

## ARTICLES

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Daniel P. O’Gorman

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# ARTICLES

## CONTRACTS, CAUSATION, AND CLARITY

Daniel P. O’Gorman\*

Contract-law remedies start with the assumption that an injured party should be fully compensated for all losses caused by the breach.<sup>1</sup> As in tort law, however, difficult issues regarding the cause of an injured party’s loss sometimes arise, including situations in which multiple factors might have caused the loss.<sup>2</sup> And, like tort law, contract law is reluctant to apply the principle of full compensation when the loss was caused by multiple factors.<sup>3</sup>

Multiple factors contributing to a particular loss often suggest the existence of principles competing with contract law’s goal of full compensation. For example, the law seeks to avoid unlimited liability for losses caused by the breach (particularly if the loss was a remote consequence of the breach) to encourage parties to take

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\* Associate Professor, Barry University School of Law, J.D., New York University, 1993; B.A., University of Central Florida, 1990. The author is indebted to Dean Leticia M. Diaz for providing a research grant on behalf of Barry University School of Law, without which this Article would not have been possible, and to Dorothe Laguerre for research assistance.

<sup>1</sup> RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 2, intro. note (AM. LAW INST. 1981) (“The initial assumption is that the injured party is entitled to full compensation for his actual loss.”).

<sup>2</sup> See E. ALLAN FARNSWORTH, CONTRACTS 731 n.9 (4th ed. 2004) (“[T]he same problems of multiple causes and of intervening causes that enliven the law of torts also arise in connection with contract damages . . .”). The multiple factors contributing to a loss are known in tort law as the “causal set.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 cmt. c (AM. LAW INST. 2010). Multiple causes, however, should be distinguished from preemptive causes or duplicative factors, which occur when the breach causes the loss but subsequent events that did not in fact contribute to the loss would have caused the same loss (a “no worse off” situation). *Id.* cmt. k.

<sup>3</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e (AM. LAW INST. 1981).

reasonable actions to reduce losses caused by breach, and to urge parties to disclose, during contract negotiations, any special circumstances that would cause the loss from breach to be greater than ordinarily expected. Accommodating the full-compensation principle and these competing principles is the primary function of the rules of contract damages.

Contract law furthers these principles that compete with the full-compensation principle not through a single doctrine, but through a general causation requirement<sup>4</sup> plus the three limitations on an award of damages: the limitations of certainty,<sup>5</sup> avoidability,<sup>6</sup> and foreseeability,<sup>7</sup> with each governing different aspects of causation.<sup>8</sup> A problem, however, with treating causation issues under multiple doctrines is that courts and attorneys are sometimes confused about which doctrine applies, and doctrines are sometimes used in a manner that addresses a problem designed to be addressed by a different doctrine. This Article clarifies causation analysis in contract law and proposes a coherent framework for such an analysis.

Part I discusses common situations in which a causation issue arises in contract cases. Part II discusses the role each of the three limitations on contract damages plays in causation analysis. Part III proposes a coherent framework for analysis. Part IV is a brief conclusion.

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<sup>4</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 347(a), (b) (AM. LAW INST. 1981) (providing that an injured party has a right to damages for losses “caused” by the breach).

<sup>5</sup> See *id.* § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

<sup>6</sup> See *id.* § 350 (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation . . . . The injured party is not precluded from recovery . . . to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”).

<sup>7</sup> See *id.* § 351(1) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”).

<sup>8</sup> See, e.g., L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 373, 375 (1937) (“What is principally revealed in the actual application of the standard of certainty is a judicial disinclination to impose on the defendant liability for those injurious effects of his breach which do not result ‘directly,’ but are due to the internal structure of the plaintiff’s business. This disinclination finds a number of distinct doctrinal formulations, of which the requirement of ‘certainty’ is only one, the others being the test of foreseeability (*Hadley v. Baxendale*) . . . .” (footnote omitted)).

## I. SITUATIONS IN WHICH MULTIPLE FACTORS CONTRIBUTE TO A LOSS

Although situations involving multiple factors contributing to a loss are most commonly associated with the law of torts, multiple factors can contribute to a loss flowing from the breach of a contract.<sup>9</sup> Losses caused by a factor in addition to the breach can be divided into different categories based on (1) the source of the cause, i.e., whether the additional factor was caused by the injured party (what can be called an intrinsic cause) or, rather, by a third party or an act of nature (what can be called an extrinsic cause); (2) the timing of the cause, i.e., whether the additional factor existed at the time of contract formation (what can be called an existing cause), occurred after contract formation but before breach (what can be called an interim cause), or occurred after breach (what is called an intervening cause);<sup>10</sup> and (3) the contribution the factor played in the loss, i.e., whether the breach was a necessary but insufficient cause of the loss, a sufficient but unnecessary cause of the loss, or a necessary and sufficient cause of the loss.<sup>11</sup>

The following cases provide examples of these different types of causation scenarios. They also show that causation issues in contract law are more common than one might expect.

A contributing factor caused by the injured party and existing at the time of contract formation (an intrinsic, existing cause) was involved in the celebrated case of *Hadley v. Baxendale*.<sup>12</sup> In *Hadley*, a carrier breached a contract to deliver a miller's broken crankshaft to an engineer within a specified number of days, causing lost profits to the miller because the crankshaft operated the mill and the engineer needed the broken crankshaft as a model to make a replacement.<sup>13</sup> Although the carrier's breach of contract was a factor in the miller's lost profits, so was the miller's failure to keep a spare crankshaft on hand.<sup>14</sup> Thus, the injured party's actions (or

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<sup>9</sup> FARNSWORTH, *supra* note 2.

<sup>10</sup> See *Intervening Cause*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining *intervening cause* as "[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury"). "If the intervening cause is strong enough to relieve the wrongdoer of any liability, it becomes a *superseding cause*." *Id.*

<sup>11</sup> See David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 281 (2005–2006) (discussing necessary and sufficient causes).

<sup>12</sup> *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145.

<sup>13</sup> *Id.* at 147.

<sup>14</sup> *Id.* at 151.

inactions), existing at the time of contract formation (failing to have a spare crankshaft), contributed to the loss occurring.<sup>15</sup>

A contributing factor not caused by the injured party and existing at the time of contract formation (an extrinsic, existing cause) was involved in *Johnson v. Healy*.<sup>16</sup> In *Johnson*, the defendant breached a warranty to properly construct the foundation of a house.<sup>17</sup> The foundation was not suitable because of improper fill that had been placed on the lot some time before the builder had bought the lot.<sup>18</sup> Thus, the loss was caused not only by the improper foundation, but the improper fill as well.<sup>19</sup>

A contributing factor caused by the injured party and occurring after formation but before breach (an intrinsic, interim cause) was involved in *Lesmeister v. Dilly*.<sup>20</sup> In *Lesmeister*, the plaintiff entered into a contract for the construction of a grain storage building on his property.<sup>21</sup> The defendants breached the contract by building a defective building, but during construction the plaintiff contributed to the loss in multiple ways.<sup>22</sup> He dumped bushels of corn on the cement slab where the frame was being erected, interfering with construction.<sup>23</sup> Despite the fact that the frame was incomplete, he directed that the sides and roof be put on so the corn could be covered, even though the heavy metal framework should have been assembled before the sides and roof were attached.<sup>24</sup> He also asked the builder to change its procedure for attaching side panels, preventing the building from being waterproof.<sup>25</sup>

A contributing factor not caused by the injured party and occurring after formation but before breach (an extrinsic, interim cause) was involved in *Point*

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<sup>15</sup> *Id.* at 151.

<sup>16</sup> *Johnson v. Healy*, 405 A.2d 54 (Conn. 1978).

<sup>17</sup> *Id.* at 55, 57.

<sup>18</sup> *Id.* at 55–56.

<sup>19</sup> *Id.*

<sup>20</sup> *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983).

<sup>21</sup> *Id.* at 98.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

*Productions A.G. v. Sony Music Entertainment, Inc.*<sup>26</sup> In *Point Productions*, the plaintiff alleged that the defendant's breach caused it to go bankrupt, but evidence showed that after contract formation, the plaintiff's affiliated companies suffered a series of financial setbacks that also contributed to the plaintiff's financial instability.<sup>27</sup>

A contributing factor caused by the injured party after the breach (an intrinsic, intervening cause) was involved in *Offenberger v. Beulah Park Jockey Club, Inc.*<sup>28</sup> In *Offenberger*, the defendant breached a contract for the sale of trifecta tickets for a horse race, failing to provide the tickets for what turned out to be the winning combination.<sup>29</sup> The plaintiff, however, after receiving some of the tickets he had paid for, left the ticket window without checking to determine if he had received all of them.<sup>30</sup> It was stipulated that the plaintiff had "purchased a racing program which contain[ed] a notice in bold letters advising ticket purchasers to make sure that the ticket issued is the number requested and stating that mistakes cannot be rectified after one leaves the windows."<sup>31</sup> Thus, the plaintiff's failure to make sure he had received all of the tickets contributed to the loss occurring.<sup>32</sup>

A contributing factor not caused by the injured party and occurring after breach (an extrinsic, intervening cause) was involved in *Lenox, Inc. v. Triangle Auto Alarm*.<sup>33</sup> In *Lenox*, the defendant allegedly breached a contract by negligently installing a car alarm.<sup>34</sup> The plaintiff was in the business of selling jewelry, and the alarm was installed in the car of one of its salespersons.<sup>35</sup> A thief broke into the car

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<sup>26</sup> *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 215 F. Supp. 2d 336 (S.D.N.Y.), *opinion amended on reconsideration*, 2002 WL 31856951 (S.D.N.Y. Dec. 19, 2002).

<sup>27</sup> *Id.* at 339–40.

<sup>28</sup> *See Offenberger v. Beulah Park Jockey Club, Inc.*, No. 79AP-471, 1979 WL 209570 (Ohio Ct. App. Dec. 28, 1979).

<sup>29</sup> *Id.* at \*1–2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \*1.

<sup>32</sup> *Id.*

<sup>33</sup> *Lenox, Inc. v. Triangle Auto Alarm*, 738 F. Supp. 262 (N.D. Ill. 1990).

<sup>34</sup> *Id.* at 264.

<sup>35</sup> *Id.*

and stole \$125,000 worth of jewelry.<sup>36</sup> Thus, the loss was caused not only by the defective car alarm, but by the thief breaking into the car.<sup>37</sup>

With respect to the contribution that the breach played in the loss, a breach is a necessary but insufficient cause of the loss when, had the breach not occurred, the loss would not have occurred, but another factor was also necessary for the loss to occur. For example, in *Hadley*, the loss would not have occurred but for the carrier's breach, but the miller's lack of a spare crankshaft was also necessary. A breach is a sufficient but unnecessary cause when it alone would have caused the loss, but another factor would have caused the loss anyway. For example, in *California and Hawaiian Sugar Co. v. Sun Ship, Inc.*,<sup>38</sup> the defendant and a third party each failed to timely provide the plaintiff with a necessary portion of an integrated tug barge.<sup>39</sup> The defendant's breach was itself sufficient to cause the loss, but the loss would have occurred anyway because the third party also failed to provide a necessary portion of the tug barge.<sup>40</sup> When there are such multiple sufficient causes, the situation is referred to as a case of "overdetermined harm."<sup>41</sup> A necessary and sufficient cause is when the breach alone would have caused the loss, but there was another factor that contributed to the loss but was not itself sufficient to cause the loss. For instance, if in *Point Productions* the injured party's bankruptcy would have been caused by the defendant's breach alone, but other factors contributed to the injured party's weak financial condition, though they alone would have been insufficient, the breach would have been a necessary and sufficient cause of the loss.

## II. THE DIFFERENT ROLES IN CAUSATION ANALYSIS PLAYED BY THE THREE LIMITATIONS ON CONTRACT DAMAGES

As previously noted, contract law does not address causation issues within a single doctrine. Rather, the general causation requirement<sup>42</sup> plus each of the

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<sup>36</sup> *Id.* The case also involved a contributing factor by the plaintiff, which was keeping \$125,000 worth of jewelry in the car.

<sup>37</sup> *Id.*

<sup>38</sup> *Cal. & Hawaiian Sugar Co. v. Sun Ship, Inc.*, 794 F.2d 1433 (9th Cir. 1986), *amending opinion on denial of rehearing*, 811 F.2d 1264 (1987).

<sup>39</sup> *Id.* at 1435.

<sup>40</sup> *Id.*

<sup>41</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 27 cmt. b (AM. LAW INST. 2010).

<sup>42</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 347(a), (b) (AM. LAW INST. 1981) (providing that an injured party has a right to damages for losses "caused" by the breach).

limitations on an award of damages—the requirements of certainty,<sup>43</sup> mitigation,<sup>44</sup> and foreseeability<sup>45</sup>—govern different aspects. This section discusses the role each plays in the causation analysis. Before doing so, however, the importance of the causation analysis is demonstrated with a discussion of contract law’s rejection of the principle of apportionment.

### A. Failure to Apportion Damages

In contract law, most courts hold that there is no apportionment of responsibility for a loss,<sup>46</sup> even if the injured party contributed in some measure to the loss.<sup>47</sup> Contract law has also rejected equitable indemnification as a method of apportioning damages between multiple parties who contributed to a loss.<sup>48</sup> As stated in *Corbin on Contracts*:

In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff’s total injury may have been the result of many factors in addition to the defendant’s . . . breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally, the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant’s breach of contract among all the contributing factors causing the

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<sup>43</sup> See *id.* § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”).

<sup>44</sup> See *id.* § 350 (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation . . . [t]he injured party is not precluded from recovery [however] to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”).

<sup>45</sup> See *id.* § 351(1) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”).

<sup>46</sup> 5 CORBIN ON CONTRACTS § 999 (1964); see also David H. Fisk & R. Carson Fisk, 26-SPG CONSTRUCTION LAW 23 (2006) (“When a plaintiff’s cause of action arises from breach of contract, the majority of courts today will not apply a comparative causation analysis, whereby the amount of recoverable damages is apportioned according to each party’s percentage of fault.”).

<sup>47</sup> *Stop Loss Ins. Brokers v. Brown & Toland Med. Group*, 49 Cal. Rptr. 3d 609, 619–23 (Cal. Ct. App. 2006) (Pollack, J., concurring); James S. Schenck, IV & Kelli E. Goss, *Liability for Construction Defects That Result from Multiple Causes*, 9 J. AM. COLL. CONSTR. LAW. 45, 49 (2015) (“The *Restatement (Second) of Contracts* does not directly address apportionment of liability among several defendants for harm caused by breaches of separate contracts.”).

<sup>48</sup> *Stop Loss Ins. Brokers*, 49 Cal. Rptr. 3d at 619–23 (Pollack, J., concurring).

injury, and must his loss be segregated proportionately? To these questions the answer is generally No.<sup>49</sup>

Thus, the general rule is that a defendant whose breach causes a loss is responsible for the entire loss, even if other factors contributed to the loss.<sup>50</sup>

There have been, however, some exceptions. For example, some courts have apportioned liquidated damages when the owner in a construction project contributed to the builder's delay.<sup>51</sup> Some courts have also permitted a claim for contribution from another party who contributed to the injured party's loss.<sup>52</sup> Scholars have also advocated for apportioning liability based on degree of fault.<sup>53</sup> But, as stated by one court:

To permit apportionment of liability . . . arising solely from breach of contract would . . . do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed . . . . Nothing prevented [the defendant] from negotiating for protection from liability in its contract with the [plaintiff]. Having neglected to do so, it may not now be heard to complain that it is exposed to a claim for damages.

Nor are we persuaded that we should create a common-law right of contribution in contract actions. . . . [T]he need to liberalize the inequitable and harsh rules that once governed contribution among joint tort-feasors . . . are not

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<sup>49</sup> 5 CORBIN ON CONTRACTS § 999 (1964).

<sup>50</sup> See, e.g., *Havens Steel Co. v. Randolph Eng'g Co.*, 613 F. Supp. 514, 532 (W.D. Mo. 1985) ("The rule to be applied . . . is . . . the ordinary contracts rule applicable to damages involving multiple causes: that if the defendant's breach or fault was a 'substantial factor' in causing the injury, the defendant will bear full responsibility for it even though there were other, contributing causes. . . . The fact that . . . other parties may also have played some part in connection with the problem is immaterial."), *aff'd*, 813 F.2d 186 (8th Cir. 1987).

<sup>51</sup> *Jasper Constr. v. Foothill Junior Coll. Dist.*, 153 Cal. Rptr. 767, 774 (Cal. Ct. App. 1979), *disapproved of on other grounds*, *Los Angeles Unified Sch. Dist. v. Great Am. Ins.*, 49 Cal. 4th 739 (Cal. 2010). See generally Rocky Unruh & John Worden, *Liquidated Damages for Delay in Completion of Commercial Construction Projects: Are they Recoverable by the Owner When the Owner Contributes to the Delay?*, 34 SANTA CLARA L. REV. 1 (1993).

<sup>52</sup> 18 C.J.S. CONTRIBUTION § 10.

<sup>53</sup> John Barclay Phillips, *Out with the Old: Abandoning the Traditional Measurement of Contract Damages for a System of Comparative Fault*, 50 ALA. L. REV. 911, 926 (1999); see generally Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397 (2009).

pertinent to contract matters. Parties to a contract have the power to specifically delineate the scope of their liability at the time the contract is formed. Thus, there is nothing unfair in defining a contracting party's liability by the scope of its promise as reflected by the agreement of the parties. Indeed, this is required by the very nature of contract law, where potential liability is determined in advance by the parties.<sup>54</sup>

Thus, the failure of many courts to apportion damages in contract cases when there are multiple factors contributing to a loss makes contract law's causation rules in a sense more important than those in tort law. The following section discusses how contract law analyzes causation issues.

### *B. Different Doctrines Governing Causation Issues*

The traditional remedy for the breach of a contract is an award of money, rather than specific performance.<sup>55</sup> The award of damages is designed to protect the injured party's so-called expectation interest,<sup>56</sup> "which is his interest in having the benefit of the bargain by being put in as good a position as he would have been in had the contract been performed."<sup>57</sup> Thus, an injured party is entitled to recover from the breaching party, so-called expectation damages.<sup>58</sup> Making such an award the standard remedy seeks to encourage parties to rely on their contracts.<sup>59</sup>

Contract law has a general causation requirement providing that a loss can only be recovered if the breach "caused" the loss.<sup>60</sup> Additionally, there are three limitations on the recovery of expectations damages: the requirements of certainty, avoidability, and foreseeability.<sup>61</sup> As discussed below, each of these doctrines plays a distinct role in a causation analysis.

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<sup>54</sup> *Bd. of Educ. v. Sargent, Webster, Crenshaw & Folley*, 517 N.E.2d 1360, 1364–65 (N.Y. 1987).

<sup>55</sup> RESTATEMENT (SECOND) OF CONTRACTS § 346 cmt. a (AM. LAW INST. 1981).

<sup>56</sup> *Id.* § 347.

<sup>57</sup> *Id.* § 344(a).

<sup>58</sup> *Id.* § 347.

<sup>59</sup> FARNSWORTH, *supra* note 2, at 730.

<sup>60</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 347(a), (b) (AM. LAW INST. 1981) (providing that an injured party has a right to damages for losses "caused" by the breach).

<sup>61</sup> *Hoang v. Hewitt Ave. Assocs.*, 936 A.2d 915, 934 (Md. Ct. Spec. App. 2007).

Before discussing each of the doctrines, several different issues should be recognized. The first is which party has the *burden of persuasion*, meaning which party has the “duty to convince the fact-finder to view the facts in a way that favors that party.”<sup>62</sup> The second is the degree of proof necessary for the party with the burden of persuasion to discharge its burden, often called the *standard of proof*.<sup>63</sup> There is a spectrum of standards of proof used in law, including (in ascending order of difficulty) reasonable suspicion, probable cause, preponderance of the evidence, clear-and-convincing evidence, and beyond a reasonable doubt.<sup>64</sup> In a civil case, the standard of proof is typically preponderance of the evidence,<sup>65</sup> though in some situations it is clear-and-convincing evidence.<sup>66</sup> The third issue is what must be proven to discharge the burden.

### 1. General Causation Requirement

The first issue to be addressed when factors other than the breach might have caused or contributed to a loss is whether the defendant’s breach was the cause in fact of the loss.<sup>67</sup> Although this general causation requirement is related to the certainty limitation, the two doctrines are technically distinct. The general causation requirement involves whether the defendant’s breach caused the particular *type* of

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<sup>62</sup> *Burden of Persuasion*, BLACK’S LAW DICTIONARY, *supra* note 10.

<sup>63</sup> *Standard of Proof*, BLACK’S LAW DICTIONARY, *supra* note 10 (defining *standard of proof* as “[t]he degree or level of proof demanded in a specific case, such as ‘beyond a reasonable doubt’ or ‘by a preponderance of the evidence’”).

<sup>64</sup> Reasonable suspicion requires “[a] particularized and objective basis, supported by specific and articulable facts, for suspecting [the existence of the fact].” *Reasonable Suspicion*, BLACK’S LAW DICTIONARY, *supra* note 10. Reasonable suspicion is a lower standard than probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Probable cause is “[a] reasonable belief in the existence of facts . . . .” *Probable cause*, BLACK’S LAW DICTIONARY, *supra* note 10. Probable cause is a lower standard than preponderance of the evidence. *Young Oil Co. v. Durbin*, 412 So. 2d 620, 626 (La. Ct. App. 1982). Preponderance of the evidence is “[t]he greater weight of the evidence . . . .” *Preponderance of the evidence*, BLACK’S LAW DICTIONARY, *supra* note 10. Preponderance of the evidence is a lower standard than clear and convincing evidence. *In re Guardianship of Chamberlain*, 118 A.3d 229, 239 (Me. 2015). Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” *Clear and convincing evidence*, BLACK’S LAW DICTIONARY, *supra* note 10. Clear and convincing evidence is a lower standard than beyond a reasonable doubt. *State v. Profit*, 591 N.W.2d 451, 464 (Minn. 1999). Beyond a reasonable doubt is beyond a “belief that there is a real possibility that [the fact does not exist].” *Reasonable doubt*, BLACK’S LAW DICTIONARY, *supra* note 10.

<sup>65</sup> *Liberty Mut. Ins. v. Land*, 892 A.2d 1240, 1243 (N.J. 2006).

<sup>66</sup> *Lyndhurst v. Beaumont*, 170 N.E.2d 291, 294 (Ohio Com. Pl. 1959).

<sup>67</sup> FARNSWORTH, *supra* note 2, at 731 (“There is, of course, a fundamental requirement, similar to that imposed in tort cases, that the breach of contract be the cause in fact of the loss.”).

loss for which recovery is sought. The certainty requirement is about whether, assuming the breach caused the particular type of loss, the injured party can prove the *amount* of the loss to a reasonable certainty.

A well-known example of a case involving whether the type of loss was caused by the breach is *Redgrave v. Boston Symphony Orchestra*.<sup>68</sup> In *Redgrave*, an actress sued the Boston Symphony Orchestra (“BSO”) for breaching a contract for her to narrate a play.<sup>69</sup> She asserted that her losses included not only the money promised by BSO in exchange for her services, but the loss of other professional opportunities due to the negative publicity surrounding BSO’s termination of the contract.<sup>70</sup> The appellate court stated that this type of loss could, with appropriate evidence, be found to have been a sufficiently foreseeable consequence of the breach.<sup>71</sup> The court still denied recovery, except for one particular job, finding that she had failed to prove that BSO’s breach, rather than other factors (such as the actress’s political views), caused her to lose other jobs.<sup>72</sup> Thus, even if she could have proved the loss was sufficiently foreseeable and proved how much she would have made from those other jobs, she could not recover because she could not prove that the breach caused the particular *type* of loss for which she sought recovery (other jobs).

Courts, however, are not consistent on the rule applied in contract cases to determine whether the type of loss was caused by the breach. Some apply a but-for

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<sup>68</sup> *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888 (1st Cir. 1988).

<sup>69</sup> *Id.* at 890.

<sup>70</sup> *Id.* at 891–92.

<sup>71</sup> *Id.* at 894.

<sup>72</sup> *Id.* at 896–900.

test,<sup>73</sup> a position followed by the *Restatement (Second) of Contracts*;<sup>74</sup> while others apply a substantial-factor test,<sup>75</sup> a position followed by *Corbin on Contracts*.<sup>76</sup> Some courts grant discretion to the trial court to decide which standard to use.<sup>77</sup>

Before addressing each of these two tests, it is important to recognize that there would not be liability under either of the tests if it was clear that the breach played

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<sup>73</sup> *E.g., id.* at 893 (“The jury was given appropriate instructions to help it determine whether Redgrave had suffered consequential damages through loss of future professional opportunities. They were told to find that the BSO’s cancellation was a proximate cause of harm to Redgrave’s professional career only if they determined that ‘harm would not have occurred *but for* the cancellation and that the harm was a natural and probable consequence of the cancellation.” (emphasis added)); *Wright v. St. Mary’s Med. Ctr.*, 59 F. Supp. 2d 794, 801 (S.D. Ind. 1999) (“Traditional causation principles utilize an *ex post* test which requires courts to contemplate what would have probably happened ‘but for’ the defendant’s breach of contract . . .”); *Jakobiec v. Merrill Lynch Life Ins.*, No. 10-223, 2012 WL 3150518, at \*3 (D.N.H. Aug. 2, 2012) (“[T]he plaintiff can recover contract damages ‘only for loss that would not have occurred but for the breach.’” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e (AM. LAW INST. 1981))), *aff’d*, 711 F.3d 21 (1st Cir. 2013); *Meadowbrook Ctr., Inc. v. Buchman*, 90 A.3d 219, 227 n.7 (Conn. Ct. App. 2014) (“[S]ome jurisdictions have recognized a ‘but-for’ causation requirement with respect to breach of contract actions.”).

<sup>74</sup> RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. e (1981).

<sup>75</sup> *See, e.g., Havens Steel Co. v. Randolph Eng’g Co.*, 613 F. Supp. 514, 532 (W.D. Mo. 1985), *aff’d*, 813 F.2d 186 (8th Cir. 1987); *Bruckman v. Parliament Escrow Corp.*, 235 Cal. Rptr. 813, 820 (Cal. Ct. App. 1987); *Nelson v. Lake Canal Co.*, 644 P.2d 55, 59 (Colo. Ct. App. 1982); *Tuttle/White Constructors, Inc. v. Montgomery Elevator Co.*, 385 So. 2d 98, 100 (Fla. Dist. Ct. App. 1980); *Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 635 A.2d 487, 490 (N.H. 1993); *Am. Sanitary Sales Co. v. Dep’t of Treasury*, 429 A.2d 403, 407 (N.J. Super. Ct. App. Div. 1981); *Cammerer Farms v. Terra Int’l, Inc.*, No. CA91-02-020, 1991 WL 274322, at \*3 (Ohio Ct. App. Dec. 23, 1991); *Hunt v. Ellisor & Tanner, Inc.*, 739 S.W.2d 933, 938 (Tex. Ct. App. 1987). It has even been stated that the substantial-factor test is the general rule for contract cases. *See Havens Steel Co.*, 613 F. Supp. at 532 (“[T]he ordinary contracts rule applicable to damages involving multiple causes [is] that if the defendant’s breach or fault was a ‘substantial factor’ in causing the injury, the defendant will bear full responsibility for it even though there were other, contributing causes.”).

<sup>76</sup> *See* 5 CORBIN ON CONTRACTS § 999 (“In all cases involving problems of causation . . . the plaintiff’s total injury may have been the result of many factors in addition to the defendant’s . . . breach of contract . . . . In order to establish liability the plaintiff must show that the defendant’s breach was ‘a substantial factor’ in causing the injury.”). There are two other tests that are sometimes used outside of contract law and tort law—the “any factor” test and the “sole or exclusive factor” test. *See Anderson v. Standard Register Co.*, No. 01-A-01-9102-CV00035, 1992 WL 63421, at \*6 (Tenn. Ct. App. Apr. 1, 1992) (discussing the but-for, substantial-factor, and “sole or exclusive factor” test), *aff’d*, 857 S.W.2d 555 (Tenn. 1993). The “any factor” test is used under Title VII of the Civil Rights Act of 1964. *See Robert Brookins, Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 63–64 (1995) (concluding that Title VII’s motivating-factor test is synonymous with an “any factor” test).

<sup>77</sup> *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007).

no role whatsoever in the loss that occurred.<sup>78</sup> For example, assume a former employee breaches a nondisclosure agreement and discloses confidential information about his former employer to his new employer, and the new employer thereafter convinces a client to switch business from the former employer to the new employer. If the client, when deciding whether to switch business, did not consider the confidential information, then the breach did not cause the loss, and the former employee would not be liable under either test.

a. But-for Test

The but-for test for causation is a simple cause-in-fact test.<sup>79</sup> Under the but-for test, “[t]he defendant’s conduct is a cause of the [loss] if the [loss] would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the [loss], if the event would have occurred without it.”<sup>80</sup> Under this test, the breach must be a necessary condition of the loss.<sup>81</sup> This test requires a counterfactual inquiry: “One must ask what would have occurred if the actor had not [breached the contract].”<sup>82</sup> The but-for test follows from the general rule of expectation damages that “[i]n a breach of contract action, the objective is to place the injured party in the position he or she would have been in *but for* the breach.”<sup>83</sup>

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<sup>78</sup> See RESTATEMENT (SECOND) OF TORTS § 431 cmt. b (AM. LAW INST. 1965) (“In many cases the question before the court is whether the actor’s negligence was in fact the cause of the other’s harm—that is, whether it had any effect in producing it—or whether it was the result of some other cause, the testimony making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. In such a case, the question, whether the defendant’s negligence has a substantial—not merely negligible—effect in bringing about the plaintiff’s harm, does not arise if the testimony clearly proves that the harm is from a cause other than the actor’s negligence. Indeed, the testimony often makes it clear that, if the defendant’s conduct had any effect, the effect was substantial.”); *id.* § 432 cmt. b, illus. 1 (“A statute requires all vessels plying on the Great Lakes to provide lifeboats. One of the A Steamship Company’s boats is sent out of port without any such lifeboat. B, a sailor, falls overboard in a storm so heavy that had there been a lifeboat it could not have been launched in the sea then running. B is drowned. The A Company’s failure to provide lifeboats is not a cause of B’s death.”).

<sup>79</sup> Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 861 (Mo. 1993) (en banc).

<sup>80</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 266 (5th ed. 1984).

<sup>81</sup> See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 cmt. b (AM. LAW INST. 2010) (“[A] factual cause can also be described as a necessary condition for the outcome.”).

<sup>82</sup> *Id.* cmt. e.

<sup>83</sup> Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc., 872 P.2d 1359, 1366 (Colo. App. 1994) (emphasis added).

Professor David Robertson has proposed a five-step test for “but for” causation<sup>84</sup> that, under a contracts case, would proceed as follows: First, the injured party identifies the particular loss for which he is seeking damages.<sup>85</sup> Second, the defendant’s breach that allegedly caused the loss must be identified.<sup>86</sup> Third, one must imagine the state of the world if the defendant had performed as promised, but with no other changes.<sup>87</sup> Fourth, one must determine whether the particular loss still would have occurred in the hypothetical state of the world identified in step three.<sup>88</sup> The fifth and final step answers the question of whether there was but-for causation based on the conclusion reached in the fourth step.<sup>89</sup>

The but-for test as the determination of responsibility for a loss has been subject to various types of criticism, some commentators asserting that it provides for too much liability, and others that it provides for too little. For example, the but-for test can be viewed as too lenient in that it would provide for liability even if the breach played a comparatively small role in producing the loss in comparison to other contributing factors, so-called butterfly-effect cases<sup>90</sup> or overwhelming-force cases.<sup>91</sup> This lenient approach to causation is reflected in the *Restatement (Third) of Torts*: “So long as the factfinder determines that any one of the alleged acts was tortious and a but-for cause of the harm, that is sufficient to subject the actor to liability.”<sup>92</sup>

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<sup>84</sup> David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1771.

<sup>89</sup> *Id.*

<sup>90</sup> See Michael S. Moore, *Causation Revisited*, 42 RUTGERS L.J. 451, 506 (2011) (referring to such cases as “butterfly-effect cases”); John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The “But For” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2683 (2003) (same).

<sup>91</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 36 reporter’s note cmt. a (AM. LAW INST., Proposed Final Draft No. 1, 2005) (referring to such cases as “overwhelming force cases”).

<sup>92</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 cmt. i (AM. LAW INST. 2010); *id.* cmt. 1 (“So long as the defendant’s tortious conduct was more likely than not a factual cause of the harm, the plaintiff has established the element of factual cause.”); *id.* reporter’s note cmt. c (2010) (“That a party’s tortious conduct need only be a cause of the plaintiff’s harm and not the sole cause is well recognized and accepted in every jurisdiction.”).

The but-for test, applied strictly, would also provide for liability in a situation in which the wrongful act, although being a but-for cause of the loss, did not increase the risk of loss, and was merely a fortuitous cause of the loss.<sup>93</sup> Dean Prosser provided the following example in torts:

[I]f the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time for the car to be struck by lightning, speed is a cause of the accident, since without it the car would not have been there in time; and if the defendant driver is not liable to the passenger, it is because in the eyes of the law the negligence did not extend to such a risk.<sup>94</sup>

Courts have invariably found the defendant not liable in such situations.<sup>95</sup> In other words, there is no liability unless the wrongful aspect of the breach increased the risk of loss.<sup>96</sup>

Applying a but-for test as the determination of liability has been criticized, however, even when the wrongful act increased the risk of loss: “The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible.”<sup>97</sup> Thus, it has been argued that while but-for causation should be necessary for liability, it should not be sufficient, and it should solely be used as a rule of exclusion, excluding liability for losses that would have occurred even if there had been no

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<sup>93</sup> See William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 119 (1983) (“In an important class of cases, taking care would avoid an accident but liability is denied because, ex ante, the accident was not more probable on account of failure to take care.”).

<sup>94</sup> KEETON ET AL., *supra* note 80, at 264.

<sup>95</sup> See JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 180 (5th ed. 2013) (“If A is speeding and hits B, A can argue that she would have hit B even if she had been travelling at a lawful speed. . . . [O]ne could argue [however] that it was the speed with which A was travelling that placed A in the position on the road where she collided with B, warranting a conclusion that A’s excessive speed was the cause. Courts, however, have almost invariably rejected this analysis and [found] the speed inconsequential.”).

<sup>96</sup> See Richard W. Wright & Ingeborg Puppe, *Causation: Linguistic, Philosophical, Legal and Economic*, 91 CHI.-KENT L. REV. 461, 461 (2016) (“Causation of a legally recognized injury by the *wrongful aspect* of the defendant’s conduct is a fundamental requirement, as a matter of interactive (‘corrective’) justice and actual practice, for the defendant’s legal responsibility for such injury to an individual . . . .”) (emphasis added).

<sup>97</sup> KEETON ET AL., *supra* note 80, at 266.

breach.<sup>98</sup> Strangely, however, many courts and lawyers incorrectly view the but-for test as being a difficult test to satisfy.<sup>99</sup> As noted by one court, “[n]othing could be further from the truth.”<sup>100</sup>

The use of the but-for test has also been criticized for being too rigorous and enabling a defendant to unfairly avoid liability in certain situations. The first is a situation involving multiple, sufficient causes, situations in which two or more causes led to the loss, and either cause would have itself been sufficient (a case of overdetermined harm).<sup>101</sup> In such a situation, use of the but-for test would result in both defendants being absolved of liability, something considered to offend the retributive goals of law and to provide defendants with an unjustifiable windfall.<sup>102</sup>

The second is when the defendant’s breach causes the injured party to lose an opportunity for a benefit, but the opportunity of which the injured party was deprived would only have provided the injured party with a 50% or less chance of obtaining the benefit.<sup>103</sup> For example, if the defendant’s breach caused the injured party to lose the opportunity at recovering from an illness, but the chance of recovery, even if there had not been a breach, was 50% or less, then the injured party cannot prove that “but for” the breach, the injured party would not have suffered the loss.

The other type of criticism of the but-for test critiques its use in general. For example, commentators have argued that it is too difficult for a jury to imagine a counterfactual hypothetical, and asking the factfinder to do so invites the factfinder to be influenced by policy and value judgments about whether the defendant should be held liable.<sup>104</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., *Englewood Terrace Ltd. P’ship v. United States*, 94 Fed. Cl. 116, 124 (Fed. Cl. 2010) (stating it is more difficult to establish but-for causation than substantial-factor causation), *aff’d in part, rev’d in part*, 479 Fed. Appx. 969 (Fed. Cir. 2012); *City of Austin v. Houston Lighting & Power Co.*, 844 S.W.2d 773, 795–96 (Tex. App. 1992) (“Austin asserts that the applicable burden of proof in contract cases is ‘substantial factor’ causation and that ‘but for’ causation requires a higher burden of proof.”).

<sup>100</sup> *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993).

<sup>101</sup> Rue, *supra* note 90, at 2705.

<sup>102</sup> *Id.* at 2706.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2707–13.

### b. Substantial-Factor Test

The contours of the substantial-factor test for causation are difficult to state because it can be used either as an additional requirement to *avoid liability* in cases where the breach is only an insubstantial, *de minimis* factor in causing the loss (butterfly-effect or overwhelming-force cases) or a fortuitous cause, or as an alternative way to *establish liability* when the injured party cannot carry the burden of proving causation under the but-for test.<sup>105</sup> The origin of the substantial-factor test shows that it was intended to provide an alternative way to establish liability in situations involving multiple, sufficient causes (cases of overdetermined harm).

The test's origin is typically traced to the tort case of *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, decided in 1920 by the Supreme Court of Minnesota.<sup>106</sup> In *Anderson*, the plaintiff's property had been damaged by fire, and the plaintiff alleged the defendant's train engine had emitted a spark that started the fire.<sup>107</sup> The defendant argued that another fire of unknown origin had also been moving in the direction of the plaintiff's property, and would have independently caused the damage even if the defendant's engine had not started the separate fire.<sup>108</sup> The Supreme Court of Minnesota, however, approved a jury instruction that the defendant would nevertheless be liable as long as its conduct was a "substantial factor in causing plaintiff's damage."<sup>109</sup> Prosser and Keeton explain that not requiring but-for causation in such a situation, and only requiring substantial-factor causation, is justified because

it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it; and it is equally clear that

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<sup>105</sup> See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 cmt. j (AM. LAW. INST. 2010) ("The 'substantial factor' rubric is employed alternately to impose a more rigorous standard for factual cause or to provide a more lenient standard.").

<sup>106</sup> 179 N.W. 45 (Minn. 1920), *overruled in part by* *Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921).

<sup>107</sup> *Id.* at 46.

<sup>108</sup> *Id.* at 47.

<sup>109</sup> *Id.* at 47–48.

neither can be absolved from that responsibility upon the ground that the identical harm would have occurred without it, or there would be no liability.<sup>110</sup>

Because of the facts in *Anderson*, such cases have been referred to as “two fires” cases.<sup>111</sup>

The substantial-factor test gained stature when the American Law Institute included it in the *Restatement (First) of Torts* in 1934.<sup>112</sup> As used in the *Restatement (First) of Torts*, the substantial-factor test appeared designed not only to provide for liability in situations involving multiple, sufficient causes as involved in *Anderson* (overdetermined harm or “two fires” cases),<sup>113</sup> but to also screen out liability in butterfly-effect and overwhelming-force cases, where the defendant’s contribution to the harm was a but-for cause but its contribution small.<sup>114</sup> The *Restatement (Third) of Torts* provides the following explanation of butterfly-effect or overwhelming-force cases:

While factual causes are not a matter of degree with regard to the outcome, in some cases, the inputs of the causes can be compared on a common scale. Thus, three actors may each contribute an equivalent dose of poison, all three of which are required to cause another’s death . . . . In this respect, one may, in comparing the inputs, determine that one is smaller or even trivial by comparison to the

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<sup>110</sup> KEETON ET AL., *supra* note 80, at 267; *see also* Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862–63 (Mo. 1993) (“We now reiterate that the ‘but for’ test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury.”).

<sup>111</sup> *Callahan*, 863 S.W.2d at 861.

<sup>112</sup> RESTATEMENT (FIRST) OF TORTS § 431(a) (AM. LAW INST. 1934).

<sup>113</sup> *See id.* § 432 (“If two forces are actively operating, one because of the actor’s negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor’s negligence may be held by the jury to be a substantial factor in bringing it about.”).

<sup>114</sup> *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 36 cmt. a (AM. LAW INST. 2010) (“Section 431 of the first Restatement and of the Second Restatement required that tortious conduct be a ‘substantial factor’ for it to constitute a legal cause of harm, which might be understood to prevent trivial or insubstantial causes from being sufficient to subject an actor to liability.”); Rue, *supra* note 90, at 2690 (“[T]he drafters of the original Restatement seem to have been primarily concerned with protecting defendants from unlimited liability from the ‘but for’ results of their tortious acts.”).

others, even though each is a necessary link in the causal chain that produced the outcome.<sup>115</sup>

Dean Prosser advocated for the substantial-factor test as a limitation on recovery in such situations, which he termed “troublesome” cases, providing the following example: “[W]here one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.”<sup>116</sup>

The comments to the *Restatement (First) of Torts* support the conclusion that the substantial-factor test’s purpose was, according to the ALI, in part to avoid unlimited liability:

In order to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2), this is necessary but it is not of itself sufficient. The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff’s harm. The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

... It is only where the evidence permits a reasonable finding that the defendant’s conduct had some effect that the question whether the effect was substantial rather than negligible becomes important.<sup>117</sup>

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There are frequently a number of events each of which is not only a necessary antecedent to the other’s harm, but is also recognizable as having an appreciable effect in bringing it about. Of these the actor’s conduct is only one. Some other event which is a contributing factor in producing the harm may have

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<sup>115</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 reporters’ note cmt. j (AM. LAW INST. 2010).

<sup>116</sup> KEETON ET AL., *supra* note 80, at 267–68; *see also* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 reporters’ note cmt. j (AM. LAW INST. 2010) (“Another justification for the substantial-factor test is that it enables insignificant or trivial causes to be eliminated as causes. Dean Prosser advocated this purpose for the test with a hypothetical about an individual throwing a match into a forest fire.”).

<sup>117</sup> RESTATEMENT (FIRST) OF TORTS § 431 cmt. a, b (AM. LAW INST. 1934).

such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor. So too, although no one of the contributing factors may have such a predominant effect, their combined effect may, as it were, so dilute the effects of the actor's negligence as to prevent it from being a substantial factor.<sup>118</sup>

Thus, the substantial-factor test was used in the *Restatement (First) of Torts* not to determine whether the defendant's conduct caused the injured party's loss in a descriptive sense, but whether, assuming the defendant's conduct was the but-for cause of the loss, the defendant's contribution was significant enough that he should be liable for the loss.

In fact, the *Restatement (First) of Torts* identified important considerations in determining whether the defendant's conduct was a substantial factor in bringing about the loss, and none of them deals with causation in a factual sense.<sup>119</sup> And the *Restatement (Second) of Torts*, published in 1964, retained and replicated the substantial-factor test set forth in the *Restatement (First) of Torts*.<sup>120</sup> The comments reiterated that but-for causation is typically necessary, but not sufficient.<sup>121</sup>

Thus, the substantial-factor test of the First and Second *Restatements of Torts* is broader than but-for causation in the respect that it follows *Anderson* and provides for liability in a situation involving multiple, sufficient causes when the but-for test would not. At the same time, it is stricter than the but-for test because but-for causation is typically a necessary, but not sufficient, condition to liability.<sup>122</sup>

Importantly, however, some courts applied the substantial-factor test as an easier way to establish liability in all situations, not simply those involving multiple,

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<sup>118</sup> *Id.* § 433 cmt. d.

<sup>119</sup> *See id.* § 433 (“The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another: (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm; (c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (d) lapse of time.”).

<sup>120</sup> RESTATEMENT (SECOND) OF TORTS § 431(b) (AM. LAW INST. 1965).

<sup>121</sup> *Id.* § 431 cmt. a.

<sup>122</sup> *Id.*

sufficient causes.<sup>123</sup> This meant that the injured party could establish causation by proving that the defendant's conduct was a substantial factor contributing to the loss, even if the injured party could not establish it was a but-for cause of the loss, essentially using the substantial-factor test to lighten the injured party's burden of establishing causation in fact.

Like the but-for test, the substantial-factor test has been criticized. In particular, it has been criticized for failing to provide meaningful guidance on what is meant by "substantial."<sup>124</sup> In fact, the *Restatement (Third) of Torts* concludes that the substantial-factor test has "proved confusing and been misused," and thus adopts a but-for test as the sole test for factual causation,<sup>125</sup> except in cases involving multiple, sufficient causes.<sup>126</sup> The reporter states: "In short, for purposes of determining whether a tortious act is a factual cause of harm there are no degrees of factual cause. A necessary condition for a relevant harm is a factual cause of that harm, without limitation."<sup>127</sup>

With respect to the misuse of, and confusion about, the substantial-factor test, the reporter noted that some courts have used it to apply a more lenient standard than "but for" causation, while others have used it to apply a stricter standard than "but for" causation.<sup>128</sup> The reporter stated:

[The substantial-factor test] may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not "substantial factors." Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a

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<sup>123</sup> See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 cmt. j. (AM. LAW INST. 2010) ("[S]ome courts have accepted the proposition that, although the plaintiff cannot show the defendant's tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm.").

<sup>124</sup> Rue, *supra* note 90, at 2713.

<sup>125</sup> See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 (AM. LAW INST. 2010) ("Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.").

<sup>126</sup> *Id.* § 27.

<sup>127</sup> *Id.* § 26 reporters' note cmt. j.

<sup>128</sup> *Id.*

but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation.<sup>129</sup>

With respect to courts applying a stricter standard, the reporter notes that using the test in this fashion “appear[s] to be doing scope-of-liability (proximate-cause) duty.”<sup>130</sup> The comment states that “[i]n the cases of a trivial dose that contributes to an overdetermined causal outcome, courts employ scope-of-liability (proximate cause) grounds to avoid liability for the actor responsible for such.”<sup>131</sup> Also, “the advent of comparative responsibility, comparative contribution, and modification of joint and several liability provide more refined means [than the substantial-factor test] to address such matters.”<sup>132</sup>

The *Restatement (Third) of Torts* addresses issues involving scope of risk under specific doctrines, rather than factual causation.<sup>133</sup> Although the *Restatement (Third) of Torts* provides for an exception for trivial causes,<sup>134</sup> that limitation only applies when there are multiple, sufficient causes.<sup>135</sup> If a trivial cause is a necessary condition of the loss, there is sufficient causation: “[T]he actor who negligently provides the straw that breaks the camel’s back is subject to liability for the broken back.”<sup>136</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (“[T]he author of the substantial-factor test, Jeremiah Smith, intended it to address the problem of proximate cause, not factual cause. See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911). Smith envisioned the use of but-for as the standard for factual causation, while arguing that some additional limitation on liability also was required in at least a small class of cases. By the time of the fifth edition of the Prosser treatise (after his death), it had come around to the view that the substantial-factor limitation was an evaluative limitation on liability rather than an aspect of factual causation.”).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* § 36.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* § 36 cmt. b (“The exception applies only when there are multiple sufficient causes and the tortious conduct at issue constitutes a trivial contribution to any sufficient causal set. . . . The limitation on the scope of liability provided in this Section is not applicable if the trivial contributing cause is necessary for the outcome; this Section is only applicable when the outcome is overdetermined.”).

<sup>136</sup> *Id.*

## c. But-For and Substantial-Factor Test in Contracts

The seminal case adopting the substantial-factor test for contract law is *Krauss v. Greenbarg*.<sup>137</sup> In *Krauss*, the War Department awarded an overall company a contract to supply a specified number of leggings to the Department.<sup>138</sup> The contract required certain quantities to be delivered at specified intervals, and provided for liquidated damages for any delays.<sup>139</sup> The overall company then entered into a subcontract with a webbing company to provide the webbing for the leggings by specified dates.<sup>140</sup> The webbing company, however, was late on its deliveries, and the overall company was late on its deliveries to the War Department, causing the overall company to be liable for liquidated damages under its contract with the War Department.<sup>141</sup>

In a lawsuit by the webbing company against the overall company for money owed under their contract, the overall company asserted a counterclaim for breach of contract and sought, as damages, the amount of liquidated damages incurred by the overall company under its War Department contract.<sup>142</sup> The webbing company denied liability for the overall company's losses.<sup>143</sup> The webbing company introduced evidence at trial tending to prove that its delay was not the sole cause of the overall company's delay in providing the War Department with the overalls, such additional factors including "a landlord's distress and eviction at the buyers' factory, a removal by the overall company of its plant, a shortage of eyelets necessary to the manufacture of the leggings, and excessive delay by the manufacturer even after all the webbing had been delivered."<sup>144</sup> The trial court instructed the jury that the webbing company should be liable if, despite other contributing causes, "the 'primary' 'real' 'main' 'chief' cause of the overall company's delay was the webbing company's failure to deliver on time . . . ."<sup>145</sup> The trial court also instructed the jury that the delay "had 'to be sufficient in itself to have delayed his (overall company's)

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<sup>137</sup> 137 F.2d 569 (3d Cir. 1943).

<sup>138</sup> *Id.* at 570.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 571–72.

<sup>145</sup> *Id.* at 572.

contract with the Government.”<sup>146</sup> The jury returned a verdict in the defendant’s favor on its counterclaim, and a judgment was entered.<sup>147</sup> On appeal, the webbing company argued that the instruction was erroneous, and that it could only be liable if its breach was the sole cause of the loss.<sup>148</sup>

The court of appeals affirmed the jury instruction, relying on the *Restatement (First) of Torts* and adopting the substantial-factor test:

If a number of factors are operating one may so predominate in bringing about the harm as to make the effect produced by others so negligible that they cannot be considered substantial factors and hence legal causes of the harm produced. In that event liability attaches, the requisites of legal cause being shown, only to the one responsible for the predominating, or substantial, factor bringing the harm.<sup>149</sup>

The court, in adopting the substantial-factor test, stated that “[t]his problem is the same in tort and contract, though liability for consequences of an act is often carried further in instances where the defendant’s liability is based on a tortious act.”<sup>150</sup>

The appellate court then held that the trial judge’s instruction required no less than this standard and, in fact, might have been more favorable to the webbing company than it should have been (presumably referring to the requirement that the breach must have been a sufficient cause of the loss, not simply a substantial and necessary cause of the loss).<sup>151</sup> The *Krauss* court adopted (for contracts) the substantial-factor test as the *Restatement (First) of Torts* apparently intended it to be—as a requirement in addition to but-for causation to screen out liability in butterfly-effect or overwhelming-cause cases.

Subsequent courts have followed *Krauss* and adopted the substantial-factor test as an additional requirement to but-for causation for the breach of a contract.<sup>152</sup> One

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 570.

<sup>148</sup> *Id.* at 572.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 572 n.4.

<sup>151</sup> *Id.* at 572.

<sup>152</sup> *Parke State Bank v. Akers*, 659 N.E.2d 1031, 1034–35 (Ind. 1995); *Fowler v. Campbell*, 612 N.E.2d 596, 602 (Ind. Ct. App. 1993); *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994).

court held that the plaintiff's loss must be proximately caused by the defendant's breach, and "[p]roximate cause' requires . . . that the defendant's conduct be a 'substantial factor' in bringing about the harm which results, not simply be just 'a' factor or have a 'but for' causative relationship with the consequent damages claimed."<sup>153</sup> Another court held that "[t]he [trial] court [in a contract action] correctly defined proximate cause [in its instruction to the jury], stating that it requires both 'but for' causation and that defendant was the 'substantial factor' in causing plaintiff's loss."<sup>154</sup> Courts applying the substantial-factor test in contracts have often recognized that the test, as adopted in *Greenbarg*, is stricter than a mere but-for test, and have even stated that the test is stricter in contracts than torts:

*Greenbarg* defines a substantial factor as "conduct [having] such an effect in producing the harm as to lead reasonable men to regard it as a cause." Recognizing this definition is vague at best, the court [in *Greenbarg*] notes that a substantial factor in contract would require more culpability than in tort before a defendant would be liable. Phrased differently, an injury in contract would have fewer "substantial factors" than would the same injury in tort.<sup>155</sup>

But as in tort law, courts employing the substantial-factor test in contract law have mischaracterized it, sometimes indicating it is in general a more lenient test than but-for causation. For example, as with tort cases, courts have stated that the but-for test is a stricter test than the substantial-factor test, which, as originally conceived, is only true in a case involving multiple, sufficient causes. As stated by one court:

The Federal Circuit employs one of two tests in order to determine causation: either the "substantial factor" or the "but for" causation test. The latter is considered the stricter test, as it requires the breaching party to be liable for

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<sup>153</sup> *In re* 222 Liberty Assocs., 101 B.R. 856, 863 (Bankr. E.D. Pa. 1989).

<sup>154</sup> *Wade v. Kessler Inst.*, 778 A.2d 580, 589–90 (N.J. App. Div. 2001), *aff'd as modified*, 798 A.2d 1251 (N.J. 2002). One court held it is the injured party's burden to show that the breach contributed in a substantial measure to its damages, whereupon the burden shifts to the defendant to prove that some intervening cause contributed to the damages. *Haven Assocs. v. Donro Realty Corp.*, 503 N.Y.S.2d 826, 830 (App. Div. 1986).

<sup>155</sup> *Zetter v. Griffith Aviation, Inc.*, No. CIV.A. 603-218-DCR, 2006 WL 1117678, at \*7 (E.D. Ky. Apr. 25, 2006).

damages that but for its breach would not have occurred, while the former only requires that the breach be a substantial factor in the damages that resulted.<sup>156</sup>

Some of the confusion might stem from the erroneous belief that but-for causation requires the breach to be the exclusive cause of the loss, leading to the belief that the substantial-factor test must therefore be more lenient.<sup>157</sup> Another court equated the “but for” test and the substantial-factor test.<sup>158</sup>

Courts have also used the substantial-factor test to avoid liability in fortuitous loss cases, such as *Zetter v. Griffith Aviation, Inc.*<sup>159</sup> In *Zetter*, an employment contract included a “temporary travel arrangement” clause,<sup>160</sup> under which the employer promised to provide air transportation to the employee and his family aboard a “company owned or leased aircraft.”<sup>161</sup> The employer, on a particular occasion, provided air transportation to the employee’s family on an airplane that was not company owned or leased, and due to pilot error, the airplane crashed, killing one of the employee’s children and injuring the other family members.<sup>162</sup> The employee sued for breach of contract, but the court held that because the crash was caused by pilot error rather than mechanical malfunctions on the plane, the employer’s breach was not a substantial factor in the loss.<sup>163</sup> Although the case can be viewed as holding that the type of plane played no role in the loss, it can also be viewed as holding that even if the loss would not have occurred had there been a

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<sup>156</sup> *Englewood Terrace Ltd. P’ship v. United States*, 94 Fed. Cl. 116, 124 (2010), *aff’d in part, rev’d in part*, 479 Fed. Appx. 969 (Fed. Cir. 2012).

<sup>157</sup> See *Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007) (“The proper standard, the government argues, is ‘but-for’ causation, under which the breaching party is liable only for those damages that it directly and *entirely* caused.” (emphasis added)).

<sup>158</sup> See *Brown v. Lockwood*, 432 N.Y.S.2d 186, 201 (App. Div. 1980) (“[I]t follows that in order to shift the duty to repay from the corporation to defendant, he must show that he would have been repaid by the corporation but for defendant’s nonperformance. That is to say defendant’s failure to timely make a personal loan in the required amount must have been a substantial contributing cause of the corporation’s bankruptcy.”).

<sup>159</sup> *Zetter*, 2006 WL 1117678, at \*11.

<sup>160</sup> *Id.* at \*1.

<sup>161</sup> *Id.* at \*4.

<sup>162</sup> *Id.* at \*1, \*7.

<sup>163</sup> *Id.* at \*7.

company owned or lease airplane (perhaps because there would have been a different pilot or different features of the plane), the breach did not increase the risk of a crash.

Contract law has also addressed the issue of multiple, sufficient causes, at least with respect to breaches by multiple parties. Courts hold that, as in tort law, “in [a] case of concurrent causation each defaulting contractor is liable for the breach and for the substantial damages which the joint breach occasions.”<sup>164</sup> As stated by one court:

Under the doctrine of concurrent breach of contract, “[w]here A and B owe contract duties to C under separate contracts, and each breaches independently, and it is not reasonably possible to make a division of the damage caused by the separate breaches closely related in point of time, the breaching parties, even though they acted independently, are jointly and severally liable.” In other words, “[w]hen two defendants independently breach separate contracts, and it is not ‘reasonably possible’ to segregate the damages, the defendants are jointly and severally liable.”<sup>165</sup>

Another court, however, rejected joint and several liability in such a situation, and instead apportioned liability based on the degree of fault of each defendant.<sup>166</sup>

One area where courts have relaxed the but-for requirement is cases involving the loss of chance. For example, if a breach causes the injured party to lose the chance at a particular gain, but the chance of having received it would have been 50% or less even if there had not been a breach, the injured party cannot establish but-for causation. The injured party, however, is permitted to recover the value of the lost opportunity if the promise was conditioned on a fortuitous event.<sup>167</sup>

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<sup>164</sup> Cal. & Haw. Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433, 1437–38 (9th Cir. 1986), *amending opinion on denial of rehearing*, 811 F.2d 1264 (1987).

<sup>165</sup> InsureOne Indep. Ins. Agency v. Hallberg, 976 N.E.2d 1014, 1030 (Ill. App. Ct. 2012) (quoting Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983); Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 740 (Minn. 1997)).

<sup>166</sup> *In re Emerald Casino, Inc.*, 530 B.R. 44, 210 (Bankr. N.D. Ill. 2014).

<sup>167</sup> RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (AM. LAW INST. 1981).

## 2. Reasonable Certainty

With respect to proving the amount of the loss to a reasonable certainty, this requirement is similar to proving causation with respect to the type of loss.<sup>168</sup> But it is different in that it assumes that the type of loss was caused by the defendant's breach, but that the *amount* or *extent* of the loss is unclear.<sup>169</sup> Courts use this standard to help accurately measure damages.<sup>170</sup> The issue is most commonly encountered when the injured party seeks a recovery of profits that would have been earned had the defendant not breached.<sup>171</sup> It has been argued that this is “[t]he big issue in business litigation—the one the huge verdicts turn on . . . .”<sup>172</sup>

To avoid undue speculation and thereby decrease the chance of a windfall, courts require the injured party to prove the loss (which under expectation damages includes the amount of gains prevented) to a “reasonable certainty.”<sup>173</sup> For example, in *MindGames, Inc. v. Western Publishing Co.*, the defendant allegedly breached a promise to market a new board game, but the court held that the injured party failed

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<sup>168</sup> See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 49 (6th ed. 2009) (“The certainty doctrine is . . . in part about causation.”).

<sup>169</sup> *Id.* at 497–98 (noting that once it is established that the breach caused injury, quantification is necessary); *Finkelberg v. Lockett*, 608 So. 2d 1214, 1222 n.4 (Miss. 1992) (“[I]t is well to bear in mind the distinction between the certainty required in proving *causation* in damages and that required in proving the *amount* of damages. Again, C.J.S. accurately states the latter rule and the distinction in the two: ‘§ 28-Uncertainty as to Measure or Extent. Uncertainty as to the measure or extent of damages does not bar recovery. [headnote] The rule as to the recovery of uncertain damages generally has been directed against uncertainty as to the fact or cause of damage rather than uncertainty as to the measure or extent. In other words, the rule against uncertain or contingent damages applies only to such damages as are *not the certain results* of the wrong, and not to such as are the certain results but *uncertain in amount*.’”); *Stevens Linen Assocs., Inc. v. Mastercraft Corp.*, 656 F.2d 11, 14 (2d Cir. 1981) (“[T]here is a distinction between proof of causation meaning proof that defendant’s acts caused any harm to plaintiff at all and proof of the amount of damage . . . .”); *Main v. State*, 25 Ill. Ct. Cl. 56, 58, 1965 WL 6400, at \*2 (Ill. Ct. Cl. Jan. 29, 1965) (“Although it is a well established maxim of law that damages, to be recoverable, must be actual, and not speculative or uncertain, a distinction has been drawn between uncertainty as to cause and uncertainty as to amount.”).

<sup>170</sup> Doug Carleton, Note, *Averting the New Business’ Battle to Prove Lost Profits: A Reinroduction of the Traditional Reasonable Certainty Rule as a Penalty Default*, 67 S. CAL. L. REV. 1573, 1576 (1994).

<sup>171</sup> RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (AM. LAW INST. 1981).

<sup>172</sup> Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What is Really Means*, 12 TRANSACTIONS: TENN. J. BUS. L. 11, 11 (2010).

<sup>173</sup> RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981).

to introduce sufficient evidence to establish the amount of profits that would have been earned had there been no breach.<sup>174</sup>

Although the certainty requirement, like the general causation requirement, is about causation (a certainty issue is simply a type of causation question—how much loss did the defendant’s breach cause?), it is useful to separate the broader question of causation into separate sub-issues to clarify the type of causation issue being addressed. Referring to the “causation” requirement when analyzing the type of loss and the “certainty” requirement when analyzing the amount of loss helps identify the precise causation issue to be resolved.<sup>175</sup> Although both deal with causation, the general causation requirement focuses attention on other possible causes for the loss, whereas the certainty requirement focuses attention not on other possible causes for the loss, but on the extent of the loss. Some courts state that the fact of loss must be established to a reasonable certainty, but once the fact of loss has been established the amount need not be proven to a reasonable certainty, something known as the “fact and amount rule.”<sup>176</sup>

Professor McCormick referred to the certainty requirement with respect to the amount of loss as “probably the most distinctive contribution of the American courts to the common law of damages,”<sup>177</sup> which is interesting because no one seems to be sure exactly what that contribution entailed. Although courts state that the amount of loss must be established to a “reasonable certainty,”<sup>178</sup> courts disagree on what it means to prove a loss with “reasonable certainty,”<sup>179</sup> other than perhaps agreeing that

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<sup>174</sup> See generally *MindGames, Inc. v. W. Pub. Co.*, 218 F.3d 652 (7th Cir. 2000).

<sup>175</sup> Even commentators conflate the general causation requirement and the certainty requirement. For example, Professor Farnsworth discussed the “loss of chance” doctrine as a relaxation of the certainty requirement. FARNSWORTH, *supra* note 2, at 804. It is, however, more appropriately considered a relaxation of the general causation requirement. In such cases, the injured party is typically deprived of an opportunity to receive a specified amount of money. While it is true that in a sense the injured party cannot prove to a reasonable certainty the amount of loss caused by the defendant’s breach, the issue is more appropriately considered one of general causation—the injured party cannot prove that the type of loss was caused by the breach.

<sup>176</sup> Lloyd, *supra* note 172, at 29.

<sup>177</sup> CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 124 (1935).

<sup>178</sup> See Lloyd, *supra* note 172, at 12 (“Every United States jurisdiction has adopted the rule that lost profits must be proven with reasonable certainty.”).

<sup>179</sup> See *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943 (Colo. 1985) (“[T]here are conflicting views of the meaning of the reasonable-certainty standard . . .”).

it means something less than beyond a reasonable doubt.<sup>180</sup> Specifically, there is disagreement whether the certainty requirement imposes a stricter standard of proof than the typical preponderance-of-the-evidence standard for proving damages in a civil action.

The *Restatement (Second) of Contracts* states that courts have traditionally applied a standard of proof in contract cases stricter than in tort cases.<sup>181</sup> Professor Joseph Perillo agrees, stating that although there is no satisfactory way of defining “certainty” or “reasonable certainty,” they mean “that the quality of evidence must be of a higher caliber than is needed to establish most other factual issues in a lawsuit.”<sup>182</sup> He maintains that different levels of stringency are imposed based on whether the injured party is seeking general damages (less stringent) or consequential damages (more stringent), and that “the stringency of its application has tended to vary in different decades dependent upon the makeup and philosophy of the bench in a particular jurisdiction at a particular time.”<sup>183</sup> Professor Perillo’s conclusion that the reasonable-certainty requirement is stricter than a preponderance-of-the-evidence standard is supported by the definition of *clear and convincing evidence*, which is “[e]vidence indicating that the thing to be proved is highly probable or *reasonably certain*.”<sup>184</sup> Perillo argues that “the standard of certainty, like

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<sup>180</sup> See, e.g., *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 594 (Or. 1977) (Lent, J., specially concurring) (“I must confess . . . that I have no more idea what reasonable certainty means than I have as to the meaning of certainty. I would assume that it is some lesser quantum of proof than . . . beyond a reasonable doubt, or to a moral certainty.”).

<sup>181</sup> RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (AM. LAW INST. 1981); see also FARNSWORTH, *supra* note 2, at 800; *McHale v. Toplovich*, No. 59729, 1992 WL 14403, at \*4 (Ohio App. Div. Jan. 30, 1992) (“As a general rule, an injured party cannot recover damages for breach of contract beyond the amount that is established by the evidence with reasonable certainty, and generally, courts have required greater certainty in the proof of damages for breach of contract than for a tort.”).

<sup>182</sup> PERILLO, *supra* note 168, at 498; see also Lloyd, *supra* note 172, at 16 (referring to the possibility of requiring “businesses to recover lost profits only when they can prove with a *great deal of certainty* that but for the actions of the defendant they actually would have earned those profits” (emphasis added)).

<sup>183</sup> PERILLO, *supra* note 168, at 498; see, e.g., *Tractebel Energy Mktg. v. AEP Power Mktg.*, 487 F.3d 89, 109 (2d Cir. 2007) (holding that under New York law, there is a lower standard for proving the amount of general damages than for consequential damages).

<sup>184</sup> *Clear and Convincing Evidence*, BLACK’S LAW DICTIONARY, *supra* note 10 (emphasis added). Some courts fail to recognize that “reasonable certainty” must refer to the standard of proof, sometimes stating that the injured party must prove losses to a reasonable certainty by a preponderance of the evidence. See, e.g., *Clean Fuel LLC v. United States*, 110 Fed. Cl. 415, 420 n.5 (2013) (“[T]he merits of a claim for lost profits concern whether the plaintiff has established by a preponderance of the evidence that . . . a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.” (citations omitted)); *Anderson v. Wade*, 33 Fed. Appx. 750, 756 (6th Cir. 2002) (“[T]he district court properly

the rule of foreseeability, is [thus] based at least partly upon a policy of limiting contractual risks.”<sup>185</sup>

Professor McCormick disagreed, maintaining that the reasonable-certainty standard is the equivalent of a probability (preponderance-of-the-evidence) standard,<sup>186</sup> a position followed by Chancellor John Murray,<sup>187</sup> some courts,<sup>188</sup> and some treatises.<sup>189</sup> Notably, Judge Richard Posner has stated that the reasonable-certainty requirement is the standard “applicable to proof of damages generally.”<sup>190</sup>

Professor Robert Lloyd has argued that a court, when applying the reasonably-certain test, decides “whether it is fair to award this much money on the basis of this much proof.”<sup>191</sup> He argues that

[i]f the term “reasonable certainty” were taken literally, the court’s confidence that the estimate was accurate would be the only factor considered. But . . . “reasonable certainty” is really code for “does the court think that, given all of the

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concluded that Anderson must show his damages to a reasonable certainty by a preponderance of the evidence, not by clear and convincing evidence.”).

<sup>185</sup> PERILLO, *supra* note 168, at 499; *see also* MCCORMICK, *supra* note 177, at 105 (“[T]he standard of ‘certainty’ was developed, and has been used, chiefly as a convenient means of keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise”); Lloyd, *supra* note 172, at 15 (“It has long been recognized that the economy cannot flourish when businesses are afraid to enter into transactions because they fear an inadvertent breach will lead to a huge damage award.”); Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *FORDHAM L. REV.* 1085, 1096 (2000) (“The restriction that damages be proved with reasonable certainty is applied with greater strictness in contract cases than in tort cases. Thus, the rule of certainty, like the rule of foreseeability, encourages entrepreneurial risk taking.” (citation omitted)).

<sup>186</sup> MCCORMICK, *supra* note 177, § 26.

<sup>187</sup> *See* JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 122(a) (5th ed. 2011) (“Modern cases . . . typically require no more than a preponderance of the evidence because the original certainty limitation has been modified to a requirement of only ‘reasonable certainty.’”).

<sup>188</sup> *See, e.g.*, *Strock v. USA Cycling, Inc.*, Nos. 00-CV-2285-JLK, 01-CV-2444-JLK, 2006 WL 1223151, at \*6 (D. Colo. May 8, 2006); *Florafax Int’l, v. GTE Mkt. Res., Inc.*, 933 P.2d 282, 296 (Okla. 1997); *Commercial Credit Corp. v. C. F. Schwartz Motor Co.*, 251 A.2d 353, 355 (Del. Super. 1969).

<sup>189</sup> *See* 22 *AM. JUR.* 2D *DAMAGES* § 341 (2016) (“The term ‘reasonable certainty’ with regard to the determination of damages means only that the fact that there are damages must be more than merely speculative and only requires that the plaintiff meet the usual preponderance burden of proof . . .” (footnote omitted)).

<sup>190</sup> *MindGames, Inc. v. W. Publ’g Co., Inc.*, 218 F.3d 652, 657 (7th Cir. 2000).

<sup>191</sup> Lloyd, *supra* note 172, at 13.

circumstances, this plaintiff has presented sufficient evidence to make it fair to award it the damages in question.”<sup>192</sup>

In fact, it has been argued that “the standard of ‘certainty’ was developed, and has been used, chiefly as a convenient means of keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise.”<sup>193</sup>

One commentator has suggested that the reasonably-certain requirement could be used to preclude a recovery when the injured party was in a better position to avoid the loss.<sup>194</sup> The same commentator has argued that the reasonably-certain requirement, if it imposes a strict standard on recovery, operates as a penalty default rule, designed to provide the injured party with an incentive to disclose the likely amount of loss from breach during contract negotiations and to encourage the use of liquidated-damages provisions.<sup>195</sup>

### 3. Avoidability

Even if the type of loss was caused by a breach and the amount of the loss can be established with reasonable certainty, recovery for the loss will still be denied if the injured party, through reasonable efforts, “could have avoided [the loss] without undue risk, burden[,] or humiliation.”<sup>196</sup> Known as the “duty to mitigate”<sup>197</sup> or the doctrine of avoidable consequences,<sup>198</sup> the doctrine is similar to a contributory negligence standard, asking whether the injured party could have and should have avoided the loss.<sup>199</sup> “The economic justification of such a rule is plain, for it encourages the injured party to act so as to minimize the wasteful results of the

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<sup>192</sup> *Id.* at 18.

<sup>193</sup> MCCORMICK, *supra* note 177, at 105.

<sup>194</sup> *See* Carleton, *supra* note 170, at 1587 & n.47.

<sup>195</sup> *See id.* at 1608.

<sup>196</sup> RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW INST. 1981).

<sup>197</sup> *Stockton E. Water Dist. v. United States*, 109 Fed. Cl. 760, 803 (2013).

<sup>198</sup> 24 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 66:7, at 420 (Danny R. Veilleux ed., 4th ed. 2002).

<sup>199</sup> *See* Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 792 (2013) (“The . . . rule states that a defendant is not liable towards a plaintiff for any loss resulting from the defendant’s wrong (be it a tort or a breach of contract) if the plaintiff could and should have avoided that loss.” (citations omitted)).

breach.”<sup>200</sup> Chancellor Murray states that the rule is premised on the interest of fairness.<sup>201</sup> The defendant has the burden of proving, by a preponderance of the evidence, that the plaintiff failed to mitigate damages.<sup>202</sup>

Like the other doctrines discussed, the mitigation limitation is about causation, with the injured party’s failure to avoid the loss a contributing factor in the loss. As Judge Cardozo wrote:

What is meant by the supposed duty [to mitigate] is merely this: That if he unreasonably [fails to mitigate], he will not be heard to say that the loss . . . from then on shall be deemed the jural consequence of the earlier [breach]. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the [defendant].<sup>203</sup>

The difference is that the mitigation doctrine only applies to intrinsic, intervening causes. “There is no need to mitigate until there is an actual breach of contract”<sup>204</sup> or after learning or having reason to know that the other party’s performance will not be forthcoming.<sup>205</sup>

The mitigation limitation is not, however, “thought of as a consequence of a requirement of causation but a limitation under a ‘mitigation’ rule.”<sup>206</sup> In fact, one court stated that “[a] party that breaches a contract must not conflate mitigation and causation arguments, although failure to avoid a loss may bar recovery.”<sup>207</sup> Thus, like the causation and certainty requirements, this particular causation issue (injured

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<sup>200</sup> FARNSWORTH, *supra* note 2, § 12.12, at 779.

<sup>201</sup> MURRAY, *supra* note 187, § 123(a).

<sup>202</sup> See Johnson v. Washington, No. 2:07cv204, 2008 WL 850690, at \*5 (E.D. Va. Mar. 12, 2008); FARNSWORTH, *supra* note 2, § 12.12, at 780; PERILLO, *supra* note 168, at 507.

<sup>203</sup> McClelland v. Climax Hosiery Mills, 169 N.E. 605, 609–10 (N.Y. 1930) (Cardozo, J., concurring); see also PERILLO, *supra* note 168, at 506 (“[A] party who has been wronged by a breach of contract may not unreasonably sit idly by and allow damages to accumulate. Such damages are not proximately caused by the breach.”).

<sup>204</sup> PERILLO, *supra* note 168, at 507 n.12.

<sup>205</sup> See FARNSWORTH, *supra* note 2, § 12.12, at 781–82.

<sup>206</sup> See *id.* § 12.1, at 731, § 12.12, at 779–80.

<sup>207</sup> Englewood Terrace Ltd. v. United States, 94 Fed. Cl. 116, 124–25 (2010) (citation omitted), *aff’d in part, rev’d in part*, 479 Fed. Appx. 969 (Fed. Cir. 2012).

party's failure to avoid the loss after breach or repudiation) is treated as a separate category to focus on the particular issue involved. The distinction is based on timing and who is responsible for the cause. As explained by one court with respect to torts:

The doctrine of avoidable consequences is to be distinguished from the doctrine of contributory negligence. Generally, they occur—if at all—at different times. Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant.<sup>208</sup>

It has been noted that “[t]he application of mitigation principles in contract . . . actions varies greatly from jurisdiction to jurisdiction [with] many courts disagree[ing] about what is to be proved.”<sup>209</sup>

#### 4. Foreseeability

Under the foreseeability limitation, a defendant is not liable for a loss that was not a sufficiently foreseeable consequence of the breach to the defendant at the time of contract formation.<sup>210</sup> Information obtained by the defendant after formation does not expand the defendant's responsibility beyond those losses that were sufficiently foreseeable at the time of formation.<sup>211</sup> The injured party has the burden of persuasion on foreseeability<sup>212</sup> and is required to prove that the losses were sufficiently foreseeable by a preponderance of the evidence.<sup>213</sup> The foreseeability requirement is similar to tort law's proximate cause requirement, in the sense that it tends to preclude liability for a loss when there were multiple factors that contributed

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<sup>208</sup> *Miller v. Miller*, 160 S.E.2d 65, 74 (N.C. 1968) (quoting 22 AM. JUR. 2D DAMAGES § 31 (1965)).

<sup>209</sup> Neil W. Hamilton & Virginia B. Cone, *Mitigation of Antitrust Damages*, 66 OR. L. REV. 339, 369 n.151 (1987) (“The application of mitigation principles in contract . . . actions varies greatly from jurisdiction to jurisdiction. . . . For example, many courts disagree about what is to be proved and by whom with regard to the plaintiff's duty to mitigate damages.”).

<sup>210</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (AM. LAW INST. 1981).

<sup>211</sup> See *Spang Indus., Inc. v. Aetna Cas. & Sur. Co.*, 512 F.2d 365, 368 (2d Cir. 1975); MURRAY, *supra* note 187, § 121(a), at 765 (“The foreseeability of *probable* consequences must be determined as of the time of contract formation. If additional knowledge comes to the promisor subsequent to that time, it is irrelevant.”).

<sup>212</sup> See *In re Partners Group Fin., LLC*, 394 B.R. 68, 80 (Bankr. E.D. Pa. 2008).

<sup>213</sup> See *Ner Tamid Congregation of N. Town v. Krivoruchko*, 660 F. Supp. 2d 927, 932 (N.D. Ill. 2009).

to the loss, making the loss that occurred an unlikely consequence of the breach.<sup>214</sup> The widespread adoption of the foreseeability requirement is attributed to the previously discussed case of *Hadley v. Baxendale*, decided by England's Court of Exchequer in 1854.<sup>215</sup>

Courts agree that the loss need not have been a necessary or certain result of the breach,<sup>216</sup> that the type of loss must have been sufficiently foreseeable rather than the mere fact of a loss,<sup>217</sup> and that the loss must have been a sufficiently foreseeable consequence of the particular breach that occurred.<sup>218</sup> Importantly, however, like the certainty requirement, the foreseeability requirement can be applied with different degrees of strictness.

For example, courts disagree on how foreseeable, at the time of contract formation, the loss must have been. Some courts require that the loss be a *probable*

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<sup>214</sup> See Peter Linzer, *Hadley v. Baxendale and the Seamless Web of Law*, 11 TEX. WESLEYAN L. REV. 225, 228 (2005) (“*Hadley* is the contractual analog to proximate cause [in tort.]”); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 958 (7th Cir. 1982) (“The rule of *Hadley v. Baxendale* links up with tort concepts . . . . The rule is sometimes stated in the form that only foreseeable damages are recoverable in a breach of contract action. . . . So expressed, it corresponds to the tort principle that limits liability to the foreseeable consequence of the defendant’s carelessness.” (citation omitted)).

<sup>215</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 406 (3d ed. 2005) (noting that the *Hadley* rule “was eagerly adopted in the states”). New York, however, had anticipated the *Hadley* rule fifteen years earlier in *Blanchard v. Ely*, 21 Wend. 342, 342 (N.Y. 1839), and by the time of *Hadley*, the foreseeability limitation was already well-known in the United States. See Robert M. Lloyd & Nicholas J. Chase, *Recovery of Damages for Lost Profits: The Historical Development*, 18 U. PA. J. BUS. L. 315, 346 (2016). But in 1858, the New York Court of Appeals in *Griffin v. Colver*, 16 N.Y. 489, 492–94 (N.Y. 1858), four years after *Hadley*, stated that the foreseeability limitation was not the rule of decision in *Blanchard*, and “that opinion [*Blanchard*] became just another forgotten nineteenth century opinion.” *Id.* at 351.

<sup>216</sup> FARNSWORTH, *supra* note 2, § 12.14, at 795 (footnotes omitted); see also RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (AM. LAW INST. 1981) (noting that the loss need not be a necessary result of the breach).

<sup>217</sup> See *Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC*, 683 F.3d 1330, 1344 (Fed. Cir. 2012) (“The Restatement and relevant treatises have uniformly set forth the relevant standard and make clear that a plaintiff must show that the type of damages are foreseeable as well as the fact of damage.”); RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (AM. LAW INST. 1981) (“The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that *actually occurred* was not foreseeable.” (emphasis added)).

<sup>218</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (AM. LAW INST. 1981) (“He is not . . . liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a probable result of *such a breach*.” (emphasis added)).

consequence of the breach,<sup>219</sup> the standard adopted in *Hadley*<sup>220</sup> and the *Restatement (Second) of Contracts*;<sup>221</sup> others require a lower degree of probability.<sup>222</sup>

Courts also disagree about whether the amount of the loss, in addition to the type of loss, must be sufficiently foreseeable. Some courts require that only the type of loss must be sufficiently foreseeable;<sup>223</sup> others require that the magnitude of the loss also be sufficiently foreseeable,<sup>224</sup> a position followed by the *Restatement*

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<sup>219</sup> See, e.g., *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 364 (Colo. App. 2016) (“Core-Mark was required to prove that the loss was the *probable*, though not the necessary or certain, result of the breach. And in this context, probable means likely.”).

<sup>220</sup> See *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, 151, 9 Ex. 341, 354 (“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either [1] arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or [2] such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the *probable* result of the breach of it.” (emphasis added)).

<sup>221</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (AM. LAW INST. 1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a *probable* result of the breach when the contract was made.” (emphasis added)).

<sup>222</sup> See, e.g., *Hector Martinez & Co. v. S. Pac. Transp. Co.*, 606 F.2d 106, 110 (5th Cir. 1979) (“Southern Pacific replies that it was as foreseeable that the goods were to be sold as that they were to be used. This contention proves too much because Hadley allows recovery for harms that should have been foreseen. The general rule does not require the plaintiff to show that the actual harm suffered was the *most* foreseeable of possible harms. He need only demonstrate that his harm was not so remote as to make it unforeseeable to a reasonable man at the time of contracting.”); Robert M. Lloyd, *Contract Damages in Tennessee*, 69 TENN. L. REV. 837, 871 (2002) (“Although American courts have not been as liberal as British courts in applying the foreseeability requirement, a number of American courts have allowed recovery where it was clear that the probability of such damages being incurred was far less than 50%.”).

<sup>223</sup> See *Florida Power & Light Co. v. Westinghouse Elec. Co.*, 597 F. Supp. 1456, 1474–75 (E.D. Va. 1984) (“[T]he *Hadley* foreseeability test is to be applied to the kind, not the amount, of damage.”), *aff’d in part, rev’d in part*, 826 F.2d 239 (4th Cir. 1987); FARNSWORTH, *supra* note 2, at 796 (“The magnitude of the loss need not have been foreseeable . . .”); see also Thomas A. Diamond & Howard Foss, *Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale*, 63 FORDHAM L. REV. 665, 708 n.193 (1994) (“Most authority addressing the issue has held that it is not a defense that the seller could not foresee the *amount* of the loss.” (emphasis added)).

<sup>224</sup> See, e.g., *Core-Mark Midcontinent Inc.*, 370 P.3d at 361 (“[T]he injury actually suffered must be one of a kind that the defendant had reason to foresee and of an amount that is not beyond the bounds of reasonable prediction. . . . The rule merely requires that the injury must be one of such a kind and amount as a prudent person would have realized to be a probable result of the breach.” (quoting JOSEPH M. PERILLO, 11 CORBIN ON CONTRACTS § 56.7, at 108 (rev. ed. 2005))); see also *Vermont Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC*, 683 F.3d 1330, 1344 (Fed. Cir. 2012) (“[T]he injury actually suffered [still] must be . . . an amount that is not beyond the bounds of reasonable prediction.” (quoting JOSEPH M. PERILLO, 11 CORBIN ON CONTRACTS § 56.7, at 108 (rev. ed. 2005))).

(*Second*) of Contracts<sup>225</sup> and *Corbin on Contracts*.<sup>226</sup> If the amount of the loss must be sufficiently foreseeable, it is a greater limitation on the recovery of contract damages than tort damages. For example, under tort law's "thin skull," or "eggshell skull" doctrine, "[t]he defendant is held liable when the defendant's negligence operates upon a concealed physical condition . . . to produce consequences which the defendant could not reasonably anticipate. The defendant is held liable for unusual results of personal injuries which are regarded as unforeseeable . . . ."<sup>227</sup> As stated by one court:

[T]he "thin skull" doctrine is a tort concept that generally does not apply to an action for breach of contract. Damages in an action for breach of contract are limited to those contemplated by the parties at the time of the agreement, whereas the "thin skull" doctrine imposes liability for "quite unforeseeable consequences." Therefore, a defendant in an action for breach of contract generally should not be held responsible for the unforeseeable consequences of the breach.<sup>228</sup>

There is also disagreement on whether each contributing cause must have been sufficiently foreseeable, or whether the loss that occurred need only have been sufficiently foreseeable. The *Restatement (Second) of Contracts* states that "[i]f several circumstances have contributed to a loss, the party in breach is not liable for it unless he had reason to foresee *all of them*."<sup>229</sup> One court has stated, however, that under "the Restatement . . . the defendant must be able to foresee all of the contributing circumstances, not that the defendant must foresee the convergence of such circumstances."<sup>230</sup>

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<sup>225</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (AM. LAW INST. 1981) ("[A] seller who fails to deliver a commodity to a wholesaler is not liable for the wholesaler's loss of profits to the extent it is extraordinary . . . ."); see also *id.* illus. 3-7 (permitting recovery for reasonable losses and not extraordinarily or unusually large losses).

<sup>226</sup> See JOSEPH M. PERILLO, 11 CORBIN ON CONTRACTS § 56.7, at 108 (rev. ed. 2005) ("[T]he injury actually suffered [still] must be . . . an amount that is not beyond the bounds of reasonable prediction.").

<sup>227</sup> *Schafer v. Hoffman*, 831 P.2d 897, 900 (Colo. 1992) (quoting *KEETON ET AL.*, *supra* note 80, § 43, at 291-92).

<sup>228</sup> *State Farm Mut. Auto. Ins. Co. v. Peiffer*, 955 P.2d 1008, 1011 (Colo. 1998) (citation omitted).

<sup>229</sup> RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. d (AM. LAW INST. 1981) (emphasis added).

<sup>230</sup> *Coast Fed. Bank, FSB v. United States*, 49 Fed. Cl. 53, 55 (2001).

Professor E. Allan Farnsworth, despite being the reporter for the *Restatement* chapter on remedies,<sup>231</sup> believed that it “can be asserted with some assurance” that “what must be foreseeable is only that the loss would result if the breach occurred. There is no requirement that . . . the particular way that the loss came about be foreseeable.”<sup>232</sup> For example, in *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, the plaintiff sued its alarm system provider when the provider failed to respond to an alarm at the plaintiff’s warehouse, resulting in three burglars stealing inventory and then burning down the warehouse, causing the remaining inventory to be lost.<sup>233</sup> The provider argued that while the theft of inventory was sufficiently foreseeable, destruction by arson was not.<sup>234</sup> On appeal, the plaintiff confined its argument to the largest category of loss—its lost inventory.<sup>235</sup> The court held that whether arson was sufficiently foreseeable was irrelevant to determining whether the type of loss was sufficiently foreseeable:

The type or kind of losses at issue was the value of the lost inventory . . . . [T]o recover some damages for loss of inventory, Core-Mark needed only to prove that the loss of inventory was foreseeable as a probable result of the breach. [Fn: It appears undisputed that this type or kind of loss was foreseeable.] The precise manner in which that loss occurred is not relevant to this inquiry. *Farnsworth on Contracts* § 12.14, at 260–61 (“There is no requirement that . . . the particular way that the loss came about is foreseeable.”). That is, to recover some damages for loss of inventory, Core-Mark was not required to prove that the fire itself was foreseeable.<sup>236</sup>

The court, however, held that the magnitude of the loss must be sufficiently foreseeable, and that the foreseeability of the causes of the loss was relevant to that issue:

Core-Mark had the burden of proving that the general magnitude of the claimed loss was foreseeable as the probable result of the breach. To contest that element

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<sup>231</sup> See Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2042 n.51 (2001) (noting that Farnsworth was the reporter for the remedies chapter of the *Restatement (Second) of Contracts*).

<sup>232</sup> FARNSWORTH, *supra* note 2, at 795.

<sup>233</sup> *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 355 (Colo. App. 2016).

<sup>234</sup> *Id.* at 358.

<sup>235</sup> *Id.* at 362 n.4.

<sup>236</sup> *Id.* at 362.

of Core-Mark's claim, Sonitrol was entitled to submit evidence showing the contrary. One way to do this was to show that the extent of the loss was the result of circumstances of which it was not aware or had no reason to be aware. Sonitrol tried to do this by presenting evidence of Core-Mark's failure to abide by building and fire code provisions regarding storage of flammable materials, the inadequacy of the sprinkler system, and, as most relevant for present purposes, the rarity of fires resulting from undetected burglaries. In our view, all of that evidence was relevant to demonstrate that the extent of Core-Mark's loss was not foreseeable.

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In sum, Core-Mark was required to prove that both the kind and the general magnitude of its claimed losses were foreseeable as the probable result of the breach. It was not required to prove that any particular cause of the losses was a probable result of the breach. But Sonitrol was also entitled to attempt to show that the circumstances resulting in the extent of the losses were not sufficiently foreseeable; evidence of the rarity of arson in this context was relevant to that issue.<sup>237</sup>

Although foreseeability is different from causation,<sup>238</sup> the relationship between the foreseeability requirement and causation is evidenced by the many references to the foreseeability requirement as precluding recovery for "remote" losses.<sup>239</sup> This

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<sup>237</sup> *Id.* at 362–63 (footnote omitted).

<sup>238</sup> *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So. 2d 703, 713 (Miss. 2005).

<sup>239</sup> *See, e.g., Vacuum Indus. Pollution, Inc. v. Union Oil of Cal.*, 764 F. Supp. 507, 512 (N.D. Ill. 1991) ("In no sense were VIP's far-flung injuries proximately caused by Union Oil's alleged breach of contract. Rather, they are precisely the kind of remote damages not recoverable under the century-old doctrine enunciated in *Hadley v. Baxendale* . . ."), *aff'd*, 958 F.2d 375 (7th Cir. 1992); *Polidori v. Kordys*, 526 A.2d 230, 235 (N.J. Super. Ct. App. Div. 1987) ("[T]he defendant is not chargeable for remote losses, 'that he did not have reason to foresee as a probable result of the breach when the contract was made.'" (quoting *Donovan v. Bachstadt*, 453 A.2d 160 (N.J. 1982))); *W. Haven Sound Dev. Corp. v. City of West Haven*, 514 A.2d 734, 742 (Conn. 1986) ("This court has consistently applied the general damage formula of *Hadley v. Baxendale* to the recovery of lost profits for breach of contract, and it is our rule that '[u]nless they are too speculative and remote, prospective profits are allowable as an element of damage whenever their loss arises directly from and as a natural consequence of the breach.'" (quoting *Kay Petroleum Corp. v. Piergrossi*, 79 A.2d 829, 832 (Conn. 1951))); *Ohoud Establishment for Trade & Contracts v. Tri-State Contracting & Trading Corp.*, 1982 A.M.C. 1645, 1655 (D.N.J. 1981) ("Remote and speculative damages have been barred since the days of *Hadley v. Baxendale*." (citation omitted)); *Christensen v. Slawter*, 343 P.2d 341, 346–47 (Cal. Ct. App. 1959) ("Damages not meeting the test laid down in *Hadley v. Baxendale* are said to be remote and not recoverable." (footnote omitted)); *Armstrong v. Chicago, M. & St. P. Ry.*, 152 N.W. 696, 697 (S.D. 1915) ("That the damages are too remote and speculative to admit of their recovery can hardly be urged with any degree of earnestness in the light of the holding in *Hadley v. Baxendale* . . ."); *Milton v. Hudson River Steamboat Co.*, 37 N.Y. 210, 214 (1867) ("The question of proximate or remote damages, was learnedly discussed in the case of . . . *Hadley v. Baxendale* . . .").

relationship shows it plays an important role in preventing losses that have multiple causes. The foreseeability limitation, however, unlike the other limitations, focuses on the time of contract formation.<sup>240</sup>

There is also an “intimate relationship between the doctrine of foreseeability and the doctrine of avoidable consequences.”<sup>241</sup> The foreseeability limitation applies to any contributing factors, including those that occurred after the breach (intervening causes), such as when an injured party’s loss is caused by an inability to arrange a substitute transaction.<sup>242</sup> If it was not sufficiently foreseeable that the injured party would be unable to obtain substitute performance (i.e., cover) and thereby avoid the loss, recovery for the loss is precluded under the foreseeability limitation, even if the injured party made reasonable efforts to arrange a substitute transaction and would thus not be precluded from recovery under the avoidability limitation. In contrast, if at the time of contract formation the defendant had reason to know that the injured party would not be able to avoid the loss, the loss is sufficiently foreseeable, even if the reason the loss will be unavoidable is because the injured party had not taken adequate pre-breach precautions to mitigate in the event of a breach. For example, under *Hadley*, “defendants would have been liable for lost profits of the mill if they had reason to know that no substitute shaft was available.”<sup>243</sup>

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<sup>240</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351 (AM. LAW INST. 1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach *when the contract was made*.” (emphasis added)).

<sup>241</sup> PERILLO, *supra* note 168, at 493 n.8.

<sup>242</sup> See FARNSWORTH, *supra* note 2, at 796 (“Such cases [involving foreseeability] frequently involve an issue of avoidability, for it is often questioned whether the party’s inability to avoid the loss by arranging a substitute transaction was foreseeable.”); RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. e (AM. LAW INST. 1981) (“The limitation of foreseeability is often applied in actions for damages for breach of contracts to lend money. Because credit is so widely available, a lender often has no reason to foresee at the time the contract is made that the borrower will be unable to make substitute arrangements in the event of breach.”); *id.* illus. 12 (lender not liable for losses because inability to borrow money to avoid loss was insufficiently foreseeable at the time the contract was made). It has been argued that the U.C.C. did away with any foreseeability requirement for losses that could not be avoided. Roy Ryden Anderson, *Of Mack Trucks, Road Bugs, Gilmore and Danzig: Happy Birthday Hadley v. Baxendale*, 11 TEX. WESLEYAN L. REV. 431, 439–40 (2005). As noted by Professor Anderson, “[i]n significant contrast to the English focus, the UCC provision regarding foreseeability for a buyer’s recovery of consequential damages requires only that the seller at the time of the contract have had ‘reason to know’ of the buyer’s ‘general or particular requirements’ for the seller’s performance.” *Id.* at 438–39.

<sup>243</sup> PERILLO, *supra* note 168, at 507.

The foreseeability limitation does, however, play an important role in precluding recovery when the injured party's pre-contract or pre-breach fault contributed to the loss, because such fault is ordinarily not sufficiently foreseeable. In this sense, the foreseeability limitation serves the function previously performed by the doctrine of contributory negligence in tort law, albeit in a less direct way. It is similar to contributory negligence (rather than comparative negligence) in the sense that it has a binary approach to fault: if the injured party's fault means that the loss was insufficiently foreseeable at the time of contract formation, the injured party cannot recover for the loss, rather than apportioning the loss based on the degree of contribution to the loss.

To illustrate, in *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, the fact that the plaintiff's loss from inventory caused by the arson might have been increased by "Core-Mark's failure to abide by building and fire code provisions regarding storage of flammable materials [and] the inadequacy of the sprinkler system" was relevant to whether the magnitude of loss was sufficiently foreseeable.<sup>244</sup> In fact, Judge Richard Posner has argued that *Hadley's* animating principle is to preclude a recovery by an injured party who could have avoided the loss at a lower cost than the breaching party, either before or after contract formation:

[T]he animating principle of *Hadley v. Baxendale* . . . is that that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so. In *Hadley* the untoward consequence was the shutting down of the mill. The carrier could have avoided it by delivering the engine shaft on time. But the mill owners, as the court noted, could have avoided it simply by having a spare shaft. Prudence required that they have a spare shaft anyway, since a replacement could not be obtained at once even if there was no undue delay in carting the broken shaft to and the replacement shaft from the manufacturer. The court refused to imply a duty on the part of the carrier to guarantee the mill owners against the consequences of their own lack of prudence, though of course if the parties had stipulated for such a guarantee the court would have enforced it. The notice requirement of *Hadley v. Baxendale* is designed to assure that such an improbable guarantee really is intended.<sup>245</sup>

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<sup>244</sup> *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 370 P.3d 353, 362 (Colo. App. 2016).

<sup>245</sup> *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 957 (7th Cir. 1982).

With respect to interim actions, Posner provided the following hypothetical:

A commercial photographer purchases a roll of film to take pictures of the Himalayas for a magazine. The cost of developing the film is included in the purchase price. The photographer incurs heavy expenses (including the hire of an airplane) to complete the assignment. He mails the film to the manufacturer but it is mislaid in the developing room and never found.<sup>246</sup>

Posner argues that the foreseeability limitation “encourages the photographer to take adequate post-formation precautions against the loss, such as using two rolls of film or requesting special handling when he sends the roll in to be developed.”<sup>247</sup> He believes the photographer can therefore avoid the losses more inexpensively than the seller.<sup>248</sup> In general, however, the injured party is not expected to anticipate and provide against a loss that would be caused by a breach.<sup>249</sup>

Maintaining that the foreseeability limitation is *based on* sanctioning the injured party whose negligence contributed to the loss would nevertheless be an overstatement. In most cases involving consequential losses the injured party will not have acted negligently, and it is not even clear that having a spare crankshaft would have been the optimal level of care in *Hadley*.<sup>250</sup> Further, the *Hadley* court did not rely on the lack of a spare crankshaft to show that the injured party’s fault contributed to the loss. Rather, it referenced the spare crankshaft to show that the probability of loss from breach was not sufficiently foreseeable.<sup>251</sup> Additionally, the foreseeability limitation applies to unexpected contributing factors that were not caused by the injured party.<sup>252</sup>

Rather, the rule is based on the fact that “[a] contracting party is generally expected to take account of those risks that are foreseeable at the time he makes the

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<sup>246</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 127 (6th ed. 2003).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *City of Richmond v. Cheatwood*, 107 S.E. 830, 834–35 (Va. 1921).

<sup>250</sup> Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CALIF. L. REV. 563, 582 (1992).

<sup>251</sup> *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145 [151].

<sup>252</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. e illus. 14 (AM. LAW INST. 1981) (injured party’s inability to cover on short notice).

contract.”<sup>253</sup> This cryptic explanation of using foreseeability of loss as a basis for responsibility reflects an attempt to balance two conflicting principles. The first is that a breaching party should pay an amount of damages that will put the injured party in the position it would have been in had the breaching party performed as promised.<sup>254</sup> Importantly, this position is “the actual worth of the contract to him rather than to some reasonable person [and should therefore] take account of any special circumstances that are peculiar to the situation of the injured party, including his personal values and even his idiosyncrasies, as well as his own needs and opportunities.”<sup>255</sup> The second is that a breaching party should not face unlimited responsibility for all losses its breach might cause, particularly because there is strict liability for breach.<sup>256</sup> This latter concern is not only driven by notions of fairness, but by the belief “that the economy cannot flourish when businesses are afraid to enter into transactions because they fear an inadvertent breach will lead to a huge damage award.”<sup>257</sup>

The foreseeability rule strikes a compromise, placing the burden on the defendant, when the loss is sufficiently foreseeable to the defendant, to expressly disclaim responsibility at the time of contract formation or else be responsible for such a loss. It places the burden on the injured party, when the loss is insufficiently foreseeable to the defendant, to obtain express agreement from the defendant, at the time of contract formation, to accept responsibility for any unforeseeable losses (such as through a liquidated-damages clause).

Though not perfect, the *Hadley* rule is a reasonable solution to the competing principles it seeks to balance, creating a generally appropriate standard for determining which party should have responsibility during negotiations for raising

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<sup>253</sup> *Id.* cmt. a.

<sup>254</sup> *See id.* § 347 (“[T]he injured party has a right to damages based on his expectation interest . . . .”); *see also id.* § 344(a) (defining *expectation interest* as an injured party’s “interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed”).

<sup>255</sup> *Id.* § 344 cmt. b; *see also id.* § 347 cmt. b (“If defective or partial performance is rendered, the loss in value caused by the breach is equal to the difference between the value that the performance would have had if there had been no breach and the value of such performance as was actually rendered. In principle, this requires a determination of the values of those performances to the injured party himself and not their values to some hypothetical reasonable person on some market. They therefore depend on his own particular circumstances or those of his enterprise . . . .”).

<sup>256</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 48 (1974).

<sup>257</sup> Lloyd, *supra* note 172, at 15.

the issue of liability for particular losses.<sup>258</sup> Because of the beliefs that: a breaching party should ordinarily pay for losses caused by the breach,<sup>259</sup> a party “is generally expected to take account of those risks that are foreseeable at the time he makes the contract”<sup>260</sup> and can demand greater compensation to account for those risks, and that parties will often tacitly agree to be liable for sufficiently foreseeable risks,<sup>261</sup> it is reasonable to place the burden of disclaiming liability for those risks on the defendant. Because, however, the defendant cannot account for risks that are insufficiently foreseeable to it, it is reasonable to place the burden on the injured party to obtain assent from the defendant to be responsible for any such losses.

The result of using foreseeability to determine which party should have responsibility for raising the issue during negotiations not only mimics what many parties likely intended, but it also has the benefit of encouraging injured parties to disclose their special circumstances to the defendant so that the defendant can accurately assess the risk of breach<sup>262</sup> and discouraging injured parties from acting negligently.<sup>263</sup> For example, the foreseeability limitation encourages not only the disclosure of special circumstances to shift the risk of loss from such special circumstances to the defendant, it encourages a plaintiff to take reasonable precautions to avoid the breach from causing a loss. The foreseeable probability of loss will be based on the assumption the plaintiff has taken such measures. In this respect, it plays an important role in policing the plaintiff’s negligent pre-breach behavior (an intrinsic, existing cause or an intrinsic, interim cause) that is not

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<sup>258</sup> See RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 2, intro. note (AM. LAW INST. 1981) (“Except for the restrictions imposed by the rule that proscribes the fixing of penalties parties are free to vary the rules governing damages, subject to the usual limitations on private agreement such as that on unconscionable contracts or terms . . . .” (citations omitted)).

<sup>259</sup> See *id.* (“The initial assumption is that the injured party is entitled to full compensation for his actual loss. This is reflected in the general measure of damages . . . .”); see also *id.* § 347 cmt. c (“Subject to the limitations stated in §§ 350–53, the injured party is entitled to recover for all losses actually suffered.”).

<sup>260</sup> *Id.* § 351 cmt. a.

<sup>261</sup> See Daniel P. O’Gorman, *When Lightning Strikes: Hadley v. Baxendale’s Probability Standard Applied to Long-Shot Contracts*, 47 LOY. U. CHI. L.J. 859, 881–83 (2016) (arguing that the *Hadley* rule might be used as a proxy for determining the parties’ intentions).

<sup>262</sup> See *id.* at 904.

<sup>263</sup> See *id.* at 894.

addressed by the mitigation doctrine, which only applies once there has been a breach or repudiation (an intrinsic, intervening cause).<sup>264</sup>

Of course, using a single factor—foreseeable probability of loss at the time of contract formation—to determine responsibility in the absence of agreement otherwise leads to some surprising results. For example, recovery is denied for the loss suffered from the breach of a contract to provide a customer with a ticket to bet on the outcome of a horse race when it turns out it would have been a winning ticket, because the chance of winning was too low.<sup>265</sup> And recovery is permitted when a ship owner delivers goods (sugar) late and the charterer lost a resale profit because the market price dropped between the due date for delivery and the actual delivery, even though the market price was just as likely to go up as down and there was no evidence the charter had been hedging against a change in market price.<sup>266</sup> Thus, the low probability of loss leads to no recovery in a case where the parties likely intended the defendant to insure against the loss, and a high probability of loss leads to recovery in a case where the parties likely intended the defendant to not insure against the loss. The ticket seller thus has no incentive to ensure that the correct tickets are provided to a customer, even though the buyer probably would have been willing to pay a small amount of extra money to insure against the loss. And the ship owner has an incentive to only consider the possible loss from breach—not the possible gain from breach—when deciding on the amount to spend to ensure timely performance. This encourages excessive precautions, even though the charterer likely would not be willing to pay extra to insure against a short delay.

Placing the burden on an unsophisticated party, who might assume all losses caused by breach can be recovered, will also lead to some unfair results. Thus, requiring the ticket buyer to bear the risk of the loss seems more unfair than requiring the carrier to bear the risk of the loss.<sup>267</sup> Similarly, in some cases, the low price charged by the defendant might indicate it was not sufficiently aware that it would be responsible for a very large foreseeable loss if it breaches, a concern that has led

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<sup>264</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. e, illus. 14 (AM. LAW INST. 1981); see also *id.* § 350 cmt. b (noting that a party is expected to take reasonable actions to avoid loss “[o]nce a party has reason to know that performance by the other party will not be forthcoming”).

<sup>265</sup> *Offenberger v. Beulah Park Jockey Club, Inc.*, No. 79AP-471, 1979 WL 209570 (Ohio Ct. App. Dec. 28, 1979).

<sup>266</sup> See generally *Kaufos v. C. Czarnikow (Heron II)* [1967] 3 All. ER 686 (HL) (Eng.).

<sup>267</sup> See Avery W. Katz, *Contract Theory—Who Needs It?*, 81 U. CHI. L. REV. 2043, 2076 n.32 (2014) (noting that it has been argued “that the principle of *Hadley v Baxendale* should be replaced by a less restrictive model that allows for greater recovery by unsophisticated parties”).

the *Restatement (Second) of Contracts* and some courts to adopt a disproportionality doctrine that permits a court to deny recovery when the amount of loss is disproportionate to the contract price.<sup>268</sup>

The foreseeability limitation is also a blunt instrument for sanctioning the injured party for pre-breach negligent conduct that contributed to the loss. For example, in *Hadley* the issue would not be whether it was negligent for the miller to not have a spare crankshaft; the issue would be the likelihood the miller would not have a spare crankshaft. Thus, if a particular form of negligent behavior is common, then negligence could be sufficiently foreseeable. Accordingly, Learned Hand's famous statement in *The T.J. Hooper* about what is common practice never being dispositive of reasonable behavior,<sup>269</sup> would not apply in a foreseeability analysis. And if a particular form of risk-averse behavior is common then a loss caused in part by the injured party's risk neutral behavior might not have been sufficiently foreseeable.

The rough edges of the foreseeability limitation, however, are simply a product of its "ruleness," and the parties' ability to expressly disclaim or assume liability for a particular loss softens some of the rule's rough edges. Also, although it might seem unusual for a party to assume the risk of another party's negligence, thereby suggesting that the defendant would always contract out of such liability if the matter were negotiated, in some situations it would make sense to accept the risk. If the expected loss is a factor of the chance of breach multiplied by the chance of loss if there is a breach multiplied by the amount of loss in the event of breach, the defendant might be able to more cost-effectively reduce the chance of breach than the injured party can reduce the chance of loss if there is a breach. Essentially, what would have been negligence is no longer negligence because the defendant presumably has adjusted its level of precautions to make the cost to the injured party of reducing the chance of loss if there is a breach inefficient.

The point is that in many situations it will be unclear which party would have agreed to assume the risk of a particular loss if the matter had been negotiated. Requiring the defendant to disclaim liability when the loss is sufficiently foreseeable and requiring the injured party to obtain the defendant's agreement to assume the

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<sup>268</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (AM. LAW INST. 1981); see also Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 345–60 (1998) (discussing the disproportionality doctrine in the courts).

<sup>269</sup> 60 F.2d 737, 740 (2d Cir. 1932).

risk when it is not sufficiently foreseeable is as reasonable a division of responsibility for raising the issue as any other, at the level of generality adopted by the rule.

### III. PROPOSED FRAMEWORK FOR ANALYZING CAUSATION ISSUES IN CONTRACT LAW

This Part sets forth a coherent framework for analyzing causation issues in contract cases. Such a framework should take into account the starting assumption of contract damages—full compensation—and recognize that the exceptions are just that—exceptions.<sup>270</sup> At the same time, it should take account of the fact that it is typically considered more difficult to recover contract damages than tort damages<sup>271</sup> and that contract damages should not be punitive.<sup>272</sup> Each doctrine should have a single, distinct function that does not overlap with the function of any of the other doctrines. The doctrines should also have a common approach to causation. For example, if a strict standard is applied to one of the doctrines, the failure to apply a strict standard to the other doctrines should be justified. The first section in this Part will explain the appropriate roles played by each doctrine in a causation analysis, and the second section will address the appropriate test for each doctrine.

#### A. *The Appropriate Role Played by Each Doctrine*

The role played by each doctrine has previously been discussed, and this section therefore need only set forth those roles in summary fashion. When there are multiple factors potentially causing a particular type of loss, and the issue is whether the defendant's breach was the cause in fact of the *type* of loss, the court should apply the general causation requirement provided the other potential factor was not an intrinsic, intervening cause. When the issue involves the *amount* or *extent* of a particular type of loss, the court should apply the certainty requirement, unless the issue is whether an intrinsic, intervening cause increased the amount or extent of the loss. When the issue involves multiple factors potentially causing a particular type of loss or increasing the amount or extent of the loss, and the factor other than breach is an intrinsic, intervening factor, the court should apply the avoidability doctrine rather than the general causation requirement or the certainty requirement. And the

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<sup>270</sup> See RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 2, intro. note (AM. LAW INST. 1981) (“The initial assumption is that the injured party is entitled to full compensation for his actual loss. This is reflected in the general measure of damages . . . .”); see also *id.* § 347 cmt. c (“Subject to the limitations stated in §§ 350–53, the injured party is entitled to recover for all losses actually suffered.”).

<sup>271</sup> See, e.g., *id.* § 352 cmt. a (“Courts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort.”).

<sup>272</sup> See *id.* § 355 (“Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”).

court should always apply the foreseeability test with respect to any loss, even if one or more of the other doctrines also applies.

Thus, the first two doctrines (general causation requirement and the certainty limitation) are mutually exclusive in that they address different causation issues (type of loss versus amount of loss). The first two doctrines and the avoidability doctrine are mutually exclusive because they deal with causes arising at different times (existing and interim versus intervening) and avoidability is limited to intrinsic causes. The foreseeability doctrine always applies because even if the loss is recoverable under the first three doctrines, the loss cannot be recovered if it was not sufficiently foreseeable to the defendant at the time of contract formation. The first two doctrines (general causation requirement and the certainty limitation) are about factual causation. Avoidability is about both factual causation and whether the injured party should be held responsible for a loss it helped cause. Foreseeability is about whether the defendant should be responsible for a loss it in fact caused.

### *B. The Substance of the Doctrines*

As previously discussed, there is considerable disagreement among courts and commentators regarding the substance of each doctrine. Each of the doctrines can be applied in a way to increase or decrease the injured party's chance of recovering for a particular loss. Unfortunately, because courts and commentators often fail to recognize that each doctrine addresses a different aspect of the same issue—causation—they typically fail to appreciate that the doctrines should be applied in a similar fashion, irrespective of whether it is in a way that increases or decreases the chance of recovering for a particular loss. Also, they often fail to recognize that some of the competing tests are unnecessary because the concerns addressed by the test are handled by another doctrine.

With respect to whether to apply a but-for standard or a substantial-factor standard to the general causation requirement, it does not take long to recognize that the substantial-factor test should be banished from contract law. Tort law has much more experience with the substantial-factor test than contract law, and if the ALI has concluded that it should be discarded from tort law because it is confusing and has been misapplied, there is little reason to retain it in contract law.

Also, the version of the substantial-factor test that permits proof of causation when the injured party cannot establish but-for causation by a preponderance of the evidence is particularly unsuited for contract law for several reasons. First, it is generally considered that there should be less responsibility for a loss in contract law

than tort law.<sup>273</sup> Second, proof of causation in contract law is not as difficult as some other areas of law, and a lower standard than but-for proof is therefore unnecessary. For example, under Title VII of the Civil Rights Act of 1964, the federal law prohibiting employment discrimination on the basis of race, color, religion, sex, and national origin,<sup>274</sup> in a so-called mixed motives case the employee need only establish that the unlawful motive was a “motivating factor” in the decision, not the but-for cause.<sup>275</sup> Such an easing of the causation requirement is justified by the importance of deterring employment discrimination.<sup>276</sup> Also, employment discrimination is based on motive, and proving a counterfactual involving multiple motives by the decision maker is more difficult than proving a counterfactual involving multiple events. Accordingly, there is insufficient justification for a general rule permitting an injured party in a breach-of-contract action to recover for a loss that the injured party proved was a substantial factor in the loss, but could not prove was a but-for cause of the loss.

With respect to multiple, sufficient causes, provided that multiple parties breached the contract, and each breach was sufficient to cause the loss (and thus neither a “but for” cause of the loss), it is appropriate to hold each defendant liable,

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<sup>273</sup> See, e.g., *id.* § 352 cmt. a RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (AM. LAW INST. 1981) (“Courts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort.”).

<sup>274</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>275</sup> See *id.* (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); see also *id.* § 2000e-5 (“On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”); *Univ. of Tex. SW. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522–23 (2013) (“An employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision.”).

<sup>276</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 261–79 (1989) (O’Connor, J., concurring) (discussing deterrent effect as support for using substantial-factor test, rather than but-for test, in Title VII).

as courts currently do.<sup>277</sup> Absolving each party from liability would result in the injured party receiving no compensation, leaving the injured party in a worse position than if each party had performed. Precluding recovery would also discourage parties from contracting with multiple parties for a single project, even though doing so might otherwise be efficient.

Liability should not apply, however, if the breach was a sufficient cause but the loss would have occurred because of factors other than another party's breach. Permitting a recovery in such a situation would result in overcompensation. Although there are limited situations in which the court will permit overcompensation, those rationales do not apply here. First, in a case involving defective or unfinished construction and where loss in value cannot be proved with sufficient certainty, an injured party can recover the cost of completion provided the defendant does not prove such amount is clearly disproportionate to the loss in value to the injured party.<sup>278</sup> Possible overcompensation is tolerated because of concern that the alternative (diminution in value) would be under-compensation.<sup>279</sup> Second, courts will enforce reasonable stipulated-damages clauses, even if the loss that actually occurred was less than the stipulated amount.<sup>280</sup> Courts do so because such clauses avoid incurring the expense of litigating the amount of loss.<sup>281</sup> There is also at least one situation in which the court will permit a recovery even though the injured party cannot prove but-for causation. If a party's promise is conditioned on a fortuitous event, and the breach occurs before the fortuitous event and it is uncertain whether the event would have occurred, the injured party may recover damages based on the value of the promise.<sup>282</sup>

Thus, there are limited and well-defined situations in which overcompensation is permitted or in which but-for causation is not required. But the fact that these are well-recognized exceptions demonstrates that a general substantial-factor test,

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<sup>277</sup> See *Cal. & Haw. Sugar Co. v. Sun Ship, Inc.*, 794 F.2d 1433 (9th Cir. 1986), *amending opinion on denial of rehearing*, 811 F.2d 1264 (9th Cir. 1987).

<sup>278</sup> RESTATEMENT (SECOND) OF CONTRACTS § 348(2) (AM. LAW INST. 1981).

<sup>279</sup> See *id.* cmt. c (“Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be undercompensated by being limited to the resulting diminution in the market price of his property.”).

<sup>280</sup> *Id.* § 356(1).

<sup>281</sup> *Id.* cmt. a (“The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties[,] and witnesses and reduces the expenses of litigation.”).

<sup>282</sup> *Id.* § 348(3).

applied in a way to permit recovery despite being unable to prove but-for causation, is inconsistent with the general remedial scheme in contract law. Applying the substantial-factor test in a situation involving multiple, necessary causes would also be inconsistent with the expectation remedy because it would put the injured party in a better position than if there had been performance.

With respect to cases of fortuitous loss, tort law precludes recovery in such cases and there is no reason contract law should permit such recovery.<sup>283</sup> Thus, if the defendant's breach was the but-for cause of the loss, but the defendant's breach did not increase the risk of loss, there should ordinarily be no recovery. Again, if tort law does not permit the recovery, there is insufficient justification to permit the recovery in contract law. These issues need not, however, be addressed in the causation analysis, but can be adequately addressed in the foreseeability analysis. In many of these cases the loss will not have been sufficiently foreseeable. For example, in a case like *Zetter v. Griffith Aviation, Inc.*<sup>284</sup> the foreseeability limitation would preclude liability. At the time of entering into the contract, the employer had no reason to believe that using a different airplane would increase the risk of a crash.<sup>285</sup>

But *Kaufos v. C. Czarnikow (Heron II)*<sup>286</sup>—the case previously discussed involving the late delivery of sugar—might provide an example of a fortuitous loss case where the loss was held sufficiently foreseeable. In *Heron II*, the chance that the market price for sugar would be lower on the date of a later delivery than on the date of a timely delivery was found to be sufficiently foreseeable, a conclusion not open to serious dispute unless one requires that the likelihood of loss be probable. The possibility of this case being a fortuitous loss case can be shown with some assumptions. Assume that the buyer's only reason for wanting the sugar to arrive by the specified date was because the buyer wanted to sell the sugar sooner rather than later, and not because the buyer had information that the market price for sugar would drop after that date. Rather, assume that no one could predict the fluctuations in the market price for sugar, and that the price was as likely to go up as it was to go down, but that market fluctuations were common. In such a situation, if a late delivery causes the buyer to make less money than it would have if the sugar had been delivered on time, the buyer's loss is fortuitous, but the foreseeability limitation will not preclude a recovery because the drop was sufficiently foreseeable. But the loss

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<sup>283</sup> DIAMOND ET AL., *supra* note 95, at 180 (explaining that tort law does not permit a recovery for a fortuitous loss).

<sup>284</sup> *Zetter v. Griffith Aviation, Inc.*, No. CIV.A. 603-218-DCR, 2006 WL 1117678, at \*11 (E.D. Ky. Apr. 25, 2006).

<sup>285</sup> See generally *id.*

<sup>286</sup> *Heron II* [1967] 3 All. ER 686 (HL) (Eng.).

was no less fortuitous than the plane crash in *Zetter*. Also, by permitting a recovery for such a fortuitous loss, particularly when it is sufficiently foreseeable, the carrier will have an incentive to engage in inefficient expenditures to avoid a late delivery, thereby raising the price for performance.

This is easily demonstrated. Assume the following: The carrier's cost of delivering the goods on time is \$120. The carrier's cost of a late delivery is \$80. A late delivery will not cause the buyer a loss other than a possible decrease in market price. At any given time, there is a 50% chance the market price of the sugar to be delivered will be \$400 and a 50% chance it will be \$600. Under current law, if the market price is \$600 on the day set for delivery, but \$400 on the actual late delivery date, then the carrier owes the buyer \$200 in damages for the lost profit. The chance of this happening will be 25% (50% chance the price will be \$600 on the scheduled delivery day and 50% chance it will then be \$400 on the day set for delivery). Thus, the carrier's anticipated loss from a late delivery is \$50 (\$200 loss times 25% chance of loss occurring). The carrier, however, can avoid the \$50 expected loss by spending an extra \$40 and ensuring timely delivery. Thus, the carrier will have an incentive to spend \$40 even though the expected loss to the buyer from a late delivery is \$0. The carrier will then charge the buyer an extra \$40, which presumably everyone else will charge as well, and the buyer will in essence be forced to purchase insurance for a late delivery even though the buyer does not desire such insurance. Although the parties could agree that the seller will not be liable for a market price drop caused by a late delivery, it does not make sense to have a default rule that is different from what the parties would typically want.

Recovery of fortuitous losses is permitted, however, as long as the loss was sufficiently foreseeable at the time of contract formation. In fact, Article 2 of the Uniform Commercial Code, which applies to "transactions in goods,"<sup>287</sup> bases many of its remedies upon the market price of the goods at or around the time of the breach.<sup>288</sup> Thus, under current law, the breaching party assumes the risk of a change in the market price, even if the price was as likely to change in one direction as the other. Although such results appear at odds with the tort law concept that there should be no recovery for a fortuitous loss, the examples provided of such situations involve highly unlikely consequences (being struck by lightning), for which contract law's foreseeability limitation would preclude recovery. For fortuitous losses that were sufficiently foreseeable (like a change in market price), it is reasonable to assume that the parties are tacitly agreeing to be liable for such a loss, and the foreseeability of the loss makes it fair to require the prospective party in breach to disclaim liability.

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<sup>287</sup> U.C.C. § 2-102.

<sup>288</sup> *Id.* §§ 2-708(1), 2-713(1).

Also, proving that the breach did not in fact increase the risk of loss would often present a difficult factual issue, thereby increasing the cost of litigation. Accordingly, there does not appear to be sufficient justification to extend the exclusion of recovery for fortuitous losses to situations in which the loss was sufficiently foreseeable. If the parties desire to disclaim liability, they are free to make such an agreement.

To the extent that the substantial-factor test is used to absolve a defendant whose breach contributed to the loss in only a trivial way (butterfly-effect or overwhelming-force cases), the foreseeability limitation largely addresses that concern as well, provided that the amount of loss and any contributing factors must be sufficiently foreseeable. While such an analysis might be appropriate in tort law where the parties do not have an opportunity to bargain in advance about responsibility for the loss, such an analysis is inappropriate for a situation in which the parties did have an opportunity to negotiate regarding the scope of risk. As one court stated, “[b]ecause of the limiting doctrine of *Hadley v. Baxendale*, apportionment has not been a concern in contract cases.”<sup>289</sup> Using the substantial-factor test for butterfly-effect or overwhelming-force cases creates confusion as to the proper test that should be used to address such situations. The foreseeability limitation was designed to address cases involving remote causes, and thus there is no need to adopt a substantial-factor test for such a case.

With respect to proving the amount of loss to a reasonable certainty, courts should equate “reasonable certainty” with proving the amount by a preponderance of the evidence, and not a higher standard of proof, such as clear and convincing evidence. If courts apply the foreseeability limitation to the amount of loss, it would be unnecessary to apply a heightened standard when the amount of loss is large; the foreseeability analysis will address such situations. Also, because the typical standard of proof in a civil action is preponderance of the evidence, justification is necessary to impose, as a general rule, a clear and convincing evidence standard. Also, the same standard should apply both to proving that the type of loss was caused by the breach and the amount of the loss because each asks essentially the same question—what loss did the defendant’s breach cause?

The only justification that has been provided for a heightened standard is that a clear and convincing evidence standard would operate as a penalty default rule, encouraging the injured party to disclose the amount of its expected loss, with parties then agreeing to a liquidated-damages provision.<sup>290</sup> It is uncertain, however, that adopting a clear and convincing evidence standard will encourage more parties to

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<sup>289</sup> *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 306 N.W.2d 292, 301 (Wis. Ct. App. 1981).

<sup>290</sup> *See Carleton*, *supra* note 170.

discuss damages during negotiations. If the loss from breach is difficult to determine, the prospective injured party already has a strong incentive to seek a liquidated-damages provision, even if the standard of proof is preponderance of the evidence. Also, adopting a clear and convincing evidence standard as a penalty default rule will disproportionately affect unsophisticated parties, who will not be aware of the heightened standard of proof. Accordingly, the amount of the loss should only have to be proven by a preponderance of the evidence.

With respect to mitigation, its distinctive feature is precluding recovery even when the defendant's breach was a but-for and sufficiently foreseeable cause of the loss. For example, if a failure to mitigate was analyzed under the other doctrines, the fact that the injured party's failure to mitigate was a necessary cause of the loss would not prevent the defendant from being held liable as long as the defendant's breach was also a necessary cause and the failure to mitigate was sufficiently foreseeable. Thus, the injured party's failure to mitigate after breach is treated more seriously than other causes, including post-breach intrinsic causes such as the injured party's negligence. The question is whether such special treatment is warranted.

With respect to treating a failure to mitigate as a contributing factor that automatically precludes recovery, such special treatment is arguably justified because once there is a breach or repudiation, the injured party is much more aware of the possibility of losses than prior to breach or repudiation. One would expect greater efforts from an injured party to avoid loss once it becomes clear a loss will likely occur, than prior to breach or repudiation when the assumption is that the other party will perform. Also, a stricter mitigation standard provides an incentive to the defendant to promptly inform the plaintiff of the breach or repudiation because upon notice the plaintiff's negligence will be more likely to preclude a recovery.

With respect to the foreseeability limitation, if the limitation is designed to place the burden on the defendant to account for those risks that are sufficiently foreseeable, there is no basis for distinguishing between the type of loss and the amount of loss, as some courts do. If a party is not responsible for an unforeseeable *type* of loss, it is because the defendant was not expected to factor that loss into the expected cost of breach. Refusing to extend the foreseeability limitation to the *amount* or *extent* of loss, however, suggests that the defendant was expected to factor in an unexpectedly large loss as long as the type of loss was foreseeable, a *non sequitur*. Properly assessing a risk requires a party to identify both the possibility of the type of loss and the expected amount of loss. An unforeseeably large loss is different only in kind from an unforeseeable type of loss, but not different in effect. Requiring that the amount of loss be sufficiently foreseeable also has the effect of not tempting courts to avoid liability in such cases by applying a strict standard of reasonable certainty, a standard that would deviate from the typical standard of proof in civil actions.

Likewise, if the foreseeability limitation is based on the premise that the defendant is expected to account for those risks that are foreseeable but is not expected to account for those that are not, the defendant should not be expected to account for contributing factors that were not sufficiently foreseeable. In other words, each contributing factor should be sufficiently foreseeable. Although this would result in the defendant avoiding responsibility even though the risk of the type of loss was sufficiently foreseeable and the amount of loss was sufficiently foreseeable, simply because one of the contributing factors was unforeseeable, other factors that would contribute to the loss are typically more within the injured party's control or at least the injured party is more likely to have knowledge of them. Accordingly, such a rule encourages injured parties to either disclose such special circumstances or to take reasonable precautions, including not engaging in negligent behavior. Also, *ex ante*, the injured party would most likely not have wanted to pay additional money to cover a loss caused by multiple factors when at least one was unforeseeable. The defendant, not knowing how much more likely the loss is, is not in a good position to assess the additional liability, and is likely to demand more compensation than necessary.

With respect to the necessary degree of foreseeability, the issue does not involve determining the existence of a fact, where a "probable" standard might be presumed to be appropriate. Rather, one is dealing with when a party should be expected to account for a risk. Under this approach, the "probable" standard set forth in *Hadley* and adopted by the *Restatement (Second) of Contracts* is hard to defend. Is it reasonable to conclude that a risk of an event occurring should not be accounted for whenever its chance of occurring is 50% or less? Thus, the standard should simply be whether a reasonable person in the defendant's position would have accounted for the risk of the event occurring when deciding on the terms of the contract, including the price to charge.

#### IV. CONCLUSION

As in tort law, contract law cases can involve complicated issues of causation. By addressing causation issues under multiple doctrines, it is often difficult to determine which doctrine applies to a particular issue. Courts have also applied differing standards to the causation doctrines and usually fail to justify the use of the particular standard selected. This Article has sought to clarify which doctrines apply to particular causation issues and to set forth the appropriate standard for each doctrine.