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The Thin Skull Plaintiff Concept: Evasive or Persuasive

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The vast number of commentaries which discuss the unforeseen consequences of negligent torts once moved Dean Prosser to observe that "[t]here is perhaps no other one issue in the law of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing."[1] Buried beneath Prosser's "deluge" lies the little noticed thin skull plaintiff. He is the plaintiff with a cervical spine weakness who, in a fender bender, suffers a crippling whiplash,[2] the defendant store-keeper's customer with congenital heart disease who is immobilized after she trips over the store steps,[3] or the tubercular train passenger whom the defendant railroad greets in court after a derailment results in his impotency.[4] In short, he is the sort of fellow who gives "the good hands people" sweaty palms.

An exhumation of the thin skull plaintiff concept is justified if for no other reason than to dispel the many misconceptions we presently have about the principle. Generally conceived as a judicial invention of the early twentieth century, the thin skull principle is uniformly restricted to cases of personal injuries in negligent torts and is traditionally explained away as an exception to the proximate cause axiom limiting a defendant's liability to only foreseeable consequences.[5]

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1. W. PROSSER, THE LAW OF TORTS 250 (4th ed. 1971) [hereinafter cited as PROSSER].

2. Self v. Johnson, 124 So. 2d 324 (La. 1960).

3. Sonson v. J.C. Penney Co., 361 Pa. 572, 65 A.2d 382 (1949).

4. Kansas City S. Ry. v. Akin, 138 Ark. 10, 210 S.W. 350 (1919). *See also* Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970); Thompson v. Lupone, 135 Conn. 236, 62 A. 2d 861 (1948); Baltimore City Pass. R.R. v. Kemp, 61 Md. 74 (1883); Ominsky v. Charles Weinhagen & Co., 113 Minn. 422, 129 N.W. 845 (1911); Watson v. Rheinderknecht, 82 Minn. 235, 84 N.W. 798 (1901); Reegan v. Minneapolis & St. L. R.R., 76 Minn. 90, 78 N.W. 965 (1899); McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911); Lockwood v. McCaskill, 262 N.C. 663, 138 S.E. 2d 541 (1964).

5. *See, e.g.,* PROSSER, *supra* note 1, at 262; F. JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 190 (2d ed. 1964); Linden, *Down with Foreseeability of Thin Skulls and Rescuers,* 47 CAN. B. REV. 545 (1969); Comment, *Taking the Plaintiff as You Find Him*, 16 DRAKE L. REV. 49 (1967); Note, *Steinhauser v. Hertz Corp.,* 39 U. CIN. L. REV. 779 (1970). *See also*

Unfortunately, the accuracy of that modern understanding is as limiting as it is succinct. Tucked neatly away in a crevice of Prosser's Mount Proximate Cause, the thin skull principle has been interred by decades of dogmatic legal apathy. Indeed, its scant recognition by the literature of the torts field indicates that the thin skull principle borders on the pretentious.

This article, an effort to rectify some of this cavalier ignorance about the thin skull principle, will recount its long history, not only within its familiar neighborhood of proximate cause, but throughout tort law. By identifying the origins of the principle in the foundations of early jurisprudence, this historical analysis will disclose the thin skull principle as one of the few unchanged surviving elements of our ancient legal heritage. That history, in turn, will challenge the legitimacy of treating the thin skull as an exception as well as provide the basis for a fuller understanding of the principle's use and abuse today.

I. PRELIMINARY CONSIDERATIONS

The thin skull principle's aphorism, that a defendant greets his plaintiff as he finds him, obscures its simplicity. Fundamentally, the principle requires both a pre-existing physical condition within the plaintiff and conduct by the defendant which operates on that condition so as to produce aggravated injuries. However, the interaction of these factors has led to some misunderstanding as to when the thin skull principle is at work and when it disguises the application of some other notion.

By way of further elaboration of the nature of the thin skull principle, it is important to distinguish it from two allied but distinctively separate rules with which the thin skull principle is easily confused. The first of these rules, the "true value" or "shabby millionaire" rule,[6] addresses the issue of damages in declaring that just as foreseeability is not an issue in determining the extent of injury under the thin skull principle, foreseeability factors are also improper in determining the extent of damages those injuries cause. As one court has stated:

> [I]f a person fires across a road when it is dangerous to do so and kills a man who is in receipt of a large income, he will be liable for the whole damage, however great, that may have

Rowe, *The Demise of the Thin Skull Rule,* 40 MOD. L. REV. 377 (1977) (Rowe notes both the scanty authority and the division of views on the application of the thin skull rule to property losses)[hereinafter cited as Demise of the Thin Skull Rule]; Williams, *The Risk Principle*, 77 L.Q. REV. 179 (1961).

6. *See Demise of the Thin Skull Rule, supra* note 5, at 378.

> resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.[7]

The "true value" rule operates to dismiss foreseeability as an element in identifying the damages that are to be compensated; the thin skull principle operates to dismiss foreseeability in identifying the injury for which damages are to be ascertained.[8] The similarity of these perspectives has, no doubt, been responsible for much of the apparent confusion of the two rules.[9]

In a related vein, the thin skull notion is often encountered in questions concerning "cause-in-fact" issues. Here, the question of whether there exists a physical, as opposed to legal, relationship between the defendant's conduct and the claimed injury may be presented in several contexts. In its simplest form, the defendant may claim that before the accident, the plaintiff had the same injury in the same form and in the same degree as he had after the accident.[10] For example, he may assert that a back complaint after an automobile accident is actually a long-standing postural defect which was unaffected by the accident. More commonly, the defendant asserts that before the incident in suit the plaintiff had the same condition, and that although the post-accident condition is more serious than the prior condition, the claimed injury is nothing more than a result of the natural progress of

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7. Smith v. London & S.W. Ry., L.R. 6 C.P. 14, 22-23 (1870). *See also* Williams, *The Risk Principle,* 77 L.Q. Rev. 179 (1961).

8. For example, in McBroom v. State, 226 N.W.2d 41 (Iowa 1975), the plaintiff, an inmate in a state correctional institution, sought compensation from the state for injuries received in a shop accident. The court found liability and then proceeded to determine that the plaintiff may have been entitled to greater damages because his convict status would make rehabilitation even more difficult. The "true value" of his injury addressed the issue of the plaintiff's compensation. *See also* Robinson v. Standard Oil of Ind., 89 Ind. App. 167, 166 N.E. 160 (1929).

9. *See, e.g.,* Becker v. D. & E. Distrib. Co., 247 N.W. 2d 727, 730 (Iowa 1976) (citing McBroom v. State, 226 N.W.2d 41 (Iowa 1975), a true value case, as an example of the thin skull principle); Wolfe v. Checker Taxi Co., 299 Mass. 225, 12 N.E. 2d 849 (1938) (citing Larson v. Boston Elevated Ry., 212 Mass. 262, 98 N.E. 1048 (1912), a thin skull case as an example of a true value case); 22 AM. JUR. 2d *Damages* §§ 80-82 (1965) (combining the thin skull principle and true value rules without distinction); RESTATEMENT (SECOND) OF TORTS § 461 comment b (1965) [hereinafter cited as RESTATEMENT 2d]. Prosser considers the thin skull principle and true value rule as "obviously related" and, to the degree they both address the issue of injury, the resemblance is apparent. PROSSER, *supra* note 1, at 262. However, apart from separate historical origins, the rules differ both in the method of their application and the sequence of their application. The categorical decision (to recognize an injury or not) of the thin skull cases is addressed prior to the variable decision (the amount of compensation) of true value cases. As a result, different procedures may be utilized (such as rules of evidence) in the resolution of the issues presented in each context.

10. Annot., 2 A.L.R. 3d 294 (1965).

the prior ill and was unaffected by the accident.[11] Hence, in a complaint for alleged activation of a pre-existing dormant cancer, the defendant may admit that the injured person did not suffer from the claimed injury before the accident but may urge instead that the post-accident condition developed naturally from some other pre-existing condition. In a suit to recover for insanity claimed to have been caused by a collision, the defendant may admit plaintiff's sanity prior to the accident but contend that the plaintiff had syphilis before the accident and that the post-accident insanity was caused by that prior condition.[12] Finally, the defendant may claim that the arthritic plaintiff's injury was caused by post-accident factors which are unrelated to either his conduct or negligence. Thus, the plaintiff's claim for back injuries as a result of an accident would be dismissed if the defendant were able to establish that the plaintiff's injuries were attributable to football injuries suffered the day after the crash. In each of these situations, the court is asked to look for intervening or superseding physical causes which act so as to break the causal chain between the defendant's acts and the plaintiff's injury. It is important to understand that this factual question is prefatory to a consideration of the legal relationship involved in the thin skull principle's sphere.[13] Nonetheless, like the "true value" rule, causation issues have been frequently misunderstood as thin skull issues, sometimes producing mysterious results.[14]

With this preliminary understanding in mind, it becomes appropriate to approach a discussion of the origins of the thin skull principle. Such an investigation, it is hoped, will yield the necessary insight into the thin skull's rationale so that a fuller appreciation of the principle's application is possible.

II. Evasive Historical Values And Rationale

It is proper to initiate this historical analysis by explaining that the purpose in exploring the origins of the thin skull principle is not only to chronicle its roots, but also to explain its development. This analysis will aid in understanding the underlying rationales for the principle, in contributing to a clearer definition of its role, and in providing a secure basis for modern utilizations of the principle.

The genesis of the thin skull principle is widely attributed to a

11. *Id.*
12. *Id.*
13. *Id.*
14. *See* Evans v. S.J. Groves & Sons Co., 315 F.2d 335 (2d Cir. 1963) (Judge Friendly discusses the confusion in this area).

1901 English decision: *Dulieu v. White & Sons*.[15] The pregnant plaintiff had been working behind a bar in her husband's tavern when the defendant, driving a carriage past the establishment, lost control of his horse and collided with the building. The woman, though physically untouched, claimed that the shock and fright caused by the collision subsequently resulted in her giving premature birth to an idiot child. Though the case is remembered today principally for its articulation of the thin skull principle,[16] at the time it was decided *Dulieu* was significant for quite another reason. An earlier case had declared that fright, unaccompanied by physical impact, was not a legally recognized injury. In overruling that earlier decision, *Dulieu* permitted the court to modify that earlier holding by determining that if fright were accompanied by some physical manifestation of the mental injury, then the subsequent injury was compensable. From this vantage, the *Dulieu* court was able to go on to assert that the pregnancy, as a pre-existing condition, did not make her ultimate injury too remote from the defendant's negligence in causing her mental fright:

> If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.[17]

This thin skull dictum, that pregnancy did not make the plaintiff's ultimate injury too remote, was not supported by the *Dulieu* court with specific citations; rather, it appears in the opinion as a supplemental aspect of the case's then more significant rejection of the physical impact limitation for mental fright. The case nonetheless articulated the essential precondition for the application of the thin skull principle: a preexisting condition within a plaintiff, though unknown and reasonably unknowable to the defendant, would not bar that plaintiff's recovery.

The fact that no precedent was offered in the opinion for the application of the thin skull principle lends credence to the view that the *Dulieu* decision was the first judicial recognition of it. However, a review of American cases decided prior to 1901 contradicts that belief, for it appears that at least in this country the thin skull principle was a well known, widely utilized principle of tort law. The 1892 decision of

15. [1901] 2 K.B. 669.
16. *See supra* note 9.
17. [1901] 2 K.B. 669, 675.

Purcell v. St. Paul City Railway[18] is typical. The pregnant plaintiff in that case was a passenger on a streetcar; she claimed that as a result of near collision between the vehicle in which she was riding and the defendant's streetcar, she experienced extreme mental shock that caused her to go into violent convulsions and eventually led to her giving premature birth. The court, in upholding an award of damages for the miscarriage, reasoned that the railroad company's defense, which sought to deny liability because of the plaintiff's predisposition to injury, was untenable. The analysis is strikingly similar to that engaged in by the *Dulieu* court:

> If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.[19]

Interestingly, the *Purcell* court, like the *Dulieu* court, applied the thin skull principle only after rejecting the physical impact limitation on the

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18. 48 Minn. 134, 50 N.W. 1034 (1892). *See also* Montgomery & E. Ry. v. Mallette, 9 So. 363 (Ala. 1891); Louisville, N. A. & C. Ry. v. Snyder, 117 Ind. 435 (1888); Jeffersonville, M. & I. Ry. v. Riley, 39 Ind. 568 (1872); Bodkin v. Cassady, 106 Iowa 334, 76 N.W. 772 (1898); Lapeleine v. Morgan's L. & T. R. & S. S. Co., 40 La. 661, 4 So. 875 (1888); Baltimore City Pass. Co. v. Kemp, 61 Md. 619 (1883); Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 30 N.E. 1013 (1892); Shartle v. City of Minneapolis, 17 Minn. 284 (1871); Jewell v. Railway, 55 N.H. 84 (1874); Witrak v. Nassau Electric Ry., 52 A.D. 234, 65 N.Y.S. 257 (1900); Reading City Pass. Ry. v. Eckhert, 4 A. 530 (Pa. 1886); Sawyer v. Dunlany, 30 Tex. 479 (1867); Shenandoah Valley Ry. v. Moose, 83 Va. 827, 3 S.E. 796 (1887); Hawkins v. Front St. Cable Ry., 3 Wash. 592, 28 P.1021 (1892); Steward v. City of Ripon, 38 Wisc. 584 (1875); Oliver v. Town of LaValle, 36 Wisc. 592 (1875). The thin skull appears also to have been recognized in other common law countries. *See, e.g.,* Linklater v. Minister of Railways, [1900] 18 N.Z.L.R. 536 ("A person suffering from any complaint who travels by railway must take any risks that a person in his condition would be likely to incur through a railway journey . . . [but] the fact that the plaintiff at the time of the injury was suffering from a disease or weakness, curable or incurable, though its tendency was to aggravate the injury caused by the negligence, does not impair the plaintiff's right to recover." *Id.* at 537); Fitzpatrick v. Great W. Ry., 12 Up. Can. Q.B. 645 (1855); Clippens Oil Co. v. Edinburgh & Dist. Water, [1907] A.C. 291 (Scot.). In fact, an 1832 English decision discredits the view that *Dulieu* was the first decision to announce the thin skull principle within England. Boss v. Litton, 172 Eng. Rep. 1030 (K.B. 1832) ("A foot passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of the persons driving carriages along it."). *Id.* at 1031.

19. Purcell v. St. Paul City Ry., 48 Minn. 134, 139, 50 N.W. 1034, 1035 (1892).

plaintiff's initial mental injury.[20] The resolution of the cause-in-fact issue, of whether the defendant's conduct was physically linked to the plaintiff's ultimate injury without an independent intervening or superseding cause, enabled the court to apply the thin skull principle. The common recognition of the two courts that physical causation was the initial question led the two opinions toward a rationale that is compatible with present understanding of the thin skull principle.[21]

It is frustrating that the *Purcell* court, like the *Dulieu* court, failed to provide guidance for the application of the thin skull principle. In fact, a review of the American thin skull cases during this period reveals few citations to precedent; instead, the majority of courts seemingly relied on the common sense nature of the principle.[22] In 1875 the Iowa Supreme Court asserted the thin skull principle by boldly rejecting the defendant's predisposition to injury theory without citing precedent: "If this doctrine [plaintiff predisposition] has ever been recognized by any court, the sooner, in the interest of humanity, it is abandoned the better."[23] While these cases do little to indicate the legal foundation of the rule, they are important in their implicit recognition of another aspect of the thin skull principle: it is rooted in one of our basic, if unarticulated, notions of fairness.

Voorheis, in his treatise on torts,[24] articulated the most extensive

20. Courts following the physical impact test dismiss thin skull claims. *See, e.g.,* Phillips v. Dickerson, 85 Ill. 11 (1877); Lehman v. Brooklyn City Ry., 54 N.Y. Sup. Ct. 355 (1888).

21. *See also* Pittsburg & C. Ry. v. McClurg, 56 Pa. 294 (1867).

22. In Sorenson v. Northern Pac. Ry., 36 F.166 (Minn. 1888) the court stated: "I know that *post hoc* is not always *propter hoc,* but where *propter hoc* is uncertain, the *post hoc* may often be decisive." *Id.* at 167. One court appeared to reject the thin skull principle when the plaintiff passenger of the defendant's common carrier claimed that the fright she experienced as a result of a fire in the defendant's car caused the suppression of her menses. The court determined that the plaintiff had to "assume the risks" inherent in rail travel and denied her recovery. Pullman Palace Car Co. v. Barker, 40 Colo. 344 (1878). The decision was frequently criticized in subsequent thin skull cases. *See, e.g.,* Louisville, N. A. & C. Ry. v. Falvey, 104 Ind. 409, 3 N.E. 989 (1886). *See also* Bovee v. Town of Danville, 53 Vt. 183 (1880) (rejecting a claim for emotional trauma suffered by plaintiff following a miscarriage). Similarly, thin skull injury claims brought against railroads in the form of breach of contract actions were also unsuccessful. *See, e.g.,* Brown v. Chicago Ry., 54 Wis. 342, 11 N.W. 356 (1882); McNamara v. Clintonville, 62 Wis. 211 (1885). *See also* Washington, *Damages in Contract at Common Law,* 47 L.Q. Rev. 345 (1931); Washington, *Damages in Contract at Common Law,* 48 L.Q. Rev. 90 (1932). *Cf.* Mobile Ohio Ry. v. McArthur, 43 Miss. 180 (1870) (recognizing a contractual tort action for injuries to a rheumatic plaintiff); Heirn v. McCaughan, 32 Miss. 17 (1856) (breach of carrier's contractual duty gives rise to a cause of action sounding in tort).

23. Allison v. The C. & N.W. R. Co., 42 Iowa 274, 281 (1875).

24. G. VOORHEIS, A TREATISE ON THE LAW OF THE MEASURE OF DAMAGES FOR PERSONAL INJURIES §§ 144-151, at 272-73 (1903) [hereinafter cited as VOORHEIS]. *See also* T. BEVAN, NEGLIGENCE IN LAW 103 (W. Byrne & A. Gibb 4th ed. 1928); A. WATSON, DAM-

early analysis of the thin skull principle. In comparing the early thin skull cases of the middle and late nineteenth century, Voorheis offered three arguments to support the principle. While these arguments are helpful in identifying nineteenth century perceptions about the principle, they are superficial in that they fail to convey an understanding of the principle's historical development. Voorheis' first argument in support of the thin skull principle is that if a court were to entertain defenses premised on a plaintiff's predisposition to injury, then "a field would be opened for speculation and expert evidence, which would lead to confusion and doubt; which would travel into scientific, philosophical and theoretical questions without limit, and which would be a source of great expense."[25] The concern Voorheis confronts here is actually a cause-in-fact issue which, it should be remembered, was the linchpin for the application of the thin skull principle in such cases as *Dulieu* and *Purcell*.[26] Voorheis errs by confusing proximate cause with factual cause. If factual cause is not proved, the question of proximate cause is not addressed. The second argument presented is that "any person possessing or susceptible to these conditions would be subjected to greater embarrassment and apprehension in pursuing his business, trade or profession with their necessary effects, and to less consideration and protection in his person than his more fortunate neighbor."[27] This rationale is appealing because it rests upon common sense justice that is inherent in the thin skull principle but is wholly unsatisfactory if applied to those unaware of their infirmities and susceptibilities. This leads us to Voorheis' third justification for the principle:

> no additional safeguard can be thrown around or given to such persons; because it is impossible to do so, because many persons are ignorant of these conditions in their systems, and which might never appear except for the injury; and because there is no means by which to anticipate the effect of an injury, however severe or slight, as the effect so much depends upon the physical condition of the person at the time of the injury . . . .[28]

Again, the argument is attractive in its distillation of the common sense values the thin skull principle reflects. This attractiveness is supported

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AGES FOR PERSONAL INJURIES §§ 195-207 (1901); 4 T. SHEARMAN & A. REDFIELD, LAW OF NEGLIGENCE 839 (1941); F. POLLOCK, THE LAW OF TORTS 51 (13th ed. 1929); F. TIFFANY, DEATH BY WRONGFUL ACT § 76 (1893); S. THOMPSON, NEGLIGENCE §§ 149-156 (1901).

25. VOORHEIS, *supra* note 24, at 276.

26. *See supra* note 21 and accompanying text.

27. VOORHEIS, *supra* note 24 at 276.

28. *Id.*

by Voorheis' inclusion of those thin skull plaintiffs who do not know of their infirmity. However, the argument is unpalatable because it fails to provide a rational, logical, or historical foundation for the principle. Whether or not the ultimate injury is foreseeable to the plaintiff, the mere existence of the injury is no more a reason for holding the defendant liable than it is to hold the plaintiff liable. The task is to explain precisely why a defendant is assigned liability for these kinds of unexpected consequences—a justification as to why a plaintiff should be compensated for such injuries evades the essential issue.

Voorheis' unfulfilling arguments should not be readily abandoned, however. In his analysis of the subject, Voorheis attempts to reconcile two potentially inconsistent policies. Just as a defendant should be held liable in proportion to his conduct, an innocent party who suffers injury at the hands of such a defendant should not be forced to absorb the costs of his misfortune. The case of *Derosier v. New England Telephone & Telegraph*[29] is illuminating in its discussion of these competing policies within tort law:

> The foreseeable quality of an event following breach of duty is always material upon the issue of accountability for the act. Upon the question of causation, this quality is material only as it operates through the moral aspect of the case, which not infrequently has directed the course of the law. He should have foreseen; therefore he is morally guilty. Causation, as distinguished from duty, is purely a matter of producing a subsequent event. In determining how far the law will trace causation and afford a remedy, the facts as to the defendant's intent, his imputable knowledge, or his justifiable ignorance are often taken into account. The moral element is here the factor that has turned close cases one way or the other. For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results.[30]

This aspect of the thin skull principle, that as between a wholly innocent party and a culpable (or, perhaps, less innocent) party the latter assumes liability, may do much to explain how it is that the thin skull

29. 81 N.H. 451, 130 A. 148 (1925).
30. *Id.* at 463, 130 A. at 152.

principle has remained virtually untouched in the past century while other basic notions of tort law have undergone significant alteration.[31] If the thin skull principle is rooted in basic values which we share with past generations, then its invulnerability over the years provides a comfortable argument for those tort scholars who accept such moralistic or value oriented interpretations of legal history.

The theory that shared morality underlies and perpetuates the thin skull principle is supported by references to a few nineteenth century thin skull cases that cite criminal law as precedent for the application of the principle. Hence, in *Louisville & N.R. Co. v. Jones*,[32] the plaintiff's decedent suffered injuries in a train derailment, which, purportedly combined with her pneumonia, caused her death. The court, though apparently somewhat troubled by the factual relationship between the derailment and the death, held that:

> If the injury was caused by the negligence of the railroad company . . . and if it contributed to and hastened her death, then the corporation would not be guiltless *Tidwell v. State*, 70 Ala. 33; Whart. Hom. § 382. This would be so in criminal prosecutions, and must be at least equally so in a civil suit, such as this. In such case the wrong and injury are, in fact, the cause of the death.[33]

This analogy to criminal law is interesting in that it not only supplies a convenient body of law for precedent, but also unifies jurisprudential philosophy with the common theme of moral culpability and innocence. This approach is buttressed by abundant authority that could enable one to trace the thin skull principle through criminal cases well back into the seventeenth century.[34] Sir Matthew Hale's *Historia Placitorum Coronae*, one of the earliest treatises on criminal law,[35] contains the following passage:

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31. For example, the recognition of mental or emotional injury.

32. 83 Ala. 376, 3 So. 902 (1888).

33. *Id.* at 377, 3 So. at 904. *See, e.g.,* Gray v. Little, 126 N.C. 385, 35 S.E. 611 (1900); Rex v. Martin, 172 Eng. Rep. 907 (1832). *See also* 1 S. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE § 145 (1901).

34. *See, e.g.,* 1 J. ARCHBOLD, CRIMINAL PROCEDURE, PLEADING & EVIDENCE 917 (7th ed. 1860); 2 J. BISHOP, CRIMINAL LAW, 347-48 (1872); D. POWER, ROSCOE'S DIGEST OF LAW OF EVIDENCE IN CRIMINAL CASES 660-61 (G. Sharswood 6th ed. 1866); *see also* Governor Wall's Case, 28 Howell, St. Tr. 51 (1802); The Dean of St. Asaph, 21 Howell, St. Tr. 847, 1022 (1783) ("[I]f a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an *indictment* for trespass, but he must answer in an *action* for everything he has done."); Livingston v. Commonwealth, 55 Va. 582 (1857); Commonwealth v. Fox, 7 Gray 585, 73 Mass. 585 (1856).

35. 1 SIR M. HALE, HISTORIA PLACITORUM CORONAE (1736).

> If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or a hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder, as the case happens, in him, that gives the wound or hurt, for he doth not die simply *ex visitatione dei*, but the hurt that he receives hastens it, and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned and wise judge justice Rolle frequently direct.[36]

The "morality" approach finds additional strength in other intentional tort cases from this era, where the thin skull principle seems to have been similarly active.[37] As an example, *Vosburg v. Putney*[38] involved a battery which arose when the defendant kicked the plaintiff's infected leg. The defendant was held liable for the aggravated injury his conduct caused.[39] Similarly, in *Bray v. Latham*,[40] a decision reached in 1888, the court upheld an action in conversion for the aggravated personal injuries suffered by the emphysemic plaintiff when the defendant set fire to her home. In these and other cases,[41] it could be persuasively argued that the moral culpability of the defendant appears to have justified the imposition of civil liability much as the criminal defendant would have assumed criminal liability.

This analysis is cogent in several broad respects. First, the use of the thin skull principle in negligence and intentional tort cases acts so as to extend a defendant's liability in the same way that the culpability factor operates in criminal cases.[42] Second, the use of the thin skull principle in personal injury suits mirrors its use in the criminal arena.[43]

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36. *Id.* at 428. *See also* 1 W. HAWKINS, HISTORIA PLACITORUM CORONAE 119 (1701).

37. *See generally* Focht, *Proximate Cause in the Law of Homicide,—With Special Reference to California Cases,* 12 S. CAL. L. REV. 19 (1938).

38. 80 Wis. 523, 50 N.W. 403 (1891).

39. *See also* Watson v. Rheinderknecht, 82 Minn. 235, 84 N.W. 798 (1901).

40. 81 Ga. 640, 8 S.E. 64 (1888).

41. *See, e.g.,* Newell v. Whitcher, 53 Vt. 589 (1880) (blind girl recovered for fright occasioned by defendant's trespass and assault in her bedroom); Barbee v. Reese, 60 Miss. 906, *aff'd,* 61 Miss. 181 (1883).

42. *See supra* note 9 and accompanying text.

43. That the thin skull principle is applied to personal injuries, as opposed to property injuries, is one of the more distinctive aspects of the principle. *But see* Rowe, *The Demise of the Thin Skull Rule,* 40 MOD. L. REV. 377, 381 (1977). This distinction is evidenced by the recognition that suits which are essentially personal injury claims but premised on actions designed to vindicate property injuries also permit the application of the thin skull principle. Hence, in Boushell v. J.H. Beers, Inc., 215 Pa. Super. 439, 258 A.2d 682 (1969), the plaintiff

Finally, the notion of moral culpability in criminal law would go far in explaining, for example, the *Dulieu* court's evident desire to establish factual causation between the defendant's careless driving and the plaintiff's premature delivery.[44] Once that cause-in-fact determination was made, it is remembered, the *Dulieu* defendant's tort (in causing the fright) provided the court with an opportunity to consider his conduct morally culpable and hold him liable for the plaintiff's subsequent injury under the thin skull principle.

As tempting as the morality approach is in providing an acceptable explanation for the thin skull principle, it suffers from an elementary flaw. Negligence differs from both criminal law and intentional tort law in that the moral approach focuses upon the defendant's moral culpability. While the *Derosier* opinion clearly indicates that the moral factor is not completely absent from negligence,[45] it lies for the most part in the background, to be utilized only when the other factors (for example, duty, breach, factual cause) fail to provide a satisfactory result. To the extent that an actor's morality is relevant in negligence suits, the thin skull principle is understandable, predictable, and explainable by value oriented, moral interpretations; however, to the extent that culpability is less prominent in negligence issues, the "moral culpability" theory is inadequate.

This insufficiency of the morality explanation becomes more evident if it is considered in light of those negligence cases where morality plays a relatively minor role in assigning liability. Cases such as *Walton v. Booth*[46] show that the thin skull principle applies just as easily in these situations as it does in intentional torts. In that case, the complaint arose against an apothecary who negligently sold a pregnant woman zinc poison rather than epsom salts. The druggist was held liable for her death, not so much because his error was so egregious, but because he failed to exercise the "exceedingly cautious" duty of care he owed the plaintiff's decedent by reason of his position.[47] Similarly, the

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brought an action in trespass against the defendant construction company for a personal injury he received on his property from a rock hurled by defendant's workers. The subsequent aggravation of an ulcer was held to be compensable under the thin skull principle even though trespass is a property tort. Furthermore, the thin skull principle will entitle a plaintiff to recover certain kinds of property damage if proximately related to the physical injury of the plaintiff. Hence, in Bernstein v. Western Union Tel. Co., 174 Misc. 74, 18 N.Y.S.2d 856 (1940), the plaintiff recovered for the cost of her glasses after the defendant's messenger boy collided with her.

44. *See supra* note 15 and accompanying text.

45. *See supra* note 29 and accompanying text.

46. 34 La. Ann. 913 (1882).

47. *Id.* at 915.

numerous railroad cases of this era demonstrate that the thin skull principle applies just as easily in cases where the railroad was grossly negligent or reckless as in cases where the railroad was as much a victim of circumstances as the plaintiff.[48] Indeed, recognition of the thin skull principle in train injury cases brought as breach of contract actions indicates that the principle may be related to concerns of moral culpability in most cases, but that it is not intrinsically dependent on moral values.[49] If the thin skull principle is valid because of the moral culpability of a tortfeasor, then the court's unhesitating application of the thin skull principle in the decisions not grounded on moral values suggests the moral theory alone does not fully explain the true nature of the thin skull principle and that a fuller explanation must be found elsewhere.

It should be understood that such an alternative does not contradict the moral rationale but rather complements it by providing a logical and historical depth to understanding the principle. With this attitude in mind, a brief review of the early development of our tort law provides a broader perspective on the thin skull problem.

Tort law, as it developed in England during and after the Middle Ages, was far different from the tort law of today. As the following passage from Holdsworth points out, it was a harsh, austere law that in many respects closely resembled the contemporary strict liability approach:

> The liability so imposed stretches far beyond the proximate consequence of any supposed negligence. *The law is regarding not the culpability of the actor, but the feelings of the injured person whose sufferings may be traced ultimately to the act.* This idea is well illustrated by the oath which a defendant must swear if he would escape liability. He must swear that he has done nothing whereby the person slain was "nearer to death or further from life."[50]

This law was clearly concerned with the plaintiff's condition, and the moral standing of the defendant was largely irrelevant in determining liability. Thus, the decrees of King Aethelbert, the earliest recorded laws of England that were written in the sixth century, read like a modern worker's compensation schedule:

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48. *See supra* note 18.

49. *See supra* note 22.

50. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 52 (3d ed. 1923) (emphasis added) [hereinafter cited as HOLDSWORTH]. *See also* Wigston, *The Origins of Tort Liability,* 81 U. PA. L. REV. 264 (1923).

36. If the outer covering of the skull is broken, 10 shillings shall be paid as compensation.
37. If both (the scalp and skull) are broken, 20 shillings shall be paid as compensation.[51]

Such laws provide little opportunity for consideration of the defendant's moral standing. But more importantly, they established the basic axiom of early law. In Holdsworth's words, "a man *acts* at his peril."[52] It is the injury and the defendant's conduct that are of concern here; legal cause, as a test of that relationship, is a crudely formulated notion, for the historian is careful to remind us that as harsh as these laws were, they were also laws of men.[53] Where, for example, a case was presented in which the plaintiff was guilty of what we might describe as contributory negligence, the "obvious justice" of the case could supersede the rigidity of the law to deny such a plaintiff recovery. However, absent such factors, early tort law is a hostile world to the moralist.

It is here that we may find the first traces of the thin skull principle. The Brehon Law, a Celtic Code in effect in Ireland sometime well before the arrival of Christianity, contains the following description of how early tort claims would have been reached:

> When a person had once been maimed, and had recovered part or all of his body fine, his position in the case of subsequent injuries was not altered for the worse. No subsequent wrongdoer could insist that the injured person should be rated as a damaged article.[54]

If the passage is read with Holdsworth's guiding caution, the thin skull principle is revealed as a notion that was originally rooted in the ancient ethic of strict liability: that a man acts at his peril. Such an understanding highlights and explains the innately quintessential feature of the thin skull principle: it acts to extend a defendant's liability without qualification. While it may easily be surmised that the common sense value of the principle may have tempered the application of it in any given case, it is equally clear that the veneer of the morality rationale, evidenced in nineteenth century case law, is a more recent construction that has concealed and distorted the fundamental nature of the principle.

The foregoing historical analysis, by its illumination of the essen-

51. THE LAWS OF THE EARLIEST KINGS 75 (F. Attenborough ed. 1927).
52. HOLDSWORTH, *supra* note 50, at 51.
53. *See* F. POLLOCK, THE LAW OF TORTS 430 (5th ed. 1929).
54. S. BRYANT, LIBERTY, ORDER & LAW IN THE IRISH FREE STATE 236 (2d ed. 1970) (quoting 3 THE ANCIENT LAWS OF IRELAND cix-cx).

tial features and motivating values of the thin skull principle, can provide the basis for a fuller articulation of the principle's constituent parts than has heretofore been possible. An enlightened understanding of the thin skull principle, in turn, provides the basis for understanding the uses and abuses of the principle in tort law.

It has been seen that one significant attribute of the principle is that it requires a pre-existing physical condition within the plaintiff that is unknown and reasonably unknowable to the defendant.[55] Thus, questions concerning the higher degree of care defendants are held to because of the knowledge of the peculiar sensitivity are directed to issues of duty and not to proximate cause as is the thin skull principle. It has also been seen that the operation of the thin skull principle is prefaced by a determination of the "cause-in-fact" relationship between the defendant's conduct and the plaintiff's injury.[56] Moreover, the thin skull principle itself is prefatory to a concern for the extent of damages derived from the injury.[57] Finally, and perhaps most importantly, the thin skull principle works in the area of proximate cause subsequent to the determination that the defendant has committed a complete tort.[58] Thus, in negligence the court must first recognize the breach of a duty by the defendant, causing both factually and proximately an injury upon which the aggravated injury follows. Upon this finding the court can properly proceed to consider the subsequent injury and, via the thin skull principle, bypass the proximate cause foreseeability limitation.

Furthermore, the recognition of this unqualified extension of liability as the paramount feature of the principle is of benefit in understanding the different rationales that have been utilized in support of the thin skull principle. In the amoral environment of early jurisprudence, the thin skull principle could be applied with the cold strictness of cold precepts—limited perhaps only by the "obvious justice" of a given situation. However, with the decline of tort actions based on writs and the concomitant arrival of our modern classifications of torts, strict liability was supplemented and replaced with torts conceived and ordered in terms of the defendant's purpose: intentional and unintentional (negligent) torts.[59] In such an environment, the simplistic appeal of strict liability became acrid to nineteenth century moral values and

55. *See supra* note 5.

56. *See supra* notes 10-13 and accompanying text.

57. *See supra* notes 7-9.

58. *See supra* notes 15-21 and accompanying text.

59. *See generally* Green, *The Regenerative Process in Law,* 33 IND. L.J. 166, 168 (1958).

compelled the creation of thin skull rationalizations based on culpability. Thus, criminal law may have step-fathered the thin skull principle through the moralistic climatic changes of the nineteenth century; however, it did not significantly alter the essential civil, amoral nature of the principle. The shift in focus from the plaintiff's injury of early law to the more modern concern with the defendant's conduct was a shift that was motivated by the offended sensibilities of men rather than inherent insufficiencies in the principle. As the following analysis makes clear, it is a shift which has confused, rather than clarified, the workings of the thin skull principle.

With this fuller understanding of the workings of the thin skull principle, a further evaluation of present popular conceptions of the principle can be provided. Perhaps the fairest modern statement of the thin skull principle is presented by the Restatement Second of Torts:

> The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.[60]

Under the Restatement, the thin skull principle works to extend a defendant's liability where the test of proximate cause would otherwise threaten to limit it. As Dean Prosser explains:

> It is as if a magic circle were drawn about the person, and one who breaks it, even by as much as a cut finger, becomes liable for all resulting harm to the person although it may be death. The defendant is held liable when his negligence operates upon a concealed physical condition, such as pregnancy, or a latent disease, to produce consequences which he reasonably could not anticipate.[61]

Prosser's metaphor of the "magic circle" is accurate in its description of the unqualified extension of liability directed under the thin skull principle, but it fails, as does the Restatement, to capture the constituent parts of the thin skull principle as well as the more central role the principle has played in the development of proximate cause theories. This occurs because the artificial divisions inherent in the Restatement format lack explicit relational ties across broad areas. Thus, under the Restatement, it could superficially appear that a defendant could be held liable for a breach of a duty owed to a plaintiff without the initial

60. RESTATEMENT (SECOND), *supra* note 9, at § 461.

61. PROSSER, *supra* note 1, at 261.

and crucial determination that the breach first established a legally recognized injury. Failing so to articulate the thin skull's relation to foreseeability, the Restatement has perhaps invited premature and erroneous application of the principle, which in turn has produced ultimate findings of liability that have perverted the intended and true effect of the principle.[62]

III. PERVASIVE APPLICATION

Perhaps more fundamentally than this, the Restatement, Dean Prosser, and other modern commentators have failed to recognize the thin skull principle as not limited solely to the foreseeability aspect of proximate cause in negligent torts,[63] but instead applicable throughout tort law.[64] It is here maintained that this principle should be seen to apply wherever a tort is present and the injured party has suffered foreseeable and unforeseeable harm. The effect of this application is compensation for both foreseeable indirect harm and unforeseeable direct harm. In the direct causation test of proximate cause the thin skull principle is not needed. With the foreseeability test the thin skull concept is used to reach direct causation results.

Hence, in the area of intentional torts, the defendant who mali-

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62. Some courts have appeared to treat the thin skull principle as a substitute for the plaintiff's burden to establish a cause-in-fact relationship between his injury and the defendant's conduct. The point was articulated by the court in Baltimore & Potomac R.R. v. Reaney, 42 Md. 117 (1875):

> But it is equally true, that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense, that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act. To entitle such party to exemption, he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done.

Id. at 37 (emphasis in original). *See also supra* notes 14, 21 and accompanying text.

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

64. § 461 is the only recognition of the thin skull principle in the RESTATEMENT (SECOND), *supra* note 9, and the principle was wholly absent from the original RESTATEMENT. However, in 1973, a broader expression of § 461 was proposed under chapter 47, *Damages,* which was intended to expand § 461:

> § 917 *Harms Resulting from Tortious Conduct.* One who tortiously harms the person or property of another is subject to liability for damages for the consequences of the harm in accordance with the rules as to whether the conduct is a legal cause of the consequences.

RESTATEMENT (SECOND) OF TORTS § 917 (Tent. Draft No. 19, 1973). While the comments to the proposed revision indicate a recognition of the thin skull's application throughout tort law, it is also evident that its authors considered the rule as the "exception" to the rule of foreseeability. As will be developed subsequently in the text, such a description inadequately accounts for the historical or analytical role of the principle.

ciously kicks the arthritic's knee is liable for the full injury resulting.[65] The defendant storekeeper who falsely imprisons a suspected shoplifter is liable for the aggravation of the imprisoned plaintiff's pre-existing mental condition.[66] As the court in *Derosier*[67] pointed out, proximate cause has never been much of a problem in the area of intentional conduct.[68] Compensating the thin skull loss is not a problem as all injuries caused by the wrongful act are compensable.

In the area of strict liability the thin skull principle would seem to apply for at least one of two reasons. First, the ideas of causation generated in negligence are carried forward under the theory of strict liability. Second, the courts exhibit a willingness to provide a remedy for injury under strict tort because of notions of risk and danger. This willingness easily encompasses the thin skull concept.

Liability for injuries caused by failures in product safety typically falls under varying theories—negligence, strict liability in tort, or warranty. The above analysis covers the use of the thin skull principle in the first two areas. Under the warranty theory, a manufacturer who breaches express and implied warranties in the production of make-up which contains sufficient quantities of poison so as to affect a normal person will be liable for the consequences realized by a plaintiff buyer who receives aggravated injuries because of an endocrine condition.[69] Thus, the principle would seem to be applicable under any theory of liability for lack of product safety.

In the nuisance area of tort law, it is common knowledge that for the plaintiff to recover there must be a showing of substantial harm.[70] A sensitive person suffering harm will not suffice, as the harm must be

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65. *See supra* notes 38-40.

66. Culp v. Federated Dep't Stores, 11 Ohio App. 2d 165, 229 N.E.2d 100 (1965). *See also* Post Pub. Co. v. Peck, 199 F. 6 (1st Cir. 1912) (defamation); Jacquith v. Stanger, 79 Idaho 49, 310 P.2d 805 (1957) (trespass to chattels); Botkin v. Cassady, 106 Iowa 334, 76 N.W. 722 (1898) (duress); Keesecker v. G.M. McKelvey Co., 64 Ohio App. 29, 27 N.E.2d 787 (1940), *rev'd on other grounds,* 68 Ohio App. 505, 42 N.E.2d 223 (1941), *rev'd on other grounds,* 141 Ohio St. 162, 47 N.E.2d 211 (1943) (trespass to property); Alsteen v. Gehl, 21 Wis.2d 349, 124 N.W.2d 312 (1963) (intentional infliction of emotional distress); Aschermann v. The Phillip Best Brewing Co., 45 Wis. 262 (1878) (conversion).

67. Derosier v. New England Tel. & Tel. Co., 81 N.H. 451, 463, 130 A. 145, 152 (1925).

68. *Id.*

69. Gober v. Revlon Inc., 317 F.2d 47 (4th Cir. 1963). *See also* Smith v. Denholm & McKay Co., 288 Mass. 234, 192 N.E. 631 (1934); Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N.W. 65 (1883) (blasting); Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P.2d 298 (1963).

70. RESTATEMENT (SECOND), *supra* note 9, at § 821F.

judged against the suffering of a normal person in the community.[71] This does not necessarily prevent the sensitive (thin-skull) person from obtaining a judgment. If the cause of action is established vis a vis harm to a normal person, the sensitive person may be compensated for injuries. As stated by the court in *Soap Corporation of America v. Balis*[72]:

> The effect of the odors on persons of ordinary sensibilities was material in determining whether or not there was a nuisance. The maintenance of the nuisance was a tort. A right of damages for injuries proximately resulting from the nuisance was not limited to persons of ordinary sensibilities. Appellant was liable to any of the plaintiffs who received injuries proximately caused by the commission of the tort.[73]

In the area of deceit or misrepresentation the threefold bases of liability apply. As the analysis above indicated, the thin skull plaintiff principle ought to apply to each theory of recovery. Under the heading of misrepresentation, reliance is a key issue,[74] and the reliance by the plaintiff must be reasonable.[75] Despite this requirement, persons truly susceptible to misrepresentations are protected.[76] This is certainly analogous to the thin skull principle.

As in the nuisance area, sensitivity is not helpful in defamation to establish the cause of action. William Prosser tells us that:

> [a] defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. This definition is certainly too narrow . . . . Defamation is rather that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.[77]

However, in the true fashion of the thin skull principle, "[w]hen the

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71. Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956); Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888); Rozell v. Northern Pac. Ry. 39 N.D. 475, 167 N.W. 489 (1918).

72. 223 S.W.2d 957 (Tex. 1949).

73. *Id.* at 962. *See also* Fish v. Hanna Coal & Ore Corp., 164 F. Supp. 870 (Minn. 1958); Krebs v. Hermann, 90 Colo. 61, 6 P.2d 907 (1931); Heirn v. McCaughan, 32 Miss. 17 (1856) (wrongful death).

74. RESTATEMENT (SECOND), *supra* note 9, at § 531.

75. *Id.*

76. Hyma v. Lee, 338 Mich. 31, 60 N.W.2d 920 (1943); Adan v. Steinbrecher, 116 Minn. 174, 133 N.W. 477 (1911).

77. PROSSER, *supra* note 1, at 739 (footnotes omitted).

cause of action is once made out, either as libel or slander per se, or by proof of special damages of a pecuniary character, it is generally agreed that plaintiff may recover additional damages for his mental distress, wounded feelings and humiliation."[78]

The balance of the concerns of tort law—invasion of privacy, misuse of legal procedure, and interference with advantageous relationships—is largely based on intentional or willful conduct with some development into negligent acts. As the analysis above indicates, notions of the thin skull principle will apply to these bases of liability.

There is yet a more intriguing aspect to the present perception of the thin skull principle which, in light of the historical development of the principle, deserves additional attention. We have been accustomed to considering the thin skull principle not solely within negligence, but particularly as the exception to the rule of foreseeability.[79] However, if the thin skull principle is viewed under another proximate cause test, "direct causation," it can be seen that the thin skull principle *is* the test of proximate cause. That is, insofar as cause-in-fact considerations determine liability in direct causation cases, the absence of the artificial legal barrier to defendant's liability is, in fact, the effective presence of the thin skull principle.[80] If it is remembered that direct causation theories of proximate cause antedated foreseeability theories,[81] describing the thin skull principle as the *exception* to the test of foreseeability misconceives the historical, analytical, and logical relation that the thin skull principle has had with the notion of proximate cause.

The point may be clarified if it is recognized that a test of proximate cause evaluates two sets of facts in establishing whether the cause-in-fact chain is of sufficient strength to hold the defendant legally responsible for the plaintiff's injury. One set of facts involves links of the chain within the plaintiff's body, and the other set of facts considered involves the links outside the plaintiff's body. Proximate cause operates to test the strength of the chain according to the given standard (*e.g.*, foreseeability). Two observations can be made at this juncture:

78. W. PROSSER, J. WADE, & V. SCHWARTZ, *Cases and Materials on Torts* 989 (6th ed. 1976).

79. *See supra* note 5 and accompanying text.

80. *See, e.g.,* Crane Elevator Co. v. Lippert, 63 F. 942 (7th Cir. 1894). In that case, the plaintiff sought recovery for a fall when tuberculosis developed soon after the injury. Relying on St. Paul R.R. v. Kellogg, 94 U.S. 469 (1876) and other direct cause precedents, the court held the subsequent injury compensable. 63 F.2d at 948.

81. *See* Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts,* 9 J. OF LEGAL STUD. 463 (1980); Seidelson, *Some Reflections on Proximate Cause,* 19 DUQ. L. REV. 1 (1980).

first, the history of the development of differing proximate cause theories (*e.g.*, "direct causation," "natural and probable consequences," "orbit of risk," and the test of "foreseeability") has occurred exclusively in the arena of facts that exist outside the plaintiff's body.[82] Thus, whether the railroad should be held liable for a burned barn produces differing results under each proximate cause theory. Second, as to those injuries received by the asthmatic within the barn, the thin skull principle (first in the form of the theory of direct causation) obviated the test of proximate cause. The same result (*i.e.*, holding the defendant liable) also obtains under any of the subsequent proximate cause theories. If these observations are accurate, the theory of direct causation (*i.e.*, the thin skull principle incarnate) allows the courts to develop standards by which to limit a defendant's liability as to those forces outside the plaintiff's body where traditional strict liability rules prevent such limits, while these courts still retain strict control over internal forces cases. The natural and probable consequences test, the orbit of risk test, and the current foreseeability test thus appear as refinements of that desire to take into account readily observable physical phenomena and evaluate them on the basis of moral value standards of legal proximity. As to those causal links within the plaintiff's body, however, no such scrutiny has occurred.[83] Instead, the law has retained the strict application of the thin skull's dictate: a man acts at his peril. It is in this way that the thin skull principle should be more properly considered as the historical and logical parent of the test of foreseeability rather than its exception.[84]

There exists a difficult to explain schism that emerges in questions of proximate cause; on the one hand, there are well-developed theories of proximate cause applied when evaluating forces outside the plaintiff's person, while on the other hand the thin skull principle retains vitality in the judicial evaluation of forces located within the plaintiff's body. It may be suggested that the factors that occur within a plaintiff's body have not been scrutinized under proximate cause analysis because they are not readily observable and are not well understood. However, to the extent that a plaintiff is unable conclusively to prove the cause-in-fact relationship between the blow on the head and the subsequent

82. This dichotomization is suggested in Williams, *The Risk Principle,* 77 L.Q. REV. 179, 179-80, 193-97 (1961).

83. Thus, Sorenson v. Northern Pac. Ry., 36 F. 166, 167 (Minn. 1888) ("*post hoc* is not always *propter hoc,* but where *propter hoc* is uncertain, the *post hoc* may often be decisive") articulates the difficulty of trying to determine causation when the specific links of the chain are not well understood.

84. *See supra* text accompanying note 52.

growth of a tumor on the wound, the idea provides tenuous justification for *presuming* the existence of a sufficient legally recognized relationship.[85] To distinguish between two sets of facts on the basis of ability to observe is to distinguish without reason since physical causation must be established initially. It might be suggested that the law, as a matter of social policy, should determine that the more culpable party assume liability for the injury. However, though we often ascribe culpability to the negligent tortfeasor, that fault is attached to the breach of a duty—to stretch that fault to include responsibility for unexpected injuries, and to do so through the amoral vehicle of the thin skull principle, is to bastardize the analytical forces involved. The moral argument, which weighs relative culpability, fits uncomfortably into the situation without rational historical support.

It is here contended that the thin skull principle is rooted in strict liability, and cannot be fully understood in terms of morality. As appealing as such moral justifications might appear, they deny the venerable validity of the legal maxim that a defendant acts at his peril. The validity of the principle must be understood within this conceptual framework and tested accordingly.

CONCLUSION

This article has reviewed the development of the thin skull principle, focusing on its role in both the development of proximate cause and broader fields of tort liability. The thin skull principle is an integral part of the law of torts, and questions directed to its continued validity must be examined within the context of that historical framework. Additionally, the breadth of application of the principle indicates that it is a basic tool of tort law. As an exception to the doctrine of foreseeability in proximate cause, it is useful in obtaining recovery for the legitimate suffering of plaintiffs. As a broadly based concept of the law of torts, it aids the teaching and understanding of seemingly anomalous notions.

85. *See supra* text accompanying notes 10-13.