Successive Causes and the Enigma of Duplicated Harm

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Recommended Citation
David A. Fischer, Successive Causes and The Engima of Duplicated Harm, 66 Tenn. L. Rev. 1127 (1999)
SUCCESSIVE CAUSES AND THE ENIGMA OF DUPLICATED HARM

DAVID A. FISCHER*

I. INTRODUCTION

Some of the most intriguing brain teasers in tort law involve the valuation of damages for harm arising from wrongfully inflicted injury to person or property. Consider the following example:

A wrongdoer shoots and instantly kills a person in the path of an avalanche that would have killed the person a few seconds later. The person's survivors bring a wrongful death action against the shooter, seeking compensation for the loss of support they would have received from the decedent if she had lived.

Should the court require the shooter to pay for loss of support beyond the time that the avalanche would have killed the decedent? Does the answer depend on whether the avalanche was caused by another wrongdoer? If the avalanche was caused by another wrongdoer, would that person be liable for any loss of future support? These questions are perplexing because either the gunshot or the avalanche alone would be sufficient to cause the loss of future support; therefore, it is difficult to attribute the harm to either cause. This Article refers to harm actually or potentially caused by more than one force as "duplicated harm."

I once thought that the questions raised by duplicated harm hypotheticals had little practical importance; they belonged to a dusty corner of abstract tort law and had few implications for real-world problems. However, after mulling over this problem further, I realized that the enigma posed by the duplicated harm hypotheticals is not unique. When viewed from the proper perspective, it is apparent that in virtually every tort case both the wrongful act of the defendant and

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* James Lewis Parks Professor of Law, University of Missouri-Columbia. The author gratefully acknowledges the assistance of the following persons who read early drafts of the manuscript and provided helpful comments: Michelle Cecil, Henry Chambers, Liz Fischer, Mark Geistfeld, Michael Green, Chris Guthrie, Andrew Klein, Peter Mueser, Philip Peters, and Gary Schwartz. The author also gratefully acknowledges research help provided by Jennifer Floyd, Brian McCartney, and Rob Smith. All mistakes, however, are mine. The work on this article was supported by a grant from the University of Missouri Law School Foundation.

1. In this Article, I use the Restatement definitions of the terms "injury" and "harm." "Injury" means the "invasion of any legally protected interest of another." RESTATEMENT (SECOND) OF TORTS § 7(1) (1965). "Harm" means "loss or detriment in fact of any kind to a person resulting from any cause." Id. § 7(2). Thus, injury can occur without harm (a transitory trespass), and harm can occur without injury (a loss of profits due to a business downturn). Id. § 7 cmt. a.
some other force, not attributable to the defendant, are each individually sufficient to cause some portion of the harm arising from the injury.

Looking at old problems from a new point of view usually provides generous rewards. I emerged from my odyssey through these murky waters with a new perspective that made it possible for me to find order in this confusing area of law and to construct a coherent framework for analyzing duplicated harm cases. This new perspective also provided important insights into the nature of the tort system. These insights are particularly relevant to the current debate regarding whether the tort system is primarily concerned with achieving efficiency (appropriate deterrence) or with achieving corrective justice. Through the process of valuing damages for duplicated harm, the goals of achieving efficiency and justice sometimes coincide; thus, the rules governing damages further both policies. When those two goals conflict, however, courts must choose between them. How they choose reflects the


3. The "notion of corrective justice" was first advanced by Aristotle. Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 Mich. L. Rev. 2348, 2350 (1990). Its goal is to nullify gains and losses that arise between individuals when one individual wrongfully injures another. Id. at 2350, 2355. In recent years numerous scholars have emphasized a corrective justice rationale for tort law. See generally PHILosophical Foundations of TORT Law (David G. Owen ed. 1995); Symposium, Corrective Justice and Formalism: The Care One Owes One's Neighbors, 77 Iowa L. Rev. 403 (1992). Leading scholars subscribing to the justice rationale have advocated widely divergent theories of how to define the concept of corrective justice. See Jules L. Coleman, Moral Theories of Torts: Their Scope and Limits (pts. 1 & 2), 1 Law & Phil. 371 (1982), 2 Law & Phil. 5 (1983) (developing "foundational" principles that can be used to formulate specific rules for resolving cases); Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151, 160-89 (1973) (advocating causation of harm as the basis for corrective justice); George P. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 543-56 (1972) (advocating reciprocity of risk as the basis for corrective justice); Ernest J. Weinrib, Toward a Moral Theory of Negligence Law, 2 Law & Phil. 37, 43 (1983) (using Kantian principles to give meaning to the notion of corrective justice); Wells, supra at 2353 (rejecting the idea that abstract principles of justice can lead to workable tort rules and advocating that tort law should strive to enforce community standards of just compensation by using procedures that encourage juries to do justice in individual cases).

4. The rationales often coincide with respect to other tort issues as well. See generally Schwartz, supra note 2 (discussing both deterrence and corrective justice as theories of tort liability).
priorities of the tort system.

Courts generally use the "but for" test to determine what harm was caused by an injury. Under this test, a tortfeasor’s conduct is deemed to be the cause of a particular result if that result would not have occurred in the absence of the conduct. This "but for" test works well in many cases. For example, if X lights a fire that burns the plaintiff’s building, X caused the harm (loss of value of the building) because the building would not have lost its value absent the fire.

Multiple sufficient cause cases are closely analogous to duplicated harm cases; thus, they provide a useful frame of reference for the discussion of duplicated harm. Multiple sufficient cause cases deal with duplicated causes of injury (invasion of a legally protected interest), while duplicated harm cases deal with duplicated causes of a particular harm (loss or detriment). In multiple sufficient cause cases, the "but for" test cannot identify which event caused an injury because each of the multiple forces alone was sufficient to cause the injury. Consider the following example:

X negligently lights a fire that merges with another fire, and the merged fire completely burns plaintiff’s building. Each fire alone would have been sufficient to burn the building.

Under the “but for” test, X’s fire did not cause the building to burn; even in the absence of X’s fire, the other fire would have burned the building. For the same reason, the other fire also is not a “but for” cause of the injury. These multiple sufficient cause cases arise in a wide variety of factual contexts.

In multiple sufficient cause cases, where both forces are tortious, all courts impose liability on both tortfeasors without requiring “but for” causation.

5. For the distinction between injury and harm, see supra note 1.

6. See Basko v. Sterling Drug, Inc., 416 F.2d 417, 430 (2d Cir. 1969) (either of two drugs may be sufficient to cause an illness); People v. Lewis, 57 P. 470, 471 (Cal. 1899) (either of two wounds may be sufficient to cause death); Thomsen v. Rexall Drug & Chem. Co., 45 Cal. Rptr. 642, 647 (Cal. Dist. Ct. App. 1965) (either of two drugs may be sufficient to cause an illness); Corey v. Havener, 65 N.E. 69, 69 (Mass. 1902) (noise from either of two motorcycles may be sufficient to frighten a horse); Kitchen Krafters, Inc. v. Eastside Bank, 789 P.2d 567, 575 (Mont. 1990) (either a breach of fiduciary obligation or a poor economy may be sufficient to cause loss of business), overruled on other grounds by Busta v. Columbus Hosp. Corp., 916 P.2d 122, 139 (Mont. 1996); Kyriss v. State, 707 P.2d 5, 8 (Mont. 1985) (either defendant’s malpractice or plaintiff’s arteriosclerosis may be sufficient to cause gangrene); Koenig v. Babka, 682 S.W.2d 96, 98 (Mo. Ct. App. 1984) (either of two acts of malpractice may be sufficient to cause incontinence); Wilson v. State, 24 S.W. 409, 410 (Tex. Crim. App. 1893) (either of two wounds may be sufficient to cause death); Geuder, Paeschke & Frey Co. v. City of Milwaukee, 133 N.W. 835, 840 (Wis. 1911) (either natural flooding or a broken sewer may be sufficient to flood a basement).

Courts do this to avoid the obvious injustice of allowing each culpable tortfeasor to escape liability to an innocent victim by hiding behind the negligence of the other tortfeasor. When one of the forces is innocent (non-tortious), this fairness argument is weaker. Yet, many courts impose liability on the sole tortfeasor when the other force is innocent. In lieu of “but for” causation in multiple sufficient cause cases, these courts require the jury to find that the tortfeasor’s conduct was a “substantial factor” in producing the harm.

Cases involving successive causes that duplicate harm present problems similar to those presented by multiple sufficient cause cases. Consider the following hypothetical:

Example 1

Fire X from the north and fire Y from the south approach plaintiff’s building for several days. Fire X arrives first and destroys the building. Fire Y arrives one hour later, and would have destroyed the building at that time had it not been destroyed previously by fire X.

Assume that X negligently started fire X, and that Y negligently started fire Y. This is not a case of multiple sufficient causes. Fire X is clearly the “but for” cause of the injury (the destruction of the building): but for X’s negligence, the building would not have burned. Hence, X is liable. Y is not liable, because fire Y did not destroy the building; there was no building to destroy when fire Y arrived. However, this example presents a problem of duplicated harm, which permits the argument that X should pay no significant damages to the building owner. According to this argument, the building had no appreciable value at the time it was destroyed by fire X because fire Y would have destroyed it one hour later. A building doomed to burn in one hour has little or no value.

X’s argument leads to the patently unfair conclusion that neither tortfeasor must pay any significant amount for the loss of the building. This result appears inconsistent with the multiple sufficient cause cases. If each fire reached the building at the same time, both X and Y would be liable for the full value of the building. Therefore, by analogy to the multiple sufficient cause cases, one or both tortfeasors could be held liable in the duplicated harm situation for the full value of the building.

10. See RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).
11. This example is suggested in Robert J. Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127, 1133 (1934).
The difficulty with the argument in favor of liability for duplicated harm is that virtually all tort cases involve duplicated harm of some kind. It is especially common in the case of economic losses, such as loss of earning capacity, loss of value of property, and harm necessitating expenditures for such things as medical care and funerals. Duplicated harm also occurs with non-economic losses such as pain, suffering, and mental distress. Often defendants are not held liable for harm that plaintiffs would otherwise have suffered. In many instances, that is a sound result.

Consider the example of a victim who is killed or permanently disabled by a tortfeasor. A major portion of the harm is loss of earning capacity. We measure this loss in accordance with our best estimate of the victim's remaining earning capacity at the time of the tort. If the victim was suffering from a terminal illness, the compensation awarded for lost earning capacity would cover only the time between the tort and the time that the illness would likely have prevented further employment. Conversely, a healthy person's lost earning capacity would be calculated by reference to mortality tables. In both situations, we exclude liability for harm that is duplicated by an anticipated subsequent intervening event. This is analogous to the successive cause hypothetical discussed above where fire Y is of innocent origin. In one case the intervening cause (analogous to fire Y) was the terminal illness, while in the other case it was an actuarially predicted death from unknown forces. In other words, we routinely allow tortfeasors to take advantage of expected subsequent events that are sufficient to duplicate the harm the tortfeasor caused. Otherwise, the tortfeasor would be required to pay for loss of earning capacity based on a life of infinite duration in every case.

Prior events or circumstances can also duplicate the harm that tortious conduct would have produced. For example, if a tortfeasor disables a fast food worker earning the minimum wage, he will pay smaller damages for loss of earning capacity than if he injures a surgeon. Something caused the victim to be a low-income worker before the tortfeasor injured her and further impaired her earning capacity. Our system permits the tortfeasor to reduce his liability by taking advantage of that prior cause. In other words, the tortfeasor is only liable for the difference between what the plaintiff can earn now and what the plaintiff could have earned if the tortfeasor had not injured the plaintiff. Courts exempt the tortfeasor from liability for the portion of the harm that his conduct was sufficient to produce, but that was duplicated by prior forces. The duplicated harm in the fast food worker example is the loss of ability to earn above the minimum wage. Denying

12. See infra notes 58, 145-52 and accompanying text.
13. See cases cited infra notes 37-40.
14. See, e.g., Acampora v. Ledewitz, 269 A.2d 288, 292 (Conn. 1970); McManus v. Jarvis, 22 A.2d 857, 860 (Conn. 1939) ("Where a plaintiff claims damages for future loss in capacity to earn, the probable duration of his life is an important element in determining the amount to be awarded, and resort to mortality tables is the accepted method of supplying this information."); cf., e.g., Hull v. United States, 971 F.2d 1499 (10th Cir. 1992).
the tortfeasor the right to take advantage of prior causes would require each tort victim to be compensated at an infinitely high level.

To hold tortfeasors liable for duplicated harm in every instance would be clearly impractical, unworkable, and would lead to absurd results. However, to insulate tortfeasors systematically from liability for duplicated harm would also produce unfair results in some cases. The task is to craft a reasoned approach for deciding when to hold tortfeasors liable for duplicated harm and when to exonerate them.

This article analyzes duplicated harm cases from the United States and other common-law countries and suggests approaches for deciding when tortfeasors should be liable for duplicated harm. Part II discusses the role that causation plays in valuing damages and how that role relates to the policy of achieving corrective justice. Part III creates two categories for classifying duplicated harm cases. It discusses how courts have decided cases in each category and analyzes each category in terms of the twin tort policies of achieving efficiency and corrective justice. Part IV addresses how courts deal with tortious conduct that benefits plaintiffs. Part V analyzes the conflict between efficiency and corrective justice in valuing damages for lost earning capacity and the concomitant implications for the positive economic theory of tort law. Part VI examines the implications that duplicated harm cases have on the way in which courts should decide multiple sufficient cause cases when one of the causes is innocent.

II. CAUSATION AND DAMAGE VALUATION

In tort cases, courts often treat proof of causation of harm and proof of the amount of damages necessary to compensate for the harm as separate questions that involve different standards of proof.15 Personal injury cases involving permanent disability illustrate the desirability of this approach. In such cases, a major type of harm is the loss of future earning capacity. Under the two-step process, the plaintiff must first prove that the defendant caused the harm (loss of earning capacity) by permanently disabling her, and then she must value the harm (calculate damages) by showing how much she would have earned for the rest of her life if she had not been disabled.

Courts could treat this as a single question that the plaintiff must establish by a preponderance of the evidence, under which the plaintiff must prove that the defendant caused a loss of earning capacity of a clearly established amount by causing the permanent disability. The difficulty with this one-step approach

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is that it is often impossible for the plaintiff to prove with any degree of certainty the exact amount of lost earning capacity. This is particularly true if the plaintiff is a young person who has not yet established a career at the time of the injury. Rather than deny recovery in such cases by applying the usual standard of proof, courts often permit recovery by adopting the two-step approach and relaxing the standard of proof with respect to proof of lost earning capacity. That is, the plaintiff must first prove by a preponderance of the evidence that the defendant caused a loss of earning capacity by permanently disabling her. Second, the plaintiff must value the loss by introducing as much evidence as is reasonably available under the circumstances and permitting the jury to determine the best possible estimate of the plaintiff's loss.

Use of this two-step process results in a double-dose of "but for" causation. First, most courts use the "but for" test to determine whether the defendant caused harm. Second, they value the harm by using what is the equivalent of the "but for" test because damages are designed to restore the plaintiff to the position she would have been in had the defendant not tortiously caused the harm. Therefore, in valuing the harm, courts do not consider losses resulting from other (particularly non-tortious) causes. Thus, if a preexisting condition reduced the plaintiff's earning capacity before the defendant tortiously injured the plaintiff, further impairing the plaintiff's earning capacity, the defendant is liable only for the difference between what the plaintiff can now earn and what she would have earned if

17. Id. § 912 at 478 (requiring "as much certainty as the nature of the tort and the circumstances permit").
19. See Thompson v. Smiths Shippers (North Shields) Ltd., [1984] 1 All E.R. 881, 905 (Q.B. 1983) ("The starting point for any inquiry into the measure of damages is the principle that the court should so far as possible endeavour to restore the plaintiff to the position in which he would have found himself but for the defendant's wrongful act.") (Emphasis added); see also Anthes v. Anthes, 139 N.W.2d 201, 208 (Iowa 1965) ("The right to damages for impairment of earning capacity may otherwise be classified as impairment of ability to work and earn. It is determinable by the difference between the value of an individual's services ... but for the injury, and the value of the services of an injured person ... in the future.") (emphasis added).
20. RESTATEMENT (SECOND) OF TORTS § 920 cmt. f at 512 (1979) ("The general principle underlying the assessment of damages in tort cases ... is that an injured person is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the ... tort."); see also Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) ("A plaintiff's remedy in tort is compensatory in nature and damages are generally intended not to punish a negligent defendant but to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not been done.").
21. Wright, supra note 15, at 1798; see JAMES A. HENDERSON ET AL., THE TORTS PROCESS 112 (4th ed. 1994) ("[T]he concept of actual cause ... helps to fix the size of the recoveries. ... "); King, supra note 15, at 1359-63 (advocating damage assessments reflecting the presence of preexisting conditions).
the defendant had not injured her. This method of valuing damages gives the tortfeasor the benefit of all duplicative causes by limiting the tortfeasor's liability to damages that would have occurred only as a result of that tortfeasor's conduct.

Courts use the "but for" test to value damages not as a mere quirk or oversight, but because it implements basic notions of corrective justice. Compensation for injury caused by tortious conduct is the "cardinal principle of damages in Anglo-American law."22 The "first purpose of tort law"23 is to restore the plaintiff to the position he would have been in "but for" the defendant's misconduct. This objective is inherent in the tort concept of compensation because it is a "natural ... corollary of the fault principle."24 To implement this policy, courts value damages by comparing the plaintiff's situation caused by the tortious conduct to the situation the plaintiff would have been in if the tortious conduct had not occurred. In fact, courts deny most recovery in "wrongful life" cases because of the impossibility of calculating damages in the above manner.25 In such cases, there is simply no way to compare the plaintiff's present circumstances with those that would have prevailed if the tort had not occurred.26

This Article is concerned with the consequences of using the "but for" test to value damages. The crucial point in this Part is that courts use the "but for" test to limit recovery because it furthers the corrective justice policy of restoring the victim to the position she would have occupied if the tort had not occurred.

III. EVENTS THAT DUPLICATE HARM

This Part analyzes duplicated harm cases with an emphasis on whether the policies of efficiency and corrective justice are furthered by imposing liability

22. 4 HARPER ET AL., supra note 9, § 25.1, at 490.
23. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a at 452 (1979).
24. 4 HARPER ET AL., supra note 9, § 25.1, at 494.
25. See Turpin, 643 P.2d at 964.
26. For example, the California Supreme Court stated in Turpin:

Furthermore, the practical problems are exacerbated when it comes to the matter of arriving at an appropriate award of damages. As already discussed, in fixing damages in a tort case the jury generally compares the condition plaintiff would have been in but for the tort, with the position the plaintiff is in now, compensating the plaintiff for what has been lost as a result of the wrong. Although the valuation of pain and suffering or emotional distress in terms of dollars and cents is unquestionably difficult in an ordinary personal injury action, jurors at least have some frame of reference in their own general experience to appreciate what the plaintiff has lost—normal life without pain and suffering. In a wrongful life action, that simply is not the case, for what the plaintiff has "lost" is not life without pain and suffering but rather the unknowable status of never having been born. In this context, a rational, nonspeculative determination of a specific monetary award in accordance with normal tort principles appears to be outside the realm of human competence.

Id. at 964.
for duplicated harm. Duplicated harm cases fall into two categories, each of which has three variations. The first category involves one cause that is actual and one that is potential. The second category involves two successive causes that each produce an actual accident or illness under circumstances where some or all of the harm is duplicated.

A. One Force Produces an Actual Accident or Illness and Another Force Threatens a Potential Accident or Illness that Duplicates Harm

This section analyzes cases in which one cause is actual and the other cause is potential. In these cases, one force first produces an actual accident or illness. Then, a second force threatens a potential accident or illness that would have duplicated some or all of the harm produced by the first force if the first force had not preceded it. Example 1, set out above27 and repeated here for convenience, illustrates the types of cases under consideration:

Example 1

Fire $X$ from the north and fire $Y$ from the south approach plaintiff's building for several days. Fire $X$ arrives first and destroys the building. Fire $Y$ arrives one hour later, and would have destroyed the building at that time had it not been destroyed previously by fire $X$.

Three variations of this hypothetical illustrate the full range of cases in this section: (1) fire $X$ is tortious (was caused by a wrongdoer) and fire $Y$ is innocent (Type A-1); (2) fire $X$ and fire $Y$ are both tortious (Type A-2); and (3) fire $X$ is innocent while fire $Y$ is tortious (Type A-3). We will consider each of these variations in turn. The following table summarizes the results of this analysis:

Table A

<table>
<thead>
<tr>
<th></th>
<th>Type A-1 Actual (tortious)</th>
<th>Type A-2 Actual (tortious)</th>
<th>Type A-3 Actual (innocent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liability for duplicated harm?</td>
<td>No</td>
<td>No cases</td>
<td>No</td>
</tr>
<tr>
<td>Deterrence requires liability?</td>
<td>No</td>
<td>Actual: Yes Potential: No</td>
<td>No</td>
</tr>
<tr>
<td>Fairness requires liability?</td>
<td>No</td>
<td>Actual: Yes Potential: Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

27. See supra text accompanying note 11.
Type A-I cases are those in which fire $X$ (started by $X$) is of tortious origin and fire $Y$ is of non-tortious origin. This variation includes all cases in which a tortfeasor causes harm under circumstances such that, if the tortfeasor had not acted, a subsequent non-tortious event would have duplicated all or part of that harm. Under these circumstances, courts generally exonerate the initial tortfeasor from liability for all the harm that would have been duplicated by the potential subsequent event that never actually took place.\textsuperscript{28} However, it must be sufficiently clear that the subsequent event would have occurred. This rule is important because it reflects the common-law approach to damage assessment discussed previously.\textsuperscript{29} These subsequent non-tortious events fall into two categories: harm duplicated by future forces and harm duplicated by preexisting forces. Prior to discussing the Type A-I cases in detail, the Article will consider the application of the tort policies of efficiency and corrective justice.

\textbf{a. Efficiency and Fairness}

The general approach of exonerating tortfeasors for duplicated harm in these cases is appropriate because it usually furthers the twin policies of fairness and efficiency. From a fairness perspective, imposing liability for harm duplicated by non-tortious forces is undesirable because it would give the plaintiff a windfall. Corrective justice requires no more than that the plaintiff be restored to the position that he would have occupied if the tort had not occurred.

From an efficiency perspective, liability for duplicated harm is also undesirable. Economic analysis suggests that imposing liability for harm duplicated by non-tortious forces can produce inefficient results in one of two ways. First, the administrative costs associated with litigating claims for duplicated harm constitute economic waste because they will not reduce the level of accidents. No tortfeasor can prevent the harm because it is duplicated by separate non-tortious forces. Second, either the increased scope of liability or the increased administrative costs associated with the additional increment of liability can cause overdeterrence by inducing actors to take a course of action that does not optimize social welfare. Holding the tortfeasor liable only for the harm that would not have occurred had he not been negligent is sufficient to give the tortfeasor the proper incentive to take due care.\textsuperscript{30}

\begin{itemize}
\item \texttt{28. See infra notes 32-60 and accompanying text.}
\item \texttt{29. See supra notes 22-26 and accompanying text.}
\item \texttt{30. These economic effects have been analyzed exhaustively elsewhere, and the analysis will not be repeated here. See William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 234-42 (1987); David A. Fischer, Causation in Fact in Omission}
\end{itemize}
The policies of efficiency and fairness are in conflict, however, with respect to one issue relating to the manner in which courts implement the rule against imposing liability for duplicated harm. The Type A-I cases, discussed below, demonstrate that in calculating life expectancy for purposes of determining lost earning capacity, courts tend to use the most specific and individualized evidence available rather than rely exclusively on pure averages derived from mortality tables. Use of specific evidence promotes corrective justice by making it possible to restore the plaintiff to her actual prior position. However, optimal deterrence requires the use of average life expectancy rather than the victim's actual life expectancy calculated in light of specific potential illnesses and injuries.31

b. Harm Duplicated by Future Forces

A common and important example of the exoneration of tortfeasors from liability for duplicated harm is a case involving death or long term disability in which the plaintiff seeks recovery for future lost earning capacity. Courts do not compensate the plaintiff for the amount that she could have earned (or in a wrongful death case, the amount that the plaintiff's decedent would have earned) in a life of infinite duration.32 Rather, the trier of fact must estimate what the victim's working life would have been "but for" the injury and compensate only for the amount by which the accident reduced that capacity.33 The standard mortality tables provide the starting point for this analysis.34 These tables calculate life expectancy by considering both natural and non-natural causes of death.35 However, the tables are not conclusive.36 The tortfeasor may introduce evidence indicating that the victim would have had a shorter-than-average working life due to a life threatening disease37 such as


31. The reasons for this are set out in detail in Part V of this Article and are not repeated here.

32. E.g., Hull v. United States, 971 F.2d 1499, 1502 (10th Cir. 1992).


37. RESTATEMENT (SECOND) OF TORTS § 924 cmt. e at 526 (1979).
heart disease, HIV, or cancer. Some courts also admit evidence that the victim had an unusually hazardous occupation or had bad personal habits, such as the use of alcohol, tobacco, or drugs, that would have shortened her working life. The plaintiff may likewise introduce evidence that the victim would likely have had a longer-than-average working life because of unusually good health or because of an unusually safe occupation. Since loss of earning capacity cases arise quite often, the rule exempting a tortfeasor from liability for all harm that would have been duplicated by other causes, both tortious and non-tortious, has significant impact.

In the above cases, death predicted by mortality tables is a future force that is the equivalent of a non-tortious fire $Y$ that had not come into being until after tortious fire $X$ destroyed the building. Evidence of a future death, predicted because of an existing disease, is a preexisting force that is the equivalent of a fire $Y$ that was burning before the destruction of the building by fire $X$. Preexisting forces duplicating harm are discussed in more detail in Part III.A.1.c.

Another line of cases involves future disability or death of a person too young to have an established career. To estimate loss of future earning capacity, courts must predict the degree to which non-tortious future forces would have reduced the victim's capacity to earn money. Courts then hold the tortfeasor liable for the amount the victim could have earned in the absence of the tort rather than for an infinite amount of lost earnings. To estimate future limits on earning capacity, courts have considered personal factors such as intelligence and skill as well as societal factors such as the tendency of females to earn less than males. Therefore, the tortfeasor is exempt from

41. E.g., Jones v. Kansas City S. Ry. Co., 78 So. 568, 570 (La. 1918); see also RESTATEMENT (SECOND) OF TORTS § 924 cmt. e at 526 (1979).
47. See infra text accompanying notes 61-81.
compensating the victim for the loss of earning capacity caused by the tort if it can be expected that personal and societal factors will duplicate that loss.

In both the cases predicting a future time of death and the cases predicting future forces that reduce earning capacity, courts often use speculative evidence.\textsuperscript{50} Because the future loss in question is inevitable, it makes sense for courts to limit liability using imprecise evidence when more precise evidence is unavailable. After all, death ends every life and no one has an absolutely unlimited capacity to earn money. One alternative to using imprecise evidence is to use no evidence at all and hold the defendant liable for infinite damages. This result would be inconsistent with both the policy of achieving corrective justice and the policy of achieving efficiency. Another alternative to using imprecise evidence is to award every plaintiff an average damage amount without regard to the circumstances of the case. Although this alternative is not as offensive to the efficiency goal, it would thwart the goal of placing plaintiffs in their previous position.

According to the goal of corrective justice, courts should not exonerate tortfeasors from liability for potentially duplicated harm if it leads to undercompensation. For example, in Illinois, a decedent’s estate can maintain a cause of action for the decedent’s medical, hospital, and funeral expenses arising out of a fatal accident,\textsuperscript{51} but not for the income that the decedent would have accumulated had he not been prematurely killed.\textsuperscript{52} The defendant in such a case could argue, by analogy to the lost earning capacity cases, that she is not liable for the funeral expenses. If the decedent had not been fatally injured, he would have incurred similar funeral expenses upon his eventual death. Predicting future funeral expenses is no more speculative than predicting a future time of death. Yet, Illinois courts allow recovery for funeral expenses even though they would have been duplicated by future events if the decedent had lived. This rule is correct because offsetting present funeral expenses with

\textsuperscript{50. See cases cited supra notes 33-46, 48-49.}


\textsuperscript{52. Under the Illinois Wrongful Death Act, the decedent’s survivors do have a cause of action for the losses they suffer because of the decedent’s death. The measure of damages is not, however, the amount that the decedent would have accumulated had he lived. Rather, the measure is the pecuniary value that the decedent would have contributed to the survivors had the decedent lived. 740 Ill. Comp. Stat. 180/1-2 (West 1993 & Supp. 1999); Elliott v. Willis, 442 N.E.2d 163 (1982).}
hypothetical future expenses would lead to undercompensation.

Typically, undercompensation results because the decedent would have had sufficient future income to offset his future expenses if he had lived a normal life span. The estate's cause of action in Illinois does not include any form of compensation for loss of the decedent's future income. Thus, the estate would be in a worse position if it had to absorb premature expenses caused by the defendant than it would be in if those expenses had been paid from the decedent's earnings throughout the course of a normal life.

Other states follow a contrasting rule. For example, Iowa gives the decedent's estate a survival action against the tortfeasor that does allow compensation for the loss of decedent's future income. The estate is entitled to compensation for all losses to the estate caused by the death. This includes medical and hospital expenses as well as the amount of money that the decedent would have accumulated (reduced to present worth) if the decedent had not been killed prematurely. In calculating the amount of income that would have been accumulated, expenses are deducted from the decedent's expected income. Therefore, the estate is not entitled to compensation for funeral expenses because this is an expense that the estate would have incurred anyway. However, the estate is entitled to "interest on the amount representing the reasonable cost of the funeral for the period between the date of the death of the decedent and the end of his normal period of expectancy." This is necessary to compensate the estate for paying the funeral expenses early. Under the Iowa approach, it is appropriate to deny recovery for the duplicated funeral expenses because the estate is no worse off than it would have been if the decedent had lived a normal life span.

c. Harm Duplicated by Preexisting Forces

Courts also exonerate tortfeasors from liability for future duplicated harm that is threatened by a force already in operation before the injury. They do so, however, only if the potential future harm can be proved with reasonable precision. In such cases courts apply the "thin skull" rule, which provides

53. See Chidester, 222 N.E.2d at 276.
55. See Van Wie, 77 F. Supp. at 48.
56. Id. at 48-49; Lang, 294 N.W.2d at 562-63.
58. Id. at 49.
59. Id.
60. But see Sinclair Ref. Co. v. Butler, 190 So. 2d 313, 319 (Fla. 1965) (awarding decedent's estate compensation for funeral expenses).
61. E.g., Maurer v. United States, 668 F.2d 98, 100 (2d Cir. 1981) ("[T]he burden of proof in such cases is upon the defendant to prove the extent of the damages that the preexisting condition would inevitably have caused."); Henderson v. United States, 328 F.2d
that "[t]he defendant takes the plaintiff as he finds him." If the plaintiff suffers more harm than a normal person would because of an unusual susceptibility or characteristic, the defendant is liable for the increased harm. A corollary to the "thin skull" rule comes into play when the defendant can show that the plaintiff would eventually have suffered the same harm due to his unusual susceptibility. Under these circumstances, the defendant is only liable for the harm caused during the period of time between the occurrence of the injury and the time it would have occurred anyway. Thus, if a motorist negligently injures a pedestrian who is an alcoholic and the injury precipitates delirium tremens that causes death, the defendant is liable for the death even though a normal person would not have died as a result of the accident. However, the defendant may mitigate damages by showing that, if the accident had not occurred, the delirium tremens would probably have caused a premature death.

The following examples illustrate the breadth of this rule. If the plaintiff, extraordinarily predisposed to mental illness, suffers a mental illness caused by the defendant's actions, then the defendant is liable for causing the illness. However, the defendant may reduce her damages by showing that if the accident had not occurred, some later event would probably have caused the same mental illness. If an injury to a woman in the eighth month of her pregnancy causes premature birth, plaintiff can recover for the increased costs of giving birth to a premature child; however, she cannot recover for the medical expenses that would have been incurred had she given birth normally. Courts have also exempted tortfeasors from having to pay for duplicated harm in non-economic cases. For example, a plaintiff with back disease who is injured by the defendant can claim damages for the increased pain and suffering caused by the defendant, but the defendant is not liable for the pain the disease eventually would have caused if the injury had not occurred.

502, 504 (5th Cir. 1964) ("The trier[] of fact[] must . . . determine whether or not the pre-existing condition [is] bound to worsen, in which event an appropriate discount should be made for the damages that would have been suffered even in the absence of the defendant's negligence.").

62. Maurer, 668 F.2d at 100.
63. See id.
64. Id.
65. Id.
67. Id.
69. Id. at 1173.
Courts also exonerate the tortfeasor from liability for duplicated harm when a preexisting force will produce a future accident. The classic case is *Dillon v. Twin State Gas & Electric Co.* In *Dillon*, a young boy playing on the superstructure of a bridge lost his balance and was electrocuted when he grabbed a high voltage wire maintained by the defendant. In a wrongful death action against the defendant for failing to take precautions against accidental electrocution, the court held that the jury must decide what would have happened to the boy if the wire had not been charged with electricity. If the jury decided that the boy would have regained his balance, it should award damages for loss of earning capacity for a life of normal duration. However, if the jury felt the boy would have been seriously injured, it should award damages for his capacity to earn in that injured condition. If the jury determined that he would have been killed, it should award no damages for lost earning capacity.

Other less well-known cases apply this same principle. For instance, if a tortfeasor negligently blocks a waterway and prevents a dredge from moving downstream, the tortfeasor is not liable for loss of earnings caused by the delay if the dredge would have been delayed to the same extent because high water further downstream caused a drawbridge to be impassible. Similarly, a tortfeasor who negligently leaves a rail six to eight feet from a riverbank is not a “substantial factor in producing the harm” when a boater is killed by running into the rail in the dark while heading toward the bank at full speed. If the rail had not been there, the boat would have hit the bank and the boater would have been killed at a slightly later time. A tortfeasor who negligently kills fish by pumping cold water into a stream is not liable for the harm caused by the loss of the fish if unusually cold weather conditions would have killed the fish at a later time.

It is difficult to determine when to apply the rule exonerating the tortfeasor from having to pay damages for harm that would have been duplicated by a preexisting potential cause. Several scholars advocate that the tortfeasor’s liability should be reduced only if the potential cause has “reduced the value of the interest the defendant destroyed.” Professor Joseph King’s version of

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73. Id. at 112.
74. Id. at 115.
75. See id.
76. Id.
77. Id.
80. Id.
DUPLICATED HARM

this rule provides that the potential cause does not reduce the tortfeasor’s liability unless it becomes “attached before the defendant’s conduct has reached a similar stage.” A cause becomes attached when it is so associated with the value of the plaintiff’s interest that the potential harm could not be avoided even if the plaintiff knew about it. This is a mechanical rule based on ease of application. Professor King argues that a rule that would give the tortfeasor the benefit of innocent causes that had not attached (i.e., “events contingent at the time of the injury”) would produce “absurd results” and could not be administered. Under Professor King’s proposed rule, Dillon v. Twin State Gas & Electric Co. was properly decided. The potential cause of death (the fall) had “attached” because the decedent was in the process of falling at the time he was negligently electrocuted. However, suppose that the defendant negligently killed a person who was scheduled to depart on a steamer in one hour. The steamer subsequently sank because it hit an iceberg, and all persons on board were lost at sea. Professor King asserts that the defendant should be liable for full damages without mitigation for a preexisting condition because the iceberg was a potential cause of harm that had not “attached.”

Professor King’s proposed rule successfully captures the sentiment expressed by many courts against reducing a tortfeasor’s liability on the basis of speculative evidence that another potential cause would have duplicated some of the plaintiff’s harm. Yet a bright line rule can seldom either explain all cases or resolve all cases in a desirable way. Professor King’s proposed rule is no exception. Under a rigid application of this rule, evidence of a tort victim’s bad habits, such as smoking, drinking, and drug use, should not be admissible to show a shortened life expectancy unless they have “attached” by developing into incurable diseases and conditions affecting the victim’s life expectancy. At any stage before such a disease or condition becomes inevitable, the bad habits have not “attached” because the victim could change her conduct and expect to live a normal life. Reasoning by analogy, the

83. King, supra note 15, at 1357.
84. Id. at 1357-60. Peaslee proposed a similar rule, arguing that the innocent potential cause should not relieve the tortfeasor of liability for duplicated harm unless it was a known force in active operation when the tortfeasor’s act became operative. Peaslee, supra note 11, at 1130. The authors of Prosser and Keeton on the Law of Torts agree with Peaslee’s formulation of the rule. Keeton et al., supra note 82, § 52, at 353 (stating that another force should reduce value only if “in operation when the defendant causes harm, and so imminent that reasonable persons would take them into account”).
85. King, supra note 15, at 1358.
86. See id.
87. Id. at 1357-58.
88. Id. at 1358.
89. Id.
90. Id. at 1357-60; see also Peaslee, supra note 11, at 1139-41 (agreeing with this result).
evidence of the victim's unusually good health should not be admissible to show that the victim would have lived longer than predicted by the mortality tables because good health likewise cannot "attach." It is always in the victim's power to develop bad habits that would destroy her health and shorten her life. Yet, courts use evidence both of victims' good health and of their bad habits. This evidence helps courts predict the victim's life expectancy more precisely than they could by relying on mortality tables alone, thereby reducing the speculative nature of awards.

In addition to the policy against speculation, other factors may play a role in determining when a defendant can take advantage of other causes that duplicate harm. Cases in which a defendant negligently causes a plaintiff to suffer a miscarriage illustrate this point. Contrary to the usual rule, many courts do not permit defendants to deduct the pain and suffering that a plaintiff would have experienced in normal childbirth from the pain and suffering caused by the miscarriage. 92 A possible explanation for these cases is that evidence of future pain is "too remote, speculative, and uncertain to be taken as a basis for estimating damages." 93 If this is true, the policy against speculative damages explains these cases. Yet, the pregnancy would appear to be a potential cause of future pain that had "attached" under Professor King's rule. At least after it was too late to obtain an abortion, the plaintiff lacked the power to avoid the future pain caused by the pregnancy and the birth of the child. The future pain from pregnancy hardly seems more speculative than the future back pain that was used to offset present back pain in the Powers case discussed previously. 94 Therefore, the view that the future pain of normal childbirth is too "speculative" to consider in assessing damages for a miscarriage may not be consistent with the bulk of the cases allowing defendants to escape liability for duplicated harm.

Another explanation for the miscarriage cases is that our sense of justice is less offended when a defendant is exonerated for potentially duplicated economic losses as opposed to potentially duplicated pain and suffering. Such an explanation is suggested by the court in Big Sandy & Cumberland Railroad Co. v. Blankenship. 95 It declined to permit the defendant to reduce his damages by the amount of future pain and illness because the defendant wronged the plaintiff by causing her to suffer "at a time when she otherwise would not have


94. See supra note 70 and accompanying text.

to suffer." Likewise, Hart and Honoré are less enthusiastic about offsetting damages for present pain based on evidence of potential future pain than they are about offsetting damages for present economic loss with evidence that the loss would have occurred in the future.

While Professor King's proposed rule promotes the policy against awarding speculative damages, the preceding discussion shows that in some circumstances it may reach results that violate our sense of justice. Sometimes other policies outweigh the interest promoted by the rule. Applying Professor King's rule to Example further illustrates this point. According to the rule, the first fire to become so large that the plaintiff could do nothing to avoid its effects is the fire that "attaches." would pay no damages if fire attaches, but would pay all of the plaintiff's damages if fire attaches. This latter result is inconsistent with the tort policy of putting the plaintiff in the position she would have occupied if the tort had not occurred. The plaintiff gets a windfall in the latter instance because if fire had not burned her building, fire surely would have. Furthermore, denying the plaintiff's recovery would not be unduly speculative under the particular facts of this hypothetical. Fire may not have attached, but we know, in hindsight, that fire would have destroyed the building if fire had not. This example raises the question of whether any important policy (other than ease of application) is served by deciding the case on the basis of which of the fires was the first to attach.

The attachment requirement is based on the idea that the first force to attach reduces the value of the protected interest. Thus, the second force is preempted by the first and has no causal significance.

For example, Professor King's rule would hold liable for the full value of the building if fire is the first to attach because fire caused no prior reduction in the building's value. In the rare case where both fires are of equal size and equal distance from the building, they may attach at the same time. This would result in a case of "multiple sufficient causes" because each is sufficient to cause the harm (loss of value) at the same instant. Under these circumstances, would be liable for the full value of the building because fire is a "substantial factor" in causing the harm.

Accordingly, the attachment rule may resolve the first variation of Example 1 (a Type A-I case) improperly. The result it produces is not mandated by causal principles and may not always represent good policy. A court is free to exonerate from liability for harm caused if this is desirable. Giving the

96. Id. at 317-18; see Plonty, 84 N.W. at 1007 (declining to reduce damages by the amount of future pain on the grounds that computing damages in that way is "unreasonable" and is not "sensible" or "just").
98. See supra text accompanying note 11.
99. See Wright, supra note 15, at 1795-98.
100. See supra notes 7-10 and accompanying text.
101. See supra note 11 and accompanying text.
defendant the benefit of forces that potentially duplicate harm, even when those forces have not caused a prior reduction in value, furthers the policy of restoring the plaintiff to the position she would have occupied if the tort had not occurred. Because the second force that duplicated the harm (fire $Y$) is innocent, fairness does not justify setting aside the normal rule exempting tortfeasors from having to pay for duplicated harm. In fact, in several situations where—according to this view of causation—the defendant caused the entire loss, courts reduce the defendant’s liability on the basis of subsequent innocent forces that have not yet caused a loss of value. One category of such cases allows a reduction in recovery for lost earnings on the basis of mortality tables and evidence of the victim’s unhealthy habits. In another category of cases, a tortfeasor causes a disability in an accident that is duplicated by a subsequent non-tortious illness or accident. In those cases, courts generally exonerate the tortfeasor from having to pay for the duplicated harm even though the subsequent event did not cause the loss because the loss occurred prior to the second event.

This policy analysis suggests that $X$’s liability for the value of the building in the first variation of Example 1 (Type A-1 cases) should not be contingent on which fire “attached” first. Rather, liability should depend on the quality of proof regarding whether fire $Y$ would inevitably have destroyed the building. If $X$ can prove this with sufficient clarity, $X$ should escape liability for the duplicated harm. Considerations of efficiency and fairness do not compel a contrary result.

Thus, causation of a prior reduction in value is a poor proxy for reliable proof that the harm would have been duplicated. It unnecessarily permits recovery for duplicated harm in some cases where policy dictates that recovery be denied. Requiring the defendant to prove that the harm would have been duplicated by another force yields more consistently appropriate results than requiring the defendant to prove that the other force caused a prior reduction in value of the interest the defendant destroyed.

2. Both Forces Are Tortious (Type A-2 Cases)

The second variation of Example 1 is the case in which both fire $X$ (caused by $X$) and fire $Y$ (caused by $Y$) are of tortious origin. There appear to be no cases that directly resolve the question of liability in this situation. Law professors frequently illustrate this problem with a hypothetical similar to Example 2:  

102. Wright, supra note 15, at 1798.
103. See sources cited supra notes 34-44 and accompanying text.
104. See infra text accompanying notes 142-55.
105. See cases cited infra notes 143-54.
106. KEETON ET AL., supra note 82, § 52, at 354.
107. See id. § 52, at 353-54.
Example 2

Y gives the victim a fatal poison and X shoots and kills the victim before the poison kills the victim.

a. Efficiency and Fairness

In Type A-2 cases, Peaslee and Wright agree that it would be unfair to exonerate both tortfeasors for duplicated harm and leave the plaintiff without a meaningful remedy. The same corrective justice considerations apply here as in the multiple sufficient cause cases involving two tortfeasors. In multiple sufficient cause cases, courts impose liability to prevent the unfairness that would result from letting each tortfeasor avoid liability by hiding behind the fault of the other. Imposing the same liability for duplicated harm in Type A-2 cases does not violate the policy against giving the plaintiff a windfall. It simply restores the plaintiff to the position she would have occupied if no tort had occurred. Therefore, from a corrective justice point of view, either X or Y or both should be held liable.

Also, imposing liability for duplicated harm on the tortfeasor that caused the harm in a Type A-2 case usually will further the tort goal of deterrence. Whether the deterrence goal is met depends on the sequence of events and the knowledge of the tortfeasor. In the second variation of Example 1 (a Type A-2 case), the primary measure of damages is the diminution in market value of the plaintiff's building. X can argue against liability for substantial damages, claiming that the plaintiff's building had no value at the time of its destruction due to fire. Y can make a similar argument. Accepting both arguments, neither tortfeasor would be liable for the duplicated harm. Yet, some liability is necessary because the only way to preserve the plaintiff's building is to deter both X and Y from careless burning.

Imposing liability on X and Y for the full value of any harm arising from injuries they cause (including duplicated harm) is useful because it gives them an incentive to avoid negligent behavior. This is an example of a “simultaneous joint tort” that requires a minimum (or fixed) amount of care by both X and Y to avoid plaintiff’s loss. To deter both X and Y from negligently lighting their respective fires, it is necessary that they understand that each will be individually liable for the full value of the harm caused by the fire even if another tortfeasor duplicates the harm. Knowing this, at least one of the actors will be induced to not light a fire, thereby casting the entire potential liability

108. Peaslee, supra note 11, at 1131, 1138.
110. Peaslee, supra note 11, at 1131, 1137; Wright, supra note 15, at 1798.
112. LANDES & POSNER, supra note 30, at 190. A tort can be “simultaneous” in this sense even if the tortious acts do not occur at the same time. Id.
113. Id. at 197.
on the other actor. The prospect of bearing the entire liability will induce the other actor to refrain from lighting a fire, and the loss will be avoided. Adequate deterrence is achieved by imposing liability on X alone in the second variation of Example 1 because deterrence is based on the actor’s incentives before the loss occurs. Y has adequate pre-loss incentives to refrain from negligent burning because Y faces the prospect of full liability for all harm (including duplicated harm), not knowing in advance that the other fire would have previously destroyed the building.

On the other hand, if either actor (or both) knows that the other has already lit (or would inevitably light) a fire that would burn the building, then optimal deterrence cannot be achieved by imposing liability on that actor for the duplicated harm. Any investment that such an actor makes to prevent duplicated harm is wasted in an economic sense because the harm “will occur anyway.” The only deterrence rationale for imposing liability on an actor with such knowledge is to avoid the risk of strategic behavior. For example, if the law exonerated both X and Y from liability for duplicated harm, the person who lit the first fire would have an incentive to induce the other actor to light a second fire in order to escape liability for duplicated harm.

The analysis of Example 2 varies depending on whether X and Y are intentional tortfeasors or negligent tortfeasors. In either case, both X and Y committed separate torts, either battery if they intentionally injured the victim or negligence if they carelessly poisoned or shot him. Because each committed an actionable tort, each is obviously fully liable for all the harm that he caused in a “but for” sense, such as pain and suffering and medical expenses. In addition, if X and Y were both negligent and if X did not know that Y had already poisoned the victim, then X should be fully liable for the harm that was duplicated by Y. However, X should not be liable for harm duplicated by innocent forces. Thus, X should be liable for causing a loss of earning capacity between the time that the shot caused death and the time the victim would have died according to the mortality tables. Conversely, if X knew that Y had already poisoned the victim, then, in the absence of strategic behavior, deterrence is not advanced by holding X liable for the harm that was duplicated by Y.

However, if either X or Y was an intentional tortfeasor, or if both were intentional tortfeasors, the analysis is different. Economic theory suggests that deliberate wrongdoers should be subject to punitive damages because liability

114. Id. at 196.
115. Id.
116. Id. at 198.
117. Id.
118. Shavell, supra note 30, at 495.
119. Even though the poison did not cause death, it might have caused illness before the victim was shot. If this occurred, the poison caused physical harm. Therefore, the victim had a negligence cause of action against Y before he was shot.
for actual damages does not create a sufficient incentive to refrain from the wrongful conduct. Thus, if either $X$ or $Y$ (or both) intended to kill the victim, that person (or both persons) should be held liable for more than the victim's actual damages (including damages for duplicated harm).

b. The Economic Loss Theory

While scholars such as Hart and Honoré, Wright, the authors of Prosser and Keeton, and King agree that it is desirable to hold one or both tortfeasors liable for duplicated harm, there is less agreement on the appropriate theory of recovery. For example, they all agree that, in cases like Example 1, $X$ should be liable for all damages without a discount for the harm that fire $Y$ would have duplicated. Thus, $Y$ would be exempt from liability for the duplicated harm. However, they reach the conclusion via different theories. Hart and Honoré and Wright subscribe to the theory that $X$ rather than $Y$ destroyed the plaintiff's building. Therefore, $X$ should not be permitted to set up $Y$'s wrong as an excuse for reducing damages. King and the authors of Prosser and Keeton subscribe to the theory that $X$ deprived the plaintiff of her potential cause of action against $Y$.

In most cases, holding both tortfeasors liable is the fairest result because it increases the chances that a solvent defendant will be available for suit. In cases involving economic harm, the authors of Prosser and Keeton suggest that it is entirely plausible to hold both tortfeasors liable by analogy to the multiple sufficient cause cases involving multiple tortfeasors. In those cases, courts dispense with the "but for" test and hold each tortfeasor liable if the jury finds

120. This is true for a variety of reasons. See, e.g., LANDES & POSNER, supra note 30. 161, 186-89. Landes and Posner argue that the chances of catching the wrongdoer are low, and thus wrongdoers who are caught should pay higher than average damages so that all wrongdoers will be properly deterred. Id. at 160 & n.12. The damages for intentional torts are often "too costly to measure," and courts can save the costs of calculating damages in individual cases (and can achieve proper deterrence) by compensating all victims at the highest amount of damages. Id. at 161. Optimal damages for intentional torts threatening death are very high because "the nonlinear relationship between the value of life and the risk of death" means that the amount of money necessary to compensate for the risk of death greatly increases when the risk is high. Id. at 186-89. Finally, failing to compensate for the value of life itself in wrongful death cases produces underdeterrence. Id.

121. HART & HONORÉ, supra note 97, at 239.
122. Wright, supra note 15, at 1794-96.
123. KEETON ET AL., supra note 82, § 52, at 354.
125. HART & HONORÉ, supra note 97, at 239, 245-46; Wright, supra note 15, at 1794-95.
126. HART & HONORÉ, supra note 97, at 239, 250-51; Wright, supra note 15, at 1798-1801; see also Peaslee, supra note 11, at 1137, 1139.
127. KEETON ET AL., supra note 82, § 52, at 354; King, supra note 15, at 1363.
128. KEETON ET AL., supra note 82, § 52, at 354.
that each tortfeasor contributed in a material way to the injury. In Example 1, only fire X caused the injury (destruction of the building), but both fires were sufficient to cause the harm (loss of value of the building) either prior to or at the time of its destruction. Accordingly, it is entirely fair to hold each tortfeasor jointly and severally liable for the full value of plaintiff's building. Under this theory (hereinafter referred to as the "economic loss theory"), courts are required to create a cause of action for pure economic loss (the loss of value of the building in Example 1 or the loss of earning capacity in Example 2) because recovery does not depend on infliction of physical harm. Creating this action should not be a serious obstacle because courts are showing an increasing willingness to grant recovery for pure economic loss.

One argument against imposing liability on both X and Y under the economic loss theory is based on the theory of causation discussed above. This argument (hereinafter referred to as the "attachment argument") is that the fire that attaches is the "but for" cause of the entire loss of value. This assumes that the attached fire affects the value of the building after it attaches. Thus, any buyer who saw the fire would buy the building, if at all, only at a reduced price. The fire that threatens the building after the first fire attaches is preempted by the first fire. The second fire causes no loss of value because the building had no value when the second fire became important enough to affect the building's value. Therefore, only one tortfeasor could be held liable under the economic loss theory.

However, this attachment argument should not present a serious obstacle in Example 1 to holding both X and Y liable under the economic loss theory. An identical duplicated harm problem is present in the multiple sufficient cause cases in which two tortiously caused fires merge and burn the plaintiff's building. In these cases, courts impose liability on both tortfeasors using the substantial factor test. These cases also involve questions of valuation of damages as well as questions of causation. In such cases, a defendant who is found to be a cause of the injury (the destruction of the building) under the substantial factor test could still argue that he should not be liable for damages because he caused no harm. That is, the building had no value when the tortfeasor destroyed it because the other fire attached before his fire was significant enough to affect the value of the building; the other fire duplicated

129. See, e.g., Anderson v. Minneapolis St. P. & S.S.M. Ry. Co., 179 N.W. 45, 46, 49 (1920) (upholding trial court's instructions to jury that it should find the defendant liable if the defendant's negligence was "a material or substantial element in causing plaintiff's damage").

130. E.g., J'Aire Corp. v. Gregory, 598 P.2d 60, 64 (Cal. 1979) (creating a cause of action for negligent interference with prospective advantage); People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 116 (N.J. 1985) (same).

131. See supra text accompanying notes 82-105.

132. An exception would arise in cases in which both fires attached at the same time. This would be a multiple sufficient cause case in which both fires would be regarded as causal. See supra text accompanying note 100.

133. See supra note 10 and accompanying text.
the harm (the loss of value) that the tortfeasor's fire would have produced. This argument would fail because the same corrective justice policy that denies each multiple tortfeasor the argument that he did not destroy the building because the other fire was sufficient to destroy it also denies him the argument that he did not reduce the value of the building because the other fire was also sufficient to reduce the value. Multiple sufficient cause cases involving multiple fires routinely impose full liability on the tortfeasors without regard to which cause attached first. If, notwithstanding the attachment argument, courts are free to hold tortfeasors liable for duplicated harm in multiple sufficient cause cases, they are equally free to hold tortfeasors liable for duplicated harm in successive cause cases.

Courts can reject the attachment argument for one of two reasons. First, they could reject the notion of preempted causes in this context on the basis that it is an artificial construct based on the assumption that the building's value must be determined when the first fire attaches. Cause in fact is determined in hindsight, and a court could reasonably pick a different time to value the building. The authors of Prosser and Keeton, for example, assert that "[v]alue is an estimate of worth at the time and place of the wrong." Therefore, to value the building courts should consider the forces in operation when the defendant caused the harm. In the merged fire cases, no reduction in value is appropriate, according to the authors of Prosser and Keeton, "since any decrease in value of the property before destruction must be attributed equally to the threat of each fire." In contrast, Hart and Honoré assert that in the merged fire cases neither fire reduced the value of the building until the building was actually burned. King's attachment approach to valuing damages is entirely reasonable, but so are those suggested by Hart and Honoré and by the authors of Prosser and Keeton. A court can circumvent the attachment argument against imposing liability on both X and Y in the second variation of Example 1 by valuing damages as the authors of Prosser and Keeton would.

The second way a court could avoid using the attachment argument is simply to reject the causation requirement because justice so demands. Unlike the first variation, justice indeed demands in the second variation of Example 1 that both culpable tortfeasors be responsible for placing the plaintiff in the position she would have occupied if neither fire had occurred. If courts are free to modify the rules pertaining to causation of injury in the multiple sufficient cause cases because of fairness concerns, they are equally free to modify the

134. King, supra note 15, at 1362-63; Wright, supra note 15, at 1798.
135. See, e.g., Miller v. Northern Pac. Ry. Co., 135 P. 845 (Idaho 1913) (no attachment argument was raised or considered); Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co., 179 N.W. 45 (Minn. 1920) (same).
136. Keeton et al., supra note 82, § 52, at 353.
137. Id.
138. Id. § 52, at 353 n.76.
139. Hart & Honoré, supra note 97, at 238.
rules of causation of harm in duplicated harm cases because of identical concerns.

In one exceptional situation, the tortfeasor should not be liable for the duplicated harm: when the plaintiff’s negligence is one of two successive causes of duplicated harm. Here, the plaintiff cannot make a corrective justice argument that liability is necessary to prevent one tortfeasor from benefitting from the negligence of another tortfeasor. It is appropriate to exempt the plaintiff from recovering damages for harm caused by his own misconduct. Thus, when the victim’s life expectancy is at issue, there is no corrective justice reason to exclude evidence that the victim had bad personal habits, such as smoking or drinking, in conjunction with mortality table evidence.

3. Actual Force Is Innocent and Potential Force Is Tortious (Type A-3 Cases)

The third variation of Example 1 is the case where fire $X$ (the fire that burned the building) is of innocent origin and fire $Y$ is of tortious origin. There are no cases imposing liability for duplicated harm in this situation, and scholars generally do not support such liability. Under the economic loss theory, it would be possible to hold $Y$ liable to the plaintiff for loss of value of the building. However, courts are very unlikely to apply the economic loss theory in Type A-3 cases because awarding damages would give the plaintiff a windfall. The plaintiff would have lost the full value of the building even if $Y$ had not started the subsequent fire. Because one cause is innocent, there is no fairness justification for displacing the normal measure of damages.

There is also no efficiency reason for holding $Y$ liable for the duplicated harm. These cases are like the Type A-1 cases discussed previously. Efficiency would not be advanced by imposing liability on the tortfeasor for the duplicated harm because the tortfeasor cannot do anything to prevent the harm. Therefore, any investment the tortfeasor makes to prevent the harm is wasted in an economic sense.

B. One Force Produces an Accident or Illness and a Second Force Produces an Accident or Illness that Duplicates Harm

This section of the Article analyzes situations in which an accident or illness produces actual harm and is followed by a second accident or illness that duplicates some or all of the harm produced by the first force. Again, three variations of this fact pattern illustrate the full range of possible cases under consideration in this section: (1) the first occurrence is tortious and the second occurrence is innocent (Type B-1); (2) both occurrences are tortious (Type

140. HART & HONORÉ, supra note 97, at 250-51; Peaslee, supra note 11, at 1133; Wright, supra note 15, at 1798.
141. See supra note 30 and accompanying text.
B-2); and (3) the first occurrence is innocent and the second is tortious (Type B-3). The following table summarizes the results from the analysis of these variations:

<table>
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<tr>
<th></th>
<th>Type B-1</th>
<th>Type B-2</th>
<th>Type B-3</th>
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<tr>
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<td>Force 1: Yes</td>
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<tr>
<td>Force 2 (innocent)</td>
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<tr>
<td>Liability for</td>
<td>No</td>
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<td>No</td>
</tr>
<tr>
<td>duplicated harm?</td>
<td></td>
<td>Force 2: No</td>
<td></td>
</tr>
<tr>
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<td>No</td>
</tr>
<tr>
<td>liability?</td>
<td></td>
<td>Force 2: No</td>
<td></td>
</tr>
<tr>
<td>Fairness requires</td>
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</tr>
<tr>
<td>liability?</td>
<td></td>
<td>Force 2: Yes</td>
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1. The First Force Is Tortious and the Second Is Innocent (Type B-1 Cases)

Type B-1 situations occur when a tortfeasor causes injury, and then a subsequent non-tortious event causes another actual accident or illness that duplicates some or all of the harm originally caused by the tortfeasor. In such cases, most courts allow the tortfeasor to escape liability for the duplicated portion of the harm. They reason that this is fair because the alternative, which is to ignore the plaintiff's actual future (the subsequent actual event duplicating plaintiff's harm) and award damages on the basis of the plaintiff's probable future (based on mortality tables), would place the plaintiff in a better position than he would have been in absent the tort.

From a policy perspective these rulings are correct. Neither efficiency nor fairness is promoted by imposing liability on a tortfeasor for harm duplicated by innocent forces. As in the Type A-1 cases, there is one category of Type B-1 cases that fails to produce optimal efficiency: cases in which damages are reduced for lost earning capacity on the basis of subsequent events that shorten the plaintiff's life expectancy. In calculating damages for lost earning capacity,

142. Type B-1 cases and Type A-1 cases are analogous.
143. See cases cited infra notes 145-50; see also RESTATEMENT (SECOND) OF TORTS § 910 cmt. b at 469-70 (1979) (valuing loss in light of all facts known at the time of trial regardless of whether those facts show that the damages are greater or less than they would have been if the estimate had been made at the time of the loss); HART & HONORÈ, supra note 97, at 248; Harvey McGregor, Variations on an Enigma: Successive Causes of Personal Injury, 33 MOD. L. REV. 378, 382-83 (1970); Wright, supra note 15, at 1798-1801.
optimal deterrence requires the use of average life expectancy rather than the victim’s actual life expectancy calculated in light of specific illnesses and injuries. The reasons for this are set out in detail in Part V of this Article.

In applying this principle, courts have held that when the tortfeasor inflicts injuries that cause future loss of earning capacity, the tortfeasor is not liable for lost earning capacity after the victim suffers a stroke, a spinal injury, or develops a heart condition that deprives him of all capacity to earn money. Likewise, if a tortiously disabled victim dies from an unrelated cause, the victim’s estate cannot recover damages under a survival statute for lost earning capacity beyond the date of the victim’s death. If the plaintiff in a wrongful death case dies, the estate is entitled to compensation for loss of the decedent’s support between the time of the decedent’s death and the time of the plaintiff’s death, but not thereafter. Similarly, a tortfeasor who negligently causes a collision with a ship, necessitating that the ship be put in dry-dock for repairs, must pay for the cost of repairs. However, the tortfeasor does not have to pay either for the cost of dry-dock or for the loss of income during the dry-dock period if a subsequent storm causes other harm that necessitates dry-dock for a sufficient length of time to make the collision repairs.

Subsequent causes that duplicate harm are distinguishable from subsequent causes that terminate harm. For example, where the defendant tortiously burns a plaintiff’s leg, and the leg is subsequently amputated due to an unrelated cause, the defendant is only liable for pain and suffering between the time of the original accident and the amputation. Here, the second accident ended the pain caused by the first accident, but it also duplicated any lost earning capacity caused by the first accident.

A minority of courts have reached contrary results, holding that tortiously...
disabled plaintiffs could recover for loss of earning capacity for the time period after they developed diseases that were equally disabling. Some workers’ compensation cases have also awarded damages for harm duplicated by subsequent diseases. The policy analysis discussed above indicates that these cases were wrongly decided. However, the workers’ compensation cases may be distinguishable from tort cases for two reasons. First, they are not concerned with corrective justice. Workers’ compensation is a statutory scheme designed to compensate injured workers without regard to the fault of either the employer or the employee. Therefore, the notion of restoring plaintiff to the position he would have occupied “but for” the tort does not apply. Second, workers’ compensation statutes strictly limit recovery. Imposing liability for duplicated harm in workers’ compensation cases does not create the same risk of excessive liability as imposing liability in tort cases.

2. Both Forces Are Tortious (Type B-2 Cases)

Type B-2 cases arise when a tortfeasor injures the plaintiff, and in an unrelated event, a second tortfeasor causes an injury that duplicates some or all of the harm caused by the first accident. Generally, courts hold the first tortfeasor liable for all the harm caused by the first accident, including the duplicated harm. Thus, the second tortfeasor is liable only for the additional harm resulting from the second accident.

Successive accident cases that clearly fall into this pattern are relatively rare. Most successive accidents produce divisible injuries caused by each tortfeasor. These cases often involve difficult problems of proving which tortfeasor caused which injuries. Courts resolve these problems using special rules for apportioning damages. Cases decided under these rules may
sometimes involve issues of duplicated harm. However, those issues may never be resolved if the evidence is unclear. Under those circumstances, the case will be decided on the basis of which party has the burden of proof with regard to apportioning damages.

The leading case raising the question of duplicated harm in this context is the English case Baker v. Willoughby. In Baker, the first tortfeasor injured the plaintiff's leg in an automobile accident, and in a later unrelated incident the second tortfeasor shot the plaintiff in the leg and inflicted a wound that necessitated amputation. In a suit against the first tortfeasor, the House of Lords held the defendant liable for disability to the leg including the period of time after the leg was amputated. Stene v. Evans, another English case, is similar. There, the first tortfeasor negligently injured plaintiff, causing a twenty percent disability. The second tortfeasor, in an unrelated accident, totally disabled plaintiff. The court held the first tortfeasor liable for the twenty percent disability without reduction for the subsequent accident.

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159. E.g., Glick v. Ballentine Produce Inc., 396 S.W.2d 609, 611 (Mo. 1965) (finding both tortfeasors jointly and severally liable where the first tortfeasor inflicted injuries that would have killed the decedents; and before the decedents died, a second tortfeasor inflicted injuries that were also sufficient to kill them), overruled on other grounds by Bennett v. Owens-Corning Fiberglas Corp., 896 S.W.2d 464, 466 (Mo. 1995). Quoting from Brantley v. Couch, 383 S.W.2d 307, 310 (Mo. Ct. App. 1964), the Glick court stated:

[W]here the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tort-feasor, and the injured person may at his option or election institute suit for the resulting damages against any one or more of such tort-feasors separately, or against any number or all of them jointly.

Glick, 396 S.W.2d at 613.


161. Baker, 2 W.L.R. at 52.

162. Id.

163. Id. at 57-58.

164. [1958] 14 D.L.R. (2d) 73 (Alta.).

165. Id. at 74, 78.

166. Id. at 75-76.

167. Id. at 78.
a. Commonwealth Cases

The Commonwealth cases have evolved the most coherent rationale for the rule in successive injury cases. The early cases relied on a conceptual rationale that the second harm-producing event should not cut off the liability of the first tortfeasor because the disability caused by the first tortfeasor persisted even after the second accident.\textsuperscript{168} Thus, the court in \textit{Stene v. Evans} reasoned that because the first tortfeasor caused a twenty percent disability, the second accident, which was totally disabling, could only cause an eighty percent disability.\textsuperscript{169} Hence, the disability caused by the first tortfeasor continued beyond the second accident. If the second accident had shortened the plaintiff's life, the liability of the first tortfeasor would terminate at the point of death because the original disability would not persist beyond death.

More recent Commonwealth cases do not rely on this conceptual rationale.\textsuperscript{170} Instead, these successive injury cases were decided on the basis of policy. In Type B-1 cases, the courts hold that a succeeding non-tortious accident or illness that duplicates the harm caused by the prior tortious injury cuts off the liability of the first tortfeasor for harm duplicated by the second accident.\textsuperscript{171} There, the dominant principle of damages, full compensation, is achieved by putting the plaintiff in the same position he would have occupied if he had not sustained the wrong.\textsuperscript{172} However, in Type B-2 cases in which the second injury is tortious, courts hold the first tortfeasor liable as though the second tort had not occurred.\textsuperscript{173} They hold the second tortfeasor liable only for the balance of the plaintiff's damages.\textsuperscript{174} This approach avoids the injustice of using the "but for" rule to allow both tortfeasors to escape liability for the duplicated portion of the harm.\textsuperscript{175}

b. Efficiency and Fairness

From a corrective justice perspective, Type B-2 cases, in which both

\begin{itemize}
  \item \textsuperscript{168} See \textit{Stene}, 14 D.L.R (2d) at 78; \textit{Baker}, 2 W.L.R. at 57.
  \item \textsuperscript{169} \textit{Stene}, 14 D.L.R (2d) at 78.
  \item \textsuperscript{170} See cases cited \textit{infra} notes 171-75.
  \item \textsuperscript{172} See \textit{Penner}, 5 W.W.R. at 332-33.
  \item \textsuperscript{173} Id. at 334; see also Taylor v. Simonis, 11437 of 1995 BC9700920 (Supreme Court of New South Wales, Common Law Division, 1997).
  \item \textsuperscript{174} For example, \textit{Performance Cars, Ltd. v. Abraham} involved successive collisions that both caused damage to the plaintiff's automobile which necessitated repainting the lower part of the car. [1962] 1 Q.B. 33 (1961). The court held that the tortfeasor who caused the second collision was not liable for the cost of the repainting. \textit{Id.} at 35-42.
  \item \textsuperscript{175} Jobling, 3 W.L.R. at 165; \textit{Penner}, 5 W.W.R. at 335; see also Taylor v. Simonis, 11437 of 1995 BC9700920 (Supreme Court of New South Wales, Common Law Division, 1997).
\end{itemize}
successive forces are tortious, and Type A-2 cases, in which both the actual and potential forces are tortious, are similar. It is desirable to hold at least one tortfeasor liable for duplicated harm because the plaintiff should have a remedy. Furthermore, both tortfeasors should be held liable if this is possible without either offending conventional notions of causation or creating unacceptably difficult proof problems. However, it is more feasible to impose liability for the duplicated harm on the first tortfeasor than on the second due to practical proof problems discussed below.

The efficiency analysis in the Type B-2 cases is also similar to that in Type A-2 cases. As a general rule, tortfeasors should not be held liable for harm that they could not have prevented. Therefore, the second tortfeasor should not be liable for the duplicated harm because he could have done nothing to prevent the original loss. The major exception is that liability for duplicated harm is justified if it is necessary to prevent strategic behavior. Strategic behavior occurs when the first tortfeasor induces a second tortfeasor to cause duplicated harm under the belief that both tortfeasors will escape liability for the duplicated harm.

There is an efficiency argument for imposing liability on the first tortfeasor for the duplicated harm. Not knowing that the second tort was going to occur, the first tortfeasor occupies the position of a simultaneous joint tortfeasor. Potential liability must be great enough to induce the tortfeasor to guard against harm that might be duplicated by other tortfeasors unless he knows that the other torts will inevitably occur. Therefore, to achieve appropriate deterrence, the scope of liability must include harm duplicated by other tortfeasors.

This argument has implications for the use of mortality tables to calculate life expectancy in order to determine loss of earning capacity. Standard mortality tables consider torts and crimes when calculating life expectancy. The efficiency argument suggests that these tables should estimate life expectancy without taking torts and crimes into account.

In Type B-2 cases, the practice of imposing liability on the first tortfeasor for duplicated harm is consistent with the dual tort goals of fairness and efficiency. Thus far, courts have been unwilling to place liability on the second tortfeasor in Type B-2 cases. The practice of exonerating the second tortfeasor is efficient. However, it may not be fair, particularly in cases in which a judgment against the first tortfeasor is uncollectible. There are at least two theories that courts could use to hold the second tortfeasor liable. First, some scholars suggest holding the second tortfeasor liable on the theory that he deprived the plaintiff of her action against the first tortfeasor for the duplicated

176. See supra text accompanying note 111.
177. See supra note 30 and accompanying text.
178. See supra text accompanying notes 112-18.
179. See Fredericks v. Pittsburgh & L.E.R. Co., 16 N.E.2d 1009, 1014 (Ohio Ct. App. 1938) (finding liability in multiple sufficient cause cases when the forces are concurrent, but not when they are successive).
Although this is a plausible theory of liability, it has the disadvantage of exempting the first tortfeasor from liability.

A second approach would hold both tortfeasors liable based on the economic loss theory. This theory would work if courts valued the loss at the time of the second accident rather than at the time of the first accident. Under this theory, courts would regard the first tortfeasor as the sole cause of the loss of value between the first injury and the second injury and regard both wrongdoers as the multiple sufficient causes of the duplicated loss of value after the second injury. This way, each tortfeasor would be jointly and severally liable for the duplicated harm because each was a substantial factor in producing that harm.

Courts are not likely to apply this economic loss theory to Type B-2 cases for two reasons. First, this theory may represent too great a departure from the usual analysis of causation to be acceptable to courts. Second, the theory presents impossibly difficult problems of proof when applied comprehensively to Type B-2 cases. Courts would have to examine all prior forces in the life of the victim or the victim's property to determine which forces produced reductions in value. Next, they would have to determine which of those forces were tortious and which were innocent. Finally, courts would have to apportion prior reductions in value between innocent and tortious causes so that they could hold the tortfeasor liable only for the harm duplicated by tortious causes. To circumvent these proof problems, courts would have to strictly limit the economic loss theory to cases where evidence of a prior tortious force duplicating the loss is clear.

The recent Commonwealth cases probably represent the most acceptable approach to Type B-2 cases. They provide plaintiffs with a reasonable remedy, they fit in well with traditional views of causation, and they do not create unusually difficult problems of proof.

3. The First Force Is Innocent and the Second Is Tortious (Type B-3 Cases)

The third variation of cases in this section involves those in which the first occurrence results from innocent forces and the second results from tortious forces. Here, courts exonerate tortfeasors because their conduct caused no harm; the loss occurred before the tortious conduct took place. For example, in lost earning capacity cases, in which the victim has an established earning

180. King, supra note 15, at 1362-63; McGregor, supra note 143, at 381; see also HART & HONORÉ, supra note 97, at 247-48.
181. See supra text accompanying notes 120-39.
182. Type B-3 cases are analogous to Type A-3 cases.
183. See Carpenter, supra note 9 at 949-50; McGregor, supra note 143, at 382; Strachan, supra note 156, at 392; Wright, supra note 15, at 1799; see also Kerry v. England, 1898 App. Cas. 742, 744 (P.C. 1898) (appeal taken from L.C.) (exonerating tortfeasor responsible for giving a fatal dose of tartar emetic because of the victim's preexisting disease).
capacity at the time of trial, courts base damages on the loss of that existing capacity. That is, courts give tortfeasors the benefit of the preexisting forces that reduced the plaintiff’s capacity to earn money prior to the tortious injury even though the tortfeasor’s conduct was sufficient to duplicate the reduction in earning capacity. Thus, if the plaintiff is a fast food worker, courts will limit the plaintiff’s recovery to what she could earn as a fast food worker even though the injury was sufficient to destroy a greater earning capacity.

Another example of Type B-3 cases are those awarding compensation for destruction of property. Courts award damages on the basis of the property’s fair market value at the time of the harm. Thus, a building in a bad neighborhood is worth less than the same building in a good neighborhood. Courts give the defendants the benefit of all preexisting market forces that have reduced the value of the property before the defendant destroyed it.

These cases are clearly correct. Neither efficiency nor fairness requires that the tortfeasor be held liable for harm duplicated by innocent forces.

IV. TORTIOUS CONDUCT CAUSING BENEFIT TO THE PLAINTIFF

It is possible for a defendant’s tortious conduct to cause a benefit to the plaintiff as well as a detriment. On occasion, courts permit the defendant to mitigate damages by offsetting the benefit against the harm. Section 920 of the Restatement (Second) of Torts sets out the “benefit rule” as follows:

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

The compensation objective of tort law is to put the plaintiff as nearly as possible in the position she would have occupied if the defendant’s wrong had caused no injury. The plaintiff should be fully compensated, but should not recover any windfall. The benefit rule is a corollary of the tort principle of compensation because it prevents plaintiff from profiting from a windfall. The benefit rule is designed to help courts achieve corrective justice in awarding damages.

185. See RESTATEMENT (SECOND) OF TORTS § 927 cmt. c at 535 (1979) (noting that “value” includes market value and value to the owner).
186. See supra text accompanying notes 140-41.
188. 4 HARPER ET AL., supra note 9, § 25.1, at 493.
189. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.1, at 210 (2d ed. 1993).
190. 4 HARPER ET AL., supra note 9, § 25.4, at 519.
The following examples illustrate this rule. If a trespasser builds a trestle or deposits soil on the plaintiff's land, the value of the trestle timbers as merchandise or the increased value of the land due to the soil will be set off against the other damages.\textsuperscript{191} If the trespass is a net benefit, the trespasser will be liable for nominal damages only.\textsuperscript{192} In the New Jersey case \textit{Gracia v. Meiselman},\textsuperscript{193} a patient consented to a highly beneficial operation, but the surgeon negligently failed to inform the patient of a risk of minor nerve damage inherent in the operation.\textsuperscript{194} Nerve damage occurred and the patient sued, alleging that he would not have consented to the operation if he had known of the risk.\textsuperscript{195} The court held that the jury must be instructed to "subtract from the damages proximately caused by the nerve damage the benefits received from the operation."\textsuperscript{196} Thus, if a properly performed operation ultimately benefits the plaintiff and no alternative treatment options are available, the plaintiff will recover no damages.\textsuperscript{197}

One of the most common uses of the benefit rule involves the wrongful conception of a normal healthy child, as might occur after a tubal ligation or vasectomy fails. One line of authority holds that the birth is a net benefit as a matter of law; therefore, the parents have no action for the cost of raising the child.\textsuperscript{198} Another line of authority holds that the jury must decide on a case-by-case basis whether the child is a net detriment, in which case the parents' recovery for the cost of raising the child would be reduced by the benefits they are expected to receive in the form of companionship, affection, and the like.\textsuperscript{199} These cases represent a somewhat unusual application of the benefit rule. The Restatement version of the benefit rule does not apply in wrongful conception cases because the interest benefitted by the child (psychological) is different than the interest harmed (financial) by the defendant.\textsuperscript{200}

The benefit rule is an equitable doctrine\textsuperscript{201} which is applied somewhat inconsistently for two reasons. First, courts are reluctant to permit a defendant to impose an unwanted benefit on a plaintiff. Thus, in \textit{Burtraw v. Clark},\textsuperscript{202} the defendant trespassed on the plaintiff's land by digging a drainage ditch across

\textsuperscript{191} Meier \textit{v. Portland Cable Ry. Co.}, 19 P. 610, 616 (Or. 1888); Murphy \textit{v. City of Fond du Lac}, 23 Wis. 365, 366 (1868).
\textsuperscript{192} \textit{Meier}, 19 P. at 616; \textit{Murphy}, 23 Wis. at 366.
\textsuperscript{194} \textit{Id.} at 1373.
\textsuperscript{195} \textit{Id.} at 1373-74.
\textsuperscript{196} \textit{Id.} at 1379.
\textsuperscript{197} \textit{Id.}
\textsuperscript{200} \textit{RESTATEMENT (SECOND) OF TORTS} § 920 (1979).
\textsuperscript{201} \textit{See Gracia}, 531 A.2d at 1378.
\textsuperscript{202} 61 N.W. 552, 552 (Mich. 1894).
it. The landowner sued, claiming the cost of filling in the ditch as damages. The defendant contended that there were no damages because the ditch enhanced the value of the land. The court held that the plaintiff was entitled to recover the cost of filling in the ditch if the jury found that he intended to fill it in. If the jury found, however, that the plaintiff intended to keep the ditch and that the ditch increased the value of the land, then the plaintiff would be entitled to nominal damages only.

Second, the law is unwilling to permit tortfeasors to take advantage of benefits conferred on victims by third parties. Under the collateral source rule, "payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." An obvious application of this rule permits a plaintiff to recover medical expenses that have been paid by an insurance company. Although less obvious, it also prevents a defendant in a wrongful death case brought by the spouse of the victim from introducing evidence that plaintiff has remarried.

V. IMPLICATIONS FOR ECONOMIC ANALYSIS OF TORT LAW

The preceding analysis illustrates that in valuing damages in tort cases courts generally exonerate tortfeasors only from liability for harm that would have been duplicated by other innocent causes. This is generally consistent with economic theory. In implementing this approach, courts employ two significant practices. First, when there is no specific evidence of the victim's probable future, courts cut off liability for future harm, such as lost earning capacity, after the date when the mortality tables project that the victim's death would have duplicated that harm. Second, when the litigants produce specific evidence to show that the victim's harm would have been duplicated either earlier or later than indicated by the mortality tables, courts cut off the defendant's liability as of that date.

Pursuant to the second practice, defendants can reduce their damages by showing that the victim was suffering from a preexisting disease or infirmity, or that the victim subsequently contracted a disease, that either did or will eventually duplicate the harm caused by the defendant. Defendants can also show that the plaintiff's harm would have been duplicated by an actual or potential subsequent accident. Plaintiffs likewise can obtain greater damages by showing that the victim would have lived longer than the mortality tables indicate.

203. See id.
204. Id.
205. Id. at 553.
206. Id.
207. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).
The second practice—adjusting the victim’s life expectancy by considering specific evidence of the victim’s good health, bad health, and past and future accidents—is not consistent with the economic theory of tort law. This practice systematically results in underdeterrence because, on average, it holds defendants liable for less harm than they cause. The effect of the practice is to hold defendants liable for average damages, by reference to mortality tables, in cases in which specific evidence of the victim’s actual or potential future is not available and to hold defendants liable for less than average damages when specific evidence is available. Thus, defendants as a whole are underdeterred because they are held liable for less harm than they cause. To state the point differently, optimal deterrence does not require the use of specific evidence in conjunction with mortality tables because the tables already take into account the accidents that are the stuff of specific evidence.

As a practical matter, underdeterrence occurs because specific evidence is almost always evidence offered by a defendant of an actual or potential disease or accident that caused or would have caused a duplication of harm sooner than predicted by mortality tables. In theory, plaintiffs can present evidence that the victim would have lived longer than predicted by the mortality tables, but such evidence is usually too scarce and too weak to bring the total damages awarded to plaintiffs up to an amount equal to the amount of harm that defendants cause.

Consider death by non-natural causes. Accidents are the fifth leading cause of death for all age groups. For certain groups, such as white males between the ages of 25 and 44, accidents are the leading cause of death. When the evidence is available, defendants can reduce their liability by showing actual and potential accidents. Yet, in cases in which the defendants have no such evidence, plaintiffs will find it virtually impossible to prove that the victim would have lived appreciably longer than average. The plaintiff can introduce evidence that the victim had a relatively safe occupation, but this evidence is quite weak. Also, it has no tendency to negate future non-occupational accidents, such as traffic accidents. Therefore, the plaintiff’s opportunity for enlarging damages by showing above-average life expectancy is more restricted than the defendant’s opportunity for decreasing damages.

Death caused by disease creates similar problems for plaintiffs. The kind of evidence that a plaintiff can use to show that the victim would have lived longer than average is limited to such things as the victim’s general good health and good habits. This type of evidence is comparatively weak. It is unlikely to result in a sufficient number of above-average awards to counterbalance the below-average awards in cases in which defendants have evidence of shortened life expectancy. For example, in cases in which the defendant can show that a young victim is suffering from a terminal illness, the likely result will be an award of damages well below the average. Yet, when the plaintiff can show that an equally young victim was healthy and had good habits, the result will

209. See Anderson et al., supra note 35.
210. Id. tbl.7 at 28.
never be an award of damages sufficiently above average to bring the damages in all such cases up to the average.

A system that ignores the plaintiff's individual circumstances and awards damages only on the basis of average life expectancy of a person of the plaintiff's age is more likely to produce optimal deterrence. It is also likely to be more administratively efficient than the present system. However, courts could not adopt an average damage approach without abandoning the "first purpose of tort law," which is to restore the plaintiff to the position she would have occupied if the tort had not occurred. Courts can only restore the plaintiff to her rightful position by using precise information about what that position would have been. Awarding average damages in all cases would almost always frustrate this fundamental tort policy because most plaintiffs would get either a windfall or a shortfall. For this reason, courts are unlikely to adopt an average damage approach.

The way courts value damages tells us much about the tort system. Namely, tort law is more concerned with corrective justice than with deterrence. As Judge Posner stated in *Brackett v. Peters*:

>Tort law, which has compensatory as well as deterrent functions, focuses on injury, while criminal law, which emphasizes deterrence and incapacitation, focuses on the dangerousness of the defendant's conduct. There is no tort liability without proof of injury, but there are plenty of crimes that are punishable though no injury resulted—many attempts and conspiracies, for example. A victim's eggshell skull may require a refined adjustment in damages to reflect the likelihood that the victim would because of his vulnerability have been injured sooner or later nontortiously. But a criminal assailant is punishable as a first-degree murderer "no matter how feeble the spark" of life that his blow extinguished. Uncompleted crimes are often punished severely; and when injury or death ensues from deliberate wrongdoing, . . . the criminal law comes down heavily on the defendant without worrying overmuch about the precise amount of harm inflicted.

**VI. IMPLICATIONS FOR MULTIPLE SUFFICIENT CAUSE CASES**

In multiple sufficient cause cases, in which one of the forces was innocent, courts are split on the question of whether the tortfeasor should be liable. Absent strategic behavior, there is no efficiency reason to impose liability on the tortfeasor when one of the forces was non-tortious. The corrective justice argument for imposing liability is also quite weak because liability places the plaintiff in a better position than she would have occupied if the tort had not

211. *Restatement (Second) of Torts* § 901 cmt. a at 452 (1979).
212. 11 F.3d 78, 82 (7th Cir. 1993) (citations omitted).
213. *See supra* notes 7-10 and accompanying text.
214. *See supra* note 30 and accompanying text.
occurred. The essence of the fairness argument is that it is wrong to allow a culpable tortfeasor to escape liability to an innocent plaintiff by hiding behind an innocent force. The duplicated harm cases provide strong evidence that this fairness argument is too weak to warrant the imposition of liability.

In duplicated harm cases, courts hold at least one tortfeasor liable for duplicated harm when all duplicating forces are tortious. The unfairness of denying recovery to an innocent plaintiff by allowing each wrongdoer to assert the wrong of the other is manifest. Imposing liability places the plaintiff in the position she would have occupied if no tort had occurred. When one force is innocent, however, the usual damage rule applies and the plaintiff bears the burden of the duplicated losses. This is fair because the tort leaves the plaintiff no worse off than if the tort had not occurred. To the contrary, imposing liability violates the rule against awarding windfalls.

The near universality of the principle that applies in duplicated harm cases involving an innocent force, and the pervasiveness of such cases, suggests that fairness considerations do not warrant liability in multiple sufficient cause cases involving an innocent force. The early multiple sufficient cause cases had it right. Tortfeasors should be liable only if all duplicating forces are tortious. When one of the forces is innocent in the multiple sufficient cause cases, the plaintiff has no better fairness argument for suspending the normal rules of causation than do plaintiffs in the duplicated harm cases. From a policy perspective, the duplicated harm scenario and the multiple sufficient cause scenario are indistinguishable. The factual distinction between the scenarios is that when there are multiple sufficient causes, the innocent force concurs with the culpable force, but when the harm is duplicated, the innocent force does not necessarily concur in time. This distinction might have some emotional appeal, but it is irrelevant from a policy perspective.

VII. CONCLUSION

Most tort cases in which compensation is awarded for economic loss involve duplicated harm. This Article identifies two classes of duplicated harm cases, examines them in light of the policies underlying tort law, and offers suggestions for resolving difficult problems raised by these cases. This examination concludes that courts generally exonerate tortfeasors from liability for the duplicated portion of harm so long as the other force duplicating the harm was innocent. If all forces are tortious, courts generally hold one tortfeasor liable for the duplicated portion of the harm. This approach furthers the twin tort objectives of efficiency and fairness. When forced to choose between these two objectives in implementing specific details of the rules, however, the courts have opted for fairness rather than efficiency. This decision reflects the priorities of the tort system. This examination also has important

implications for how multiple sufficient cause cases involving innocent forces ought to be resolved.

The duplicated harm problem is complex because it presents itself in so many forms. No simple rule pertaining to this issue can produce ideal results in all cases. In the end, we must recognize that general rules of thumb can provide useful guidelines in deciding these cases, but they should not be controlling in situations where they fail to achieve desirable results.

The need for certainty and predictability in valuing damages is not as great as in some areas of law. A defendant who knows that he might be liable if he carelessly starts a dangerous fire knows enough to regulate his conduct. He does not need to know precisely how damages will be calculated in the lawsuits that might be brought against him in order to know that he should not start the fire. Thus, there is no reason to deny courts the flexibility they require to decide the diverse cases that raise this difficult damage valuation issue.