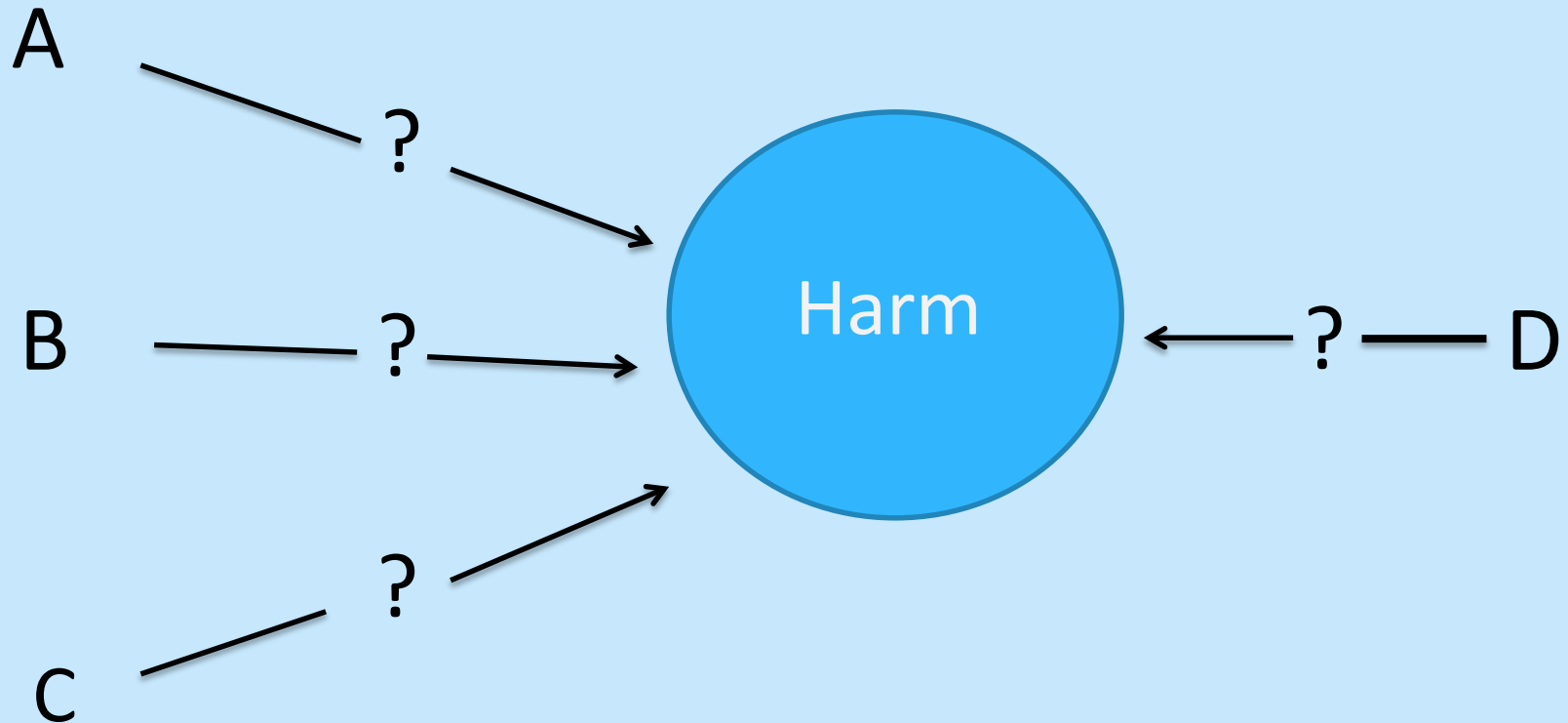


Negligence – Prima Facie Case

- D owed P a Legal Duty
- Breach of Duty
- Actual Damages
- Factual Cause
- Proximate Cause

Risks that Make
Defendant Negligent

Other Risks



Determining Breach of Duty

- 1) Would reasonable person have foreseen a risk of harm [**to someone**]?
 - If no, then not negligent
 - If yes, move on to #2
- 2) Would reasonable person have taken steps to avoid or minimize the risk (identified in #1)?
 - If no, then not negligent
 - If yes, then negligent

Element	Modern Framework (<i>Thompson</i>)	Palsgraff (Cardozo)
Duty	D owes everyone, including P, a duty of ordinary care	D owes P a duty only if: D's conduct creates an unreasonable, foreseeable risk to P
Breach of Duty	<ul style="list-style-type: none"> • D's conduct creates a reasonably foreseeable risk of harm • Reasonable and prudent person would seek to minimize or eliminate this risk • D failed to do so 	<ul style="list-style-type: none"> • D failed to act as a reasonable and prudent person would
Proximate Cause	<ul style="list-style-type: none"> • D's conduct creates a foreseeable risk to P • A reasonable and prudent person would seek to minimize or eliminate the risk to P 	N/A

Proximate Cause – Scope of Risk

Harm w/in scope of risk if: Reasonable person in similar circumstances would have

- 1) foreseen harm or risk (a) of same general type, and (b) to the general class of persons that includes the P; and
- 2) Taken greater precautions to avoid it than D took

Multifactor Test (*Palsgraf* dissent)

Proximate cause determined by balancing multiple factors:

- Foreseeability of harm to P
- Rough sense justice
- D's conduct a substantial factor in causing P's harm
- Natural and continuous sequence of events
- Directness (how many intervening causes)
- Remoteness in time and space

Proximate Cause -- Summary

- Scope of Risk: Proximate cause if w/in scope of risk created by D's negligence
 - 1) Foreseeable harm or risk (a) of same general type, and (b) to the general class of persons that includes the P; and
 - 2) Reasonable person would take greater precautions to avoid risk than D took
- Alternative Approaches:
 - 1) Multifactor test (*Palsgraf* dissent)
 - 2) For public policy reasons, general rule of law deems D's negligence proximate cause (e.g., Rescue Doctrine)

Proximate Cause – Scope of Risk

Reasonable person in similar circumstances would have

- foreseen harm or risk (a) **of same general type***, and (b) to the general class of persons that includes the P, and
- taken greater precautions to avoid that risk than D took

*** General rule: Actual harm can be w/in scope of risk even if exact harm, extent of harm, or exact manner of its occurrence not foreseeable**

Hypo – Intervening Criminal Act

Defendant operates a day care center. The day care center is located at a busy intersection. There have been several accidents at the intersection, and one time a car crashed through the chain link fence that surrounds the day care center's playground. After that accident, Defendant simply repaired the chain link fence. Six months after the fence was repaired, Bob deliberately drove his car through the day care center's fence, injuring several children who were playing on the playground. Assume that given the risk of future accidents, a reasonable and prudent day care center would have built a fence made of stronger material and that a stronger fence would have prevented Bob from driving into the playground. Is the Defendant's negligence a proximate cause of the children's injuries?

Intervening Acts – Proximate Cause

- **Criminal acts:**
 - *Traditional rule:* Criminal acts deemed a superseding cause, so no proximate cause
 - *Foreseeability rule:* Proximate cause only if specific criminal act is foreseeable (*Marcus*)
 - *Scope of risk approach:* Apply scope of risk principles (*Collins*)
- **Suicide:**
 - *Majority rule:* Suicide is a superseding cause, so no proximate cause
 - *Exceptions:*
 - (1) D's tortious conduct induces a mental illness/suicidal impulse, or
 - (2) special relationship between D and P resulting in D having duty to protect against suicide, and D aware/should know P at-risk of committing suicide
 - *Minority rule:* Apply foreseeability principles

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- **Negligent Acts:**

- *Majority rule:* Apply scope of risk principles (*Derdarian*)
- *Minority rule:* Proximate cause only if specific negligent act is foreseeable

Proximate Cause -- Summary

- Scope of Risk: Proximate cause if w/in scope of risk created by D's negligence

Within scope of risk if reasonable person in similar circumstances would have:

- Foreseen harm or risk (a) of same general type, and (b) to the general class of persons that includes the P, even if exact harm, extent of harm, or exact manner of its occurrence was not foreseeable, and
- Taken greater precautions to avoid the risk than D took

*Not proximate cause if P in position of relative safety

- Alternative Approaches:

1) Multifactor test (*Palsgraf* dissent)

2) For public policy reasons, general rule of law deems D's negligence a proximate cause (e.g., rescue doctrine)

3) Intervening Acts

- *Modern approaches*:

- Apply scope of risk principles
- Focus on foreseeability of intervening act

- *Traditional approach*: Deems intervening act a superseding cause (e.g., traditional suicide rule, traditional rule criminal acts)

Negligence Per Se and Proximate Cause

O'Guin Conditions

1. The statute/regulation/ordinance is intended to prevent type of harm D caused;
2. P member of class of persons statute/regulation/ordinance designed to protect

Factual Causation -- Revisited

- Majority/Restatement: Apply but-for test
 - *Exception*: Apply substantial factor test if Scenario 5/*Anderson*
- Minority Approach #1: Factual cause if negligence is *either* but-for cause or substantial factor
- Minority Approach #2 (Texas): Negligence is *both* but-for and substantial factor
 - In determining whether substantial factor, courts apply factors similar to *Palsgraf* dissent's factors

Multifactor Test (*Palsgraf* dissent)

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