



# Various Tests for Proximate Causation

Torts  
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## Tests for Proximate Causation

- Direct Test
- Foreseeability Test
- Harm-within-the-Risk Test

## Tests for Proximate Causation

- Direct Test

- Foresight

- Harm

**WARNING:** The direct test is not good law. (But it's worth knowing because it helps make sense of older cases and provides context for understanding the other tests.)

## Direct Test

Direct Test

- Asks if there are any intervening causes between breach and injury
  - An intervening cause is any natural event or third-party action that was necessary for the  $\Delta$ 's breach to end up causing the  $\pi$ 's injury.
- If so, then  $\pi$  fails direct test;  $\Delta$  wins
- This test is generally obsolete at this point and should not be considered good law.

## Direct Test

- Some other ways of conceiving of the direct test:
  - There must be no links in the causal chain between  $\Delta$ 's breach and  $\pi$ 's injury.
  - If there is any but-for cause between  $\Delta$ 's breach and  $\pi$ 's injury,  $\Delta$  wins.
  - The  $\pi$  must prove the  $\Delta$  acted on a "set stage"; that all that was necessary for  $\pi$ 's injury was  $\Delta$ 's breach.
- (But remember, the direct test is mostly dead-letter at this point.)

## Foreseeability Test

- Asks if  $\pi$ 's injury was foreseeable at the time of  $\Delta$ 's breach.
  - Take an imaginary trip back in time to moment of  $\Delta$ 's breach:
  - Ask, "What might go wrong here?"
  - If  $\pi$ 's injury is the kind of thing you think of, the test is satisfied.
- This is objective. It doesn't help  $\Delta$  that  $\Delta$  didn't actually foresee the harm.
- This is probably the most common articulation of proximate causation.

## Objects of Foreseeability

- Unforeseeable plaintiff
  - Test failed,  $\Delta$  wins

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- Unforeseeable plaintiff
  - Test failed,  $\Delta$  wins
- Unforeseeable type of harm
  - Case-by-case; no hard and fast rule

The example in the book was leaving kids with a shotgun, where the injury is from splinters resulting from the stock breaking.

Here's another example: Zoo negligence causes a zoo visitor to fall into the alligator pit. The visitor suffers severe injuries from anaphylaxis brought on by a severe alligator allergy. That's an unforeseeable type of harm. Courts will differ in whether this can pass the foreseeability test for proximate causation.

## Objects of Foreseeability

- Unforeseeable plaintiff
  - Test failed,  $\Delta$  wins
- Unforeseeable type of harm
  - Case-by-case; no hard and fast rule
- Unforeseeable manner of harm
  - Test usually satisfied;  $\pi$  usually wins proximate causation issue

The example in the book was the  $\pi$  motorist injured by the  $\Delta$ 's bad driving – but the  $\pi$  motorist wasn't hit by the  $\Delta$ 's car; the  $\pi$  was hit by a different car after having to walk to town because the  $\Delta$ 's driving forced the  $\pi$  into the mud where the  $\pi$ 's car got stuck.

## Objects of Foreseeability

- Unforeseeable plaintiff
  - Test failed,  $\Delta$  wins
- Unforeseeable type of harm
  - Case-by-case; no hard and fast rule
- Unforeseeable manner of harm
  - Test usually satisfied;  $\pi$  usually wins proximate causation issue
- Unforeseeable extent of harm
  - Test almost always satisfied;  $\pi$  generally wins proximate causation issue
  - a/k/a "eggshell plaintiff rule"

## Objects of Foreseeability

- Unforeseeable plaintiff

– Test failed,  $\Delta$  wins

To simplify:

- If the plaintiff is unforeseeable,  $\Delta$  wins.
- If it's just the amount of damage that's unforeseeable, then the  $\Delta$  is generally out of luck.
- If something else about what went wrong can be characterized as unforeseeable, the  $\Delta$  might possibly have a chance of winning proximate causation but shouldn't get too excited.

wins proximate causation issue

– a/k/a "eggshell plaintiff rule"

## Harm-within-the-Risk Test

- Similar to the foreseeability test, this can be thought of as a re-articulation of the foreseeability concept.
- Ask: "Is the harm suffered by the  $\pi$  the kind of thing that makes the  $\Delta$ 's conduct a breach of its duty?"
  - If so, the test is satisfied

## Superseding Causes

- A "superseding" cause results in a failure of proximate causation, even under foreseeability or harm-within-the-risk analysis.
- A superseding cause is an intervening cause that cuts off the chain of causation.
- It's a conclusory term.
  - I.e., to say an intervening cause is "superseding" is to say you're letting the  $\Delta$  off the hook.
- There's no hard or fast rule about what constitutes a superseding cause.
  - Criminal intervenors are usually superseding, unless the  $\Delta$  had some particular duty vis-à-vis criminals.

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    - I.e., to say an intervening cause is "superseding" is to say you're letting the  $\Delta$  off the hook.
  - There's no hard or fast rule about what constitutes a superseding cause.
    - Criminal intervenors are usually superseding, unless the  $\Delta$  had some particular duty vis-à-vis criminals.
- With the doctrine of superseding causes, we have a remnant of the direct test – existing in today's law.
- There's not much underlying logic to the doctrine. You just have to reason analogically from particular precedent.
- This is a major reason we went over the direct test. To the extent you want some deeper explanation for the doctrine of superseding causes, probably the best you can do is think of it as a remnant of the direct test that survives to this day.







**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

For the following questions, assume that Garnett is suing over bones broken from the force of Florvan's car being transmitted to Garnett's body in the course of the collision.

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**Garnett against Carter:**  
Is proximate causation satisfied under the direct test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Carter:**

Is proximate causation satisfied under the direct test?

Are there any intervening causes between  $\Delta$ 's act and  $\pi$ 's injury?

**YES**

**Result:** Proximate causation is not satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Carter:**

Is proximate causation satisfied under the foreseeability test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Carter:**

Is proximate causation satisfied under the foreseeability test?

At the time Carter left an empty brake fluid bottle without throwing it away, was it foreseeable someone would get hit by a car as a result? **NO**

**Result:** Proximate causation is not satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Driscoll:**

Is proximate causation satisfied under the foreseeability test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Driscoll:**

Is proximate causation satisfied under the foreseeability test?

At the time Driscoll left a brake fluid bottle filled with water in the repair shop, was it foreseeable someone would get hit by a car as a result? [YES \(at least that's what I think\)](#)

If you disagree, that's fine. I guess if we're on a jury together we'll have to work it out.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Driscoll:**

Is proximate causation satisfied under the foreseeability test?

At the time Driscoll left a brake fluid bottle filled with water in the repair shop, was it foreseeable someone would get hit by a car as a result? [YES \(at least that's what I think\)](#)

**Result:** Proximate causation is satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Driscoll:**

Is proximate causation satisfied under the harm-within-the-risk test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Driscoll:**

Is proximate causation satisfied under the harm-within-the-risk test?

Assuming it's negligent to leave a brake fluid bottle filled with water in the repair shop, is a car accident the kind of thing that makes it negligent to do so? **YES** ([I feel pretty sure about this](#))

**Result:** Proximate causation is satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**  
Is proximate causation satisfied under the foreseeability test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**  
Is proximate causation satisfied under the foreseeability test?

**Car repair knowledge bomb:**  
Brake fluid tends to have a slight yellow tint and smells like fish oil. It also has a different viscosity than water (meaning it pours somewhat differently).

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**Garnett against Enterby:**

Is proximate causation satisfied under the foreseeability test?

At the time Enterby put fluid into the brake fluid reservoir that didn't have the right color, smell, or viscosity, was it foreseeable a car accident could result? YES

**Result:** Proximate causation is satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**

Is proximate causation satisfied under the harm-within-the-risk test?



**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**

Is proximate causation satisfied under the harm-within-the-risk test?

Assuming it's negligent to put fluid into the brake fluid reservoir if it's the wrong color, smell, and viscosity, is a car accident the kind of thing that makes it negligent to do so? [YES \(I feel pretty sure about this\)](#)

**Result:** Proximate causation is satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**

Is proximate causation satisfied under the direct test?

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**

Is proximate causation satisfied under the direct test?

Are there any intervening causes between  $\Delta$ 's act and  $\pi$ 's injury?

**YES**

**Result:** Proximate causation is not satisfied.

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby:**

Is proximate causation satisfied under the direct

test? Are there any intervening causes between  $\Delta$ 's act and  $\pi$ 's injury?

**Result:** Proximate causation is not

Now let's consider injuries other than Garnett's broken bones

...



**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Hirosaki against Driscoll:**

Garnett is a nurse who was on his way to provide at-home nursing care for Hirosaki. Garnett never makes it to Hirosaki's house, and during Garnett's would-be shift that day, Hirosaki sustains an injury Garnett would have prevented.

**Is proximate causation satisfied under the foreseeability test?**

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

### Hirosaki against Driscoll:

Garnett is a nurse who was on his way to provide at-home nursing care for Hirosaki. Garnett never makes it to Hirosaki's house, and during Garnett's would-be shift that day, Hirosaki sustains an injury Garnett would have prevented.

### Is proximate causation satisfied under the foreseeability test?

**NO**, because Hirosaki is an unforeseeable plaintiff.

**Result:** Proximate causation is not satisfied.



**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby for an infection caused by negligent medical treatment while being treated for the broken bones:**  
**Is proximate causation satisfied under the foreseeability test?**

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby for an infection caused by negligent medical treatment while being treated for the broken bones:**  
**Is proximate causation satisfied under the foreseeability test?**

**YES** because medical malpractice is always considered foreseeable (even if it really isn't).

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**Garnett against Enterby for injuries sustained just after discharge from the hospital as a passenger in a taxi when the taxi was pulling out of the hospital parking lot and was hit by a bus:**

**Hypo:** Carter, Driscoll, and Enterby are auto mechanics sharing a garage. Carter opens up a bottle of brake fluid, uses it in a car, and, being sloppy, she doesn't throw away the bottle. Driscoll, coming along later, needs a container for non-potable water. Seeing the empty brake fluid container, he puts water into it, screws the cap back on, and leaves it. Sometime later, Enterby is repairing brakes. Enterby reaches for the nearest bottle labeled brake fluid and uses it on Florvan's car. Florvan picks up the "repaired" car and drives away. The brakes fail because of water in the lines, and as a result, Florvan is unable to avoid hitting Garnett.

**Garnett against Enterby for injuries sustained just after discharge from the hospital as a passenger in a taxi when the taxi was pulling out of the hospital parking lot and was hit by a bus:**

**Is proximate causation satisfied under the foreseeability test?**

**Almost certainly NO** because this isn't foreseeable. True, it's a foreseeable plaintiff and arguably a foreseeable type of harm (car accident), but a court would, if pressed, hold the bus to be a superseding cause.