the process collided with another car parked in front of a fire hydrant and close to the intersection. The plaintiff sued the driver of the parked car for his injuries based on negligence per se because the defendant had breached ordinances prohibiting parking next to a fire hydrant and parking within a certain distance from an intersection.[34] The court dismissed the suit, reasoning that neither breach had been a proximate cause of the injury and that the ordinances' purposes were not related to the accident or to the injury that resulted.[35] The first ordinance's purpose was to permit access to the fire hydrant in the event of fire, the court held, while the purpose of the second one was to prevent

provide safety equipment constituted negligence per se, leading the appellate court to reverse and remand. *Id.* at 805.

33. Rauh v. Jensen, 507 P.2d 520 (Mont. 1973).

34. *Id.* at 521.

35. *Id.* at 522.

obstruction of view for motorists and pedestrians.[36]

The court was certainly right to dismiss the suit, but for the simple reason that parking a car next to a fire hydrant or near an intersection does not increase the risk that other vehicles will collide with the parked car while trying to avoid a collision with another vehicle. There was no need to consider the purpose of each statute and ground the decision on the nonfulfillment of the limiting liability conditions. And although the court did note the lack of any causal relationship between the breaches of the ordinances and the injury,[37] it seems that it was simply using different terminology to find that the limiting liability conditions were not satisfied.

A second case that also exemplifies how courts unnecessarily resort to the limiting liability conditions is *Storke v. St. Johnsbury Trucking Co*.[38] In this case, the plaintiff, a passenger in her husband's car, was injured in a head-on collision when the car swerved into the opposite lane of traffic, colliding with an oncoming tractor-trailer driven by the defendant's employee. The plaintiff argued that the tractor's driver had violated a "slow-speed" statute, which obliges slow-speed vehicles to drive along the right-hand side of the highway, and should therefore be held liable under negligence per se.[39] The plaintiff claimed that had the statute been complied with, the collision would not have occurred. The court rejected the claim, interpreting the statute as aimed at preventing the impeding of the traffic going in the same direction, not head-on collisions. In the court's words, the statute "is helpful in the passing situation, since slow moving traffic in that context presents special problems, but not in the oncoming situation."[40]

Yet here again, the absence of a causal link between the negligence and the injury would have been a better foundation for dismissing the plaintiff's claim. This is for the simple reason that it is at the very least unclear whether the risk of head-on collisions is decreased if slow-speed vehicles drive on the right-hand side of the road. Although, on the one hand, the risk of the vehicle coming into contact with oncoming traffic may be reduced, on the other hand an oncoming vehicle may have greater difficulty "escaping" the slow-moving vehicle's path once it has entered its lane.[41] If, however, we assume that the risk of collision is reduced when slow-speed vehicles

36. *Id.* at 521.
37. *Id.*
38. Storke v. St. Johnsbury Trucking Co., 443 F.2d 89 (2d Cir. 1971).
39. *Id.* at 90–91.
40. *Id.* at 91.
41. It could also be argued that even were slow-moving vehicles to pose a lower collision risk when driving on the right-hand side of the road, there would be no decrease in the overall rate of head-on collisions because other cars would drive faster in the left-hand lane. Consideration of this possibility is beyond the scope of the discussion of the causal-link argument and the scope of this Article in general. I discuss analogous issues at Porat, *supra* note 21, at 254.

drive on the right-hand side of the road, then the accident would be causally linked to the violation of the statute. In this event, I see no reason to assume that the legislature did not intend to reduce such a risk: perhaps it is the aggregation of both the risks related to the obstruction of traffic and the risks of head-on collisions that justifies the enactment of the "slow-speed" statute.[42] Regardless, there is no sense at all in dismissing the plaintiff's claim simply because the limiting liability conditions were not met. It should either have been dismissed due to a lack of causal link or accepted because of the existence of such a link.[43]

In a third case, *Coughlin v. Peters*, the court also decided the claim based on the nonfulfillment of the limiting liability conditions rather than the lack of a causal link between the breach of the statutory duty and the injury.[44] In this case a car hit and killed a child. One of the defendants was a driver of another car parked in the street in violation of a statute that prohibited parking in the same place for longer than ten hours during the day. The plaintiff argued that the parked car had obstructed the view of the driver and the child, and that had the statute not been violated, the car would not have been parked there and the accident would have been avoided.[45] The court dismissed the claim on the grounds that the limiting liability conditions were not met. In particular, the court reasoned that the statute was not intended for the benefit of the plaintiff and that it was entirely different from a statute completely prohibiting parking in a given location.[46]

The court could have, however, easily dismissed the case for the lack of a causal link between the injury and the negligence. Had the driver of the parked car not violated the statute, he would have parked his car in a different spot, and the risk resulting from the obstruction of drivers' or pedestrians' view would have been of the same magnitude. Furthermore, had he not parked his car for longer than ten hours, perhaps another car would have parked in the same spot at the time of the accident and created a risk similar to that created by him when he violated the statute.

42. Interestingly, liability is rarely imposed for obstructing traffic; thus, liability for head-on collisions could be especially important for incentivizing compliance with the "slow-speed" statute.

43. For a suit that was brought for negligence per se and dismissed, inter alia, because the violation of the statute did not increase the risk in question and perhaps even decreased it, see *Dunn v. Baltimore & Ohio Railroad Co.*, 537 N.E.2d 738, 747 (Ill. 1989) (a violation of certain statutes regulating train crossings does not give rise to liability toward a motorist who was killed in a collision with a train).

44. Coughlin v. Peters, 214 A.2d 127, 129 (Conn. 1965).

45. *Id.* at 128.

46. *Id.*

CONCLUSION

The most plausible interpretation of a safety statute is that all victims of its breach who are expected—as a positive matter—to benefit from its protection are entitled to recovery and all foreseeable injuries that are expected—again, as a positive matter—to result from the breach are compensable. A breach of a safety statute should therefore give rise to a strong prima facie case for recognizing liability. While the Article's main focus has been on negligence per se, it also briefly has demonstrated how its arguments can be applied to common-law negligence as well. More comprehensive consideration is necessary, however, to ground these arguments adequately with respect to common-law negligence.

Under prevailing negligence per se doctrine, courts tend to limit liability for breach of a statutory duty, often doing so when the breach did not increase the risk to the class of plaintiffs to which the victim belongs or for the type of injury that materialized. In such instances, imposing liability is, indeed, unwarranted because the causal-link condition has not been met. In other cases, applying the limiting liability conditions could lead to the wrong outcome, which typically occurs when the risk that materializes is a background risk. Courts should be sensitive to the possibility that many times background risks, even if in themselves insufficient to justify the enactment of the given safety statute, could combine with unusual risks as the justification for the statute. In these cases, the materialization of both the background and unusual risks created by a breach of the statute should trigger liability, since the statute was enacted to prevent or decrease both types of risks.

Thus, the theory that liability should be imposed only for risks that the statute was intended to prevent is right. It is merely its implementation by the courts that is often wrong!