Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels

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I. INTRODUCTION

The past forty years have witnessed sweeping reforms in legal doctrines. In tort law these winds of reform have produced a dramatic expansion in the duty of care. Common law tort rules that limited the responsibility of economic elites to those dependent on their conduct were systematically modified or eliminated. For example, in the 1960s, a manufacturer's duty to the consumer was expanded by the elimination of the negligence standard and its replacement with strict liability.[1] In

1. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77 (N.J. 1960);

the 1970s, a personal injury defendant's most powerful defense, contributory negligence, was replaced by comparative negligence.[2] In the 1980s, the property owner's bastion of protection against reasonable care requirements—the trespasser, licensee, and invitee duty classification structure—was eliminated or modified.[3] Elite providers of services such as doctors, and to a lesser extent lawyers, were held to have new duties concerning informing patients and obtaining consent for their actions.[4]

Simultaneously, the courts reevaluated ancient doctrines that gave excessive power to the government, perhaps the nation's most powerful elite. Since 1960, the Supreme Court has imposed limitations on previously unchallenged governmental power in Fourth, Fifth, and Sixth Amendment jurisprudence.[5] More recently, as the Supreme Court has

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Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 899-900 (Cal. 1962); RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 57-67 (1980). *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REFORM 197 (1997).

2. *See* Li v. Yellow Cab Co., 532 P.2d 1226, 1230 (Cal. 1975); VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE 1-2 (2d ed. 1986 & Supp. 1993).

3. In states such as New York, property owners now have a duty of reasonable care to all entrants. *See* Basso v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976). In states such as California, there is no duty requirement concerning trespassers committing certain felonies. *See* CAL. CIV. CODE § 847 (West 2000); *see also* Kathryn E. Eriksen, Comment, *Premises Liability in Texas–Time for a "Reasonable" Change*, 17 ST. MARY'S L.J. 417, 418-21 (1986).

4. *See* Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 226-27 (1985); Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 607 n.1 (1988); *see also* Canterbury v. Spence, 464 F.2d 772, 781 (D.C. Cir. 1972).

5. *See* Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1320-26 (1977); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 155-56 (1980); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983). Although the pace of rights development has slowed under the Burger and Rehnquist courts, many courts are still imaginatively interpreting doctrines to create new areas of protection. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18 (1991). A dramatic example is the unprecedented and subsequently vacated decision of a panel of the Tenth Circuit that held, in a decision that was followed by two district courts, that the ancient governmental practice of granting leniency to testifying codefendants is a violation of a federal bribery statute and must therefore be banned. *See* United States v. Singleton, 144 F.3d 1343, 1343 (10th Cir.

been less willing to expand those doctrines, state courts have independently continued the process of limiting governmental power.[6] Courts have also been zealous in expansively interpreting statutes that provide rights to non-elites such as those that protect the environment against industrial depredations.[7]

The legal malpractice tort, however, has managed to withstand the winds of legal change. Particularly crucial has been the refusal to apply alternative causation doctrines. The refusal to apply causation doctrines that have been embraced in other areas has significant social effects. As a result, the consumers of legal services receive less protection from the courts than do the consumers of products or medical services.

The minimization of the role of malpractice actions as a tool for protecting the recipients of legal services is particularly important. One of the central justifications of the tort compensation system is that it is an effective means of altering the conduct of potential defendants.[8] Malpractice tort litigation is the common law's mechanism for enforcing standards of professional conduct. In malpractice actions, those injured by professional malpractice come to the court seeking compensation. The courts, in deciding the cases, give compensation to the specific plaintiff and create rules of conduct for the rest of the profession.[9] This

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1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999); United States v. Lowery, 15 F. Supp. 2d 1348, 1351, 1355 (S.D. Fla. 1998), *rev'd*, 166 F.3d 1119 (11th Cir. 1999); United States v. Fraguela, No. CRIM.A. 96-0339, 1998 WL 560352, at *1 (E.D. La. Aug. 27, 1998), *vacated*, 1998 WL 910219 (E.D. La. Oct. 6, 1998).

6. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1143 (1985); Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 726-30 (1991); Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism"*, 8 U. PUGET SOUND L. REV. at vi, vii-x (1985); Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5, 6 (1989); Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003, 1004 n.5 (1994); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1016-17 (1997).

7. *See* Rhodes v. Johnson, 153 F.3d 785, 790 (7th Cir. 1998); Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448-51 (10th Cir. 1996); Environmental Defense Fund, Inc. v. Mathews, 410 F. Supp. 336, 337-38 (D.D.C. 1976); Kravetz v. Plenge, 424 N.Y.S.2d 312, 315-19 (Sup. Ct. 1979).

8. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984) ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer."); Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 679 (1985).

9. *See* Risa B. Greene, Note, *Federal Legislative Proposals for Medical Malpractice Reform: Treating the Symptoms or Effecting a Cure?*, 4 CORNELL J.L. & PUB. POL'Y 563, 581 (1995) ("Traditionally, the goals of tort law include compensating victims for their injuries, deterring wrongdoers, and vindicating societal values.").

judicial remedy is a particularly appropriate medium for the enforcement of representational standards[10] because the tort obligation to compensate serves three functions: it compensates the victim, penalizes the wrongdoer, and deters others. Because malpractice is defined as a failure to conform to the appropriate standards of the profession, judicial rulings formalize attorney standards. The court sets the standard of care in decisions on the sufficiency of evidence of breach. Once a breach of professional standards is proven, it is clear that the defendant failed to act competently and breached the trust of the client. Proof of a single element of malfeasance by itself deprives the defendant of any claim that her obligations to her client were performed professionally. It is this aspect of the tort that makes it the most equitable vehicle for imposing standards of professional conduct.

In a malpractice action, the judicial ruling on the propriety of the representation is not an amorphous abstraction. The proof of breach rests squarely on the conduct of a particular attorney based on her representation of the client. The verdict specifically finds the conduct in question impermissible. The resulting malpractice standard affects, by general deterrence, the conduct of the entire profession. The standard of care, however, is only one element of the tort. Even conclusive proof that the attorney breached her duty to a client is not enough to establish liability.[11]

The finding that representation was defective will have no impact on professional conduct unless it is enforced by the imposition of financial penalties—compensation. For these judicial rules to have an impact on representation, the legal malpractice plaintiff must be able to establish

10. In determining whether there has been negligent conduct, an appropriate standard of care must be recognized. Lawyers in the conduct of their profession are held to the higher "reasonable attorney" standard rather than merely the "reasonable person" standard. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 18.2, at 550-51 (4th ed. 1996).

11. *See* Rouse v. Dunkley & Bennett, 520 N.W.2d 406, 409 (Minn. 1994). Additionally, in suing for inadequate settlement, it has to be proven that the client would have prevailed, not that there was only a possibility or even that it was likely. It must be established that the case was legally meritorious and factually provable. *See* Carlson v. Fredrickson & Byron, 475 N.W.2d 882, 886 (Minn. Ct. App. 1991), *overruled in part by* Rouse v. Dunkley & Bennett, 520 N.W.2d 406 (Minn. 1994). In effect, the mechanism by which the causation element is implemented in litigation malpractice cases is to have the jury decide the underlying claim as part of the malpractice trial. Thus, the name given to this causation element is "'the case-within-a-case.'" *Rouse*, 520 N.W.2d at 409 (quoting Rouse v. Dunkley & Bennett, No. C6-93-777, 1993 WL 430351, at *2 (Minn. Ct. App. Oct. 26, 1993)).

that the defendant violated all of the elements of the tort. In particular, before the breach of the professional duty will be penalized, the client must prove that the breach caused an injury.[12] The impact of the causation element is thus conceptually antagonistic to the purpose of the breach element. The breach element permits the courts to set standards of professional conduct. However, the causation element may excuse the deficient attorney from any tort responsibility for her unprofessional conduct, thereby limiting the effectiveness of the tort as a vehicle for enforcing these standards.[13] Causation, therefore, is the tort law's last refuge for the shoddy practitioner.[14] It poses the greatest barrier for

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12. Simply stated, the plaintiff must prove that "but for" the negligence of the attorney, the client would have prevailed in the underlying action. *See, e.g.*, Basic Food Indus. v. Grant, 310 N.W.2d 26, 29 (Mich. Ct. App. 1981); Pool v. Burlison, 736 S.W.2d 485, 486 (Mo. Ct. App. 1987); Katsaris v. Scelsi, 453 N.Y.S.2d 994, 996 (Sup. Ct. 1982); Rorrer v. Cooke, 329 S.E.2d 355, 369 (N.C. 1985); Chocktoot v. Smith, 571 P.2d 1255, 1257 (Or. 1977); 2 MALLEN & SMITH, *supra* note 10, § 19.11, at 612 (discussing causation for pain and suffering injuries in legal malpractice claims); Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149, 151 n.9 (1988). The jury in the malpractice action is actually presented the evidence that would have been introduced during the trial of the underlying action in which the defendant attorney was allegedly negligent, and then asked to decide what the jury in that case would have done. "[T]he malpractice client must reconstruct the underlying action. If the client were a plaintiff in the litigation, the burden is to show the existence of a valid claim upon which there was a greater than fifty percent likelihood of prevailing but for the attorney's error." Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1481 (1986).

13. *See* Erik M. Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666, 690 (1978); *see also* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 136 (1995). Leubsdorf states that a number of courts have limited a convicted criminal defendant from recovering for malpractice unless it is shown "not just that he or she would have been acquitted for malpractice, but also that he or she was in fact innocent, or has received post-conviction relief setting aside the conviction. Such holdings reflect a fear of overstimulated defense lawyers or overlitigious convicts." *Id.* at 136 (footnotes omitted).

14. *See* Lord, *supra* note 12, at 1480 ("The formidable obstacle is proving cause and injury, which together determine whether the negligence will give rise to an action for damages."). "Cause in fact has been accepted to mean the client's ability to establish that, but for the attorney's negligence, the underlying action would have terminated in a more favorable result than actually occurred." *Id.* at 1480 n.13 (citing Spangler v. Sellers, 5 F. 882, 894-95 (C.C.S.D. Ohio 1881)). "Of course, if the mistake your client made and admits resulted in his client's inability to bring suit, you will need to rely on the traditional old defense of attacking the 'case within a case.'" Don W. Fowler, *Attorney Malpractice: The Defense View*, LITIG., Winter 1993, at 23, 25. Fowler stated:

> The judgment rule has been particularly helpful in defending malpractice claims arising out of ongoing litigation—for example, when a dissatisfied litigant sues his lawyer alleging that the lawyer should have called a particular witness or should have asked a certain question on cross-examination. The courts traditionally have protected lawyers under those circumstances. They generally recognize, even if litigants do not, that in every lawsuit one side loses. Many appellate opinions observe that a litigator is faced with a host of

those who have received inadequate professional services.[15]

The requirement that a claimant prove that the defendant caused the injuries should not be eliminated from the tort—it is inherent in our concept of liability. Culturally mandated standards of fairness refined by centuries of legal analysis confirm the intuitive feeling that no person should be liable unless her conduct truly injured the plaintiff. From the schoolyard to the courtroom, the phrase "no harm, no foul" reflects our society's standards of liability.[16] It is part of the historic development of the negligence tort.[17] Culture necessarily prevents any serious consideration of the complete abandonment of the doctrine. Nonetheless, outside the confines of the legal malpractice tort, the exact contours and the details of the causation doctrine have been critical issues in the American law of torts.[18]

The doctrinal development in this area has been driven by the fact that although the causation doctrine satisfactorily balances the equitable claims of the parties in the typical case, many cases are atypical. In the typical negligence action, it is pragmatically possible to prove that the defendant acted improperly and that this impropriety injured the plaintiff. However, in the atypical case, the plaintiff has a far more

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tactical decisions during the course of a lawsuit, some of which must be made on a moment's notice during trial.

Id. at 26. *But see* Stewart v. Hall, 770 F.2d 1267, 1271 (4th Cir. 1985) (holding that it was an error for the trial court to refuse to admit evidence and instruct the jury on the issues in the underlying dispute that gave rise to the malpractice claim).

15. The tension between these elements is not unique to the malpractice tort. It is reflective of the checks and balances approach of Anglo-American jurisprudence. The elements serve differing purposes and, thereby, balance the tort. The standard of proof element implements a concept of justice based on the premise that liability is the appropriate response to wrongful conduct. The causation element limits the scope of liability; it is based on the theory that justice protects the individual against State intervention without individualized proof of responsibility. Under this justice theory, wrongful conduct is not sufficient to justify a penalty. Before a penalty can be imposed, the plaintiff must show that it caused compensable harm.

16. *See* A. Dan Tarlock, *Environmental Law: Ethics or Science?*, 7 DUKE ENV. L. & POL'Y F. 193, 212 (1996) ("Private adjudication links responsibility and liability and the restrictive concept of cause-in-fact is grounded in notions of fundamental fairness common to all major legal systems.").

17. *See* LEON GREEN, RATIONALE OF PROXIMATE CAUSE 132 (1927); Paul J. Zwier, *"Cause in Fact" in Tort Law—A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 781-84 (1982). *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Little, Brown & Co. 1948); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

18. *See generally* Lori R. Ellis, Note, *Loss of Chance as Technique: Toeing the Line at Fifty Percent*, 72 TEX. L. REV. 369 (1993) (examining the loss of chance causation doctrine).

complex proof burden on causation. In these cases the plaintiff's burden cannot be met by merely proving what actually happened. The plaintiff must prove what *would* have happened in a world that did not include the defendant's negligence. This burden of proving hypothetical events[19] is created whenever there is a claim that the plaintiff's injuries were not caused by the defendant's conduct but would have occurred anyway. Proof of a hypothetical is, obviously, a much more imposing burden than simply proving history.

The burden of proving a hypothetical arises in a wide variety of cases. For example, in automobile accident cases in which a plaintiff was not wearing a seat belt, it has been argued that the plaintiff should be required to prove that the injuries would have happened with the seatbelt;[20] in "twin fire" cases the plaintiff is confronted with disproving the claim that the other fire would have caused the injuries;[21] in asbestos cases the plaintiff must show causation as a result of exposure;[22] and, in medical malpractice cases involving delayed diagnosis or improper treatment of life-threatening diseases, the plaintiff must prove that she would not have died with proper treatment.[23] The burden of proving a hypothetical also arises in the legal malpractice tort. In such cases, the plaintiff must prove, for the case-within-a-case element, what *would* have happened but for the lawyer's negligence.[24]

Proof of this type of hypothetical involves extensive knowledge both of the specific events of the particular transaction and of other similar events.[25] Courts have carefully scrutinized the appropriateness of applying the traditional burden of proof in these types of cases and, except in the legal malpractice tort,[26] have generally rejected traditional

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19. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768 n.10 (1997); Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 340 (1992).

20. *See* Swajian v. General Motors Corp., 559 A.2d 1041, 1046 (R.I. 1989) (rejecting the seatbelt defense argument on the basis of no common law duty to wear seatbelts).

21. *See* Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co., 179 N.W. 45, 46 (Minn. 1920), *overruled on other grounds by* Borsheim v. Great N. Ry. Co., 183 N.W. 518 (Minn. 1921).

22. *See* Leng v. Celotex Corp., 554 N.E.2d 468, 471 (Ill. App. Ct. 1990).

23. *See* Kuhn v. Banker, 13 N.E.2d 242, 247 (Ohio 1938).

24. *See* Daugert v. Pappas, 704 P.2d 600, 604 (Wash. 1985) ("A majority of courts have therefore concluded that when an attorney is negligent in filing an appeal, the client bears the burden of proving that the underlying case would have been successful but for the negligence of the attorney.").

25. To satisfy the burden of proving this hypothetical the plaintiff must acquire sufficient information to establish a baseline of normal consequences against which to compare the impact of the negligent conduct. *See* Vern R. Walker, *The Concept of Baseline Risk in Tort Litigation*, 80 KY. L.J. 631 , 665-72 (1991-1992).

26. It is not at all clear that the legal profession has the capacity to implement effective rules of self-regulation. *See* Manuel R. Ramos, *Legal Malpractice: Reforming*

allocations when the plaintiff is in a dependency relationship with the defendant.[27] Analysis of the critical cases demonstrates that whenever plaintiffs are found to have been in a dependent relationship with the defendant(s), courts have rejected the traditional burden and duty rules in favor of status-based rules such as "burden switching" and "loss of chance."[28]

The traditional burden of proof allocation has been rejected in dependency situations because it represents a system bias in favor of the defendant. This bias reflects the tort law's implementation of the ethical and moral values of individualism.[29] Under natural law and Puritan morality-based concepts of fairness, the natural order of the universe may not be changed unless the defendant's wrongdoing justifies the intercession of the State.[30] The judicial adoption of individualistic values extends to the assumption that the defendant's wrongdoing cannot be penalized unless the wrong has been proven.[31] Thus, the defendant *deserves* to be absolved of responsibility unless all aspects of liability are certain; the defendant is provided with a civil assumption of innocence.[32] This presumption mandates the righteous vindication of a

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Lawyers and Law Professors, 70 TUL. L. REV. 2583, 2588-89 (1996) (noting the silence in the legal profession regarding its malpractice epidemic); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 807 (1992) (stating malpractice "litigation is now a viable alternative to professional discipline").

27. *See infra* Part IV.C.

28. *See infra* Part IV.C.

29. The traditional system, although based in historical moral and natural law factors, also gains support from modern economic theories explaining the dynamic by which law effects human activity. *See generally* Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473 (1986). According to Professor Bush, a change in burden allocations that made allegations easier to establish represented a shift from "individual to group responsibility." *Id.* at 1484. Since alternative proof allocation schemes make defendants responsible for risk creation as opposed to actual injury, *see id.* at 1484-92, they might create incentives for baseless litigation. In a litigation management system that is completely dependent upon settlement to sustain itself, change in proof burdens would create an inducement for defendants to settle cases despite the absence of a credible factual basis to believe that they were responsible.

30. For an interesting perspective, see DAVID LITTLE, RELIGION, ORDER, AND LAW 114-15 (1969) (explaining that in the Puritan tradition, the individual, if free from State coercion, would perform God's "right order").

31. *See* Zweir, *supra* note 17, at 787.

32. *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 85-102 (1921). Pound identifies the core principles of a natural rights' foundation for American law as one based on the belief that the protection of individual rights is the primary function of law. This natural law concept lead to the creation of the Bill of Rights. *See* Zweir, *supra* note 17, at 792.

defendant unless uncertainty is banished.[33] It is, however, an inappropriate value by which to judge conduct when the accused has committed acts that impede the plaintiff's opportunity to prove the charges.[34]

The development of alternative doctrines has been inexorable. For almost two hundred years these doctrines have been applied to modify the impact of the traditional duty and causation doctrines so that plaintiffs who were denied proof by a defendant's conduct would not also be denied compensation.[35]

This Article will undertake an examination of the sources of various alternative causation doctrines and their applicability to the legal malpractice tort. Based on this analysis, recommendations are made to apply alternative proof doctrines in litigation malpractice cases. The scope of both this analysis and the proposed doctrinal changes is limited to the litigation bar, because the relationship between an attorney who represents a client in litigation is completely different than that between an attorney and a client in a transactional setting. Litigation attorneys control discovery, motion practice, and strategic decision-making. As a result, they have far greater control over access to information, and thus the resulting effects, than their colleagues in other segments of the profession. Their negligence deprives plaintiffs of access to information needed to prove the causation element of malpractice. Litigation malpractice thus has the essential element found in those cases in which alternative doctrines have been applied.

There is also a similarity between the relationship that litigation attorneys have with their clients, and the one that doctors have with patients. Both professionals possess such great superiority of knowledge about his or her domain that they dominate the relationship. Neither patients nor litigation clients know enough about the process to effectively control critical decisions. Rather, they are dependent upon the professional.[36]

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33. In a civil case, the plaintiff has three burdens: the burden of pleading, the burden of production, and the burden of persuasion. The burden of pleading means that one must allege the elements of the claim; the burden of production means that at trial one must produce evidence that tends to demonstrate the proposition at stake; and the burden of persuasion means one must persuade the trier of fact that one's version of the facts is more likely than not to be true. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 510-12, 992-93 (7th ed. 1997).

34. *See* Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 438-39 n.7 (1995).

35. *See generally* David Hamer, *'Chance Would Be a Fine Thing': Proof of Causation and Quantum in an Unpredictable World*, 23 MELB. U. L. REV. 557 (1999).

36. For other criticism of the causation requirement in legal malpractice cases, see Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial—A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40 (1989).

The similarity between the doctor-patient relationship and the litigation attorney-client relationship is central to this analysis, which will focus on the difference in impact and in doctrines in the medical and legal malpractice torts. Medical malpractice litigation will be used as a standard of comparison. Medical malpractice was chosen because tort litigation has had a tremendous impact on the practice of medicine and because, not coincidentally, alternative proof doctrines have been applied in medical malpractice cases.[37]

This Article's analysis has three components. Parts II and III analyze the factors that have substantially impacted medical tort litigation but not legal malpractice. Part IV analyzes the historical development of alternative duty and proof doctrines to determine the pragmatic problems that have generated their imposition. Finally, Parts V and VI analyze the factors that mandate the adoption of three of these doctrines in litigation malpractice actions. The three doctrines are: (1) the "substantial factor" test; (2) the burden-switching technique; and (3) the loss of chance valuation of damages.

II. THE IMPACT OF TORT LAW ON PROFESSIONAL CONDUCT

A. The Impact of Tort Law in General

There are two areas in which the deterrent impact of tort law has been overwhelmingly apparent: products liability and medical malpractice. These two areas may be the tort system's greatest successes. Products liability litigation has profoundly changed the way products are labeled and designed.[38] Medical malpractice tort litigation has made a noticeable

37. Medical malpractice litigation has not grown by chance. It has developed into a dominant force in part because of substantive changes in rules of law that assisted injured patients in their efforts to be compensated. Burdens of proof have been shifted from plaintiff patients to doctor defendants, new injuries have been recognized, and new duties have been created. *See* Canterbury v. Spence, 464 F.2d 772, 781 (D.C. Cir. 1972); Ybarra v. Spangard, 154 P.2d 687, 690 (Cal. 1944); Herskovits v. Group Health Coop., 664 P.2d 474, 476-77 (Wash. 1983); *see also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (Cal. 1976) (imposing a duty on psychotherapists to warn those specifically threatened by their patients); Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 515 (Ind. 1994) (requiring pharmacists to cease refilling certain prescriptions pending "direct and explicit instructions" from the prescribing physician).

38. An analysis of this can be found in DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 619, 630-77 (3d ed. 1997). There was a widespread movement among courts to begin accepting the idea of strict products liability whenever product safety did not meet reasonable consumer expectations. Reasons given by judges were

and substantial impact on the practice of medicine.[39] The factors causing the dramatic impact of tort litigation in these areas are many; however, the fact that alternative doctrines of proof and duty have been applied in both of these torts has been central to their development.

Over the past twenty years, one of the most critical concerns of the medical community has been the increase in the cost of medical treatment attributed to the practice of "defensive medicine."[40] It is generally accepted that anxiety about potential tort liability has changed the way medicine is practiced.[41] Doctors now order more tests and recommend more invasive treatments than in previous years.[42] The technological revolution in medical treatment might be the predominant cause of this change in medicine, but there is little doubt that the heightened concern over lawsuits has also played a substantial role in restructuring patient treatment.[43] Doctors fear negligence claims based

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based under three headings: practicality, justice and fairness, and social welfare. From there courts went on to say that a product could also be defective because of the kind of information that did or did not accompany it. Companies were forced to ensure that their products and labels complied with all requisite safety and health standards. *See id.* at 619.

39. *See generally* Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443; Bryan A. Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 CORNELL J.L. & PUB. POL'Y 121 (1997); Jerry Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 S. CAL. L. REV. 345 (1981).

40. *See* Ann G. Lawthers et al., *Physicians' Perceptions of the Risk of Being Sued*, 17 J. HEALTH POL., POL'Y & L. 463, 479 (1992); John H. Sullivan, *To the Legislature on Health Care: 'Do No Harm'*, SAN DIEGO UNION-TRIB, Jan 2, 1998, at B5. *See generally* William B. Schwartz & Neil K. Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282 (1978).

41. It is not the purpose of this Article to weigh the beneficial effects of malpractice litigation on patient treatment against its adverse consequences. Specifically, as a result of malpractice litigation, or the fear of litigation, the individual patient receives more medical services, such as additional diagnostic tests. *See* Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 625 (1992). These services may help individual patients; however, the increased expense of medical services may be an overall detriment to society. That complex issue has been a matter of dispute for decades. The significant fact is that there has been an impact on medical practice, while litigation has not had any significant impact on the practice of law.

42. *See id.*

43. *See* Bryan A. Liang, *Medical Malpractice: Do Physicians Have Knowledge of Legal Standards and Assess Cases as Juries Do?*, 3 U. CHI. L. SCH. ROUNDTABLE 59, 60 (1996) (discussing how medical malpractice influences the standard of care); Perrochet et al., *supra* note 41, at 625 ("[L]ost chance liability exacerbates the problem of defensive medicine in the current climate of attempts at cost containment.... [This gives] 'strong incentives for physicians to perform medically unnecessary tests or treatments to reduce their risk of liability.'" (quoting GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: CASE STUDY IN CALIFORNIA 23 (Dec. 1986))); *see also* Lawthers et al., *supra* note 40, at 479; Michelle L. Truckor, Comment, *The Loss of Chance Doctrine: Legal Recovery for Patients on the Edge of Survival*, 24 U. DAYTON L.

on the failure to pursue every diagnostic possibility[44] and now act accordingly.

A comparison of the degree to which legal and medical practices have been influenced by tort litigation reveals that tort law has not been effective in altering the legal profession's degree of concern for the quality of legal services. The contrast is stark. Although there has been a substantial increase in the amount of legal malpractice litigation,[45] unlike its medical counterpart, anxiety about malpractice liability does not permeate the legal community. Commentators do not write about the increased cost of legal services, at least not associated with the fear of malpractice litigation. However, newspapers write about the astounding cost of medical malpractice insurance.[46] Although lawyers are not indifferent to the possibility of malpractice actions,[47] there is no

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REV. 349, 369 (1999).

44. *See* Allen K. Hutkin, *Resolving the Medical Malpractice Crisis: Alternatives to Litigation*, 4 J.L. & HEALTH 21, 40 (1989-1990) ("Physicians and patients must communicate and interact on an equal level and discuss different choices of treatment. Patients must realize that complications can and do occur."); *see also* Jeffrey R. Wilbert, et al., *Coping with the Stress of Malpractice Litigation*, 171 ILL. MED. J. 23, 25 (1987) (noting that medical care providers often view malpractice suits as personal attacks on their competence and discussing doctors' abilities to personally cope with malpractice lawsuits).

45. *See* Ramos, *supra* note 26, at 2583, 2584 ("[L]egal malpractice claims costs lawyers and their insurers ... billions of dollars [each year]."). *See generally* John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235 (1989). Another indication of the increase is that the legal malpractice treatise by Mallen and Smith has doubled in size in the last decade. *Compare* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (3d ed. 1989) (containing two volumes), *with* MALLEN & SMITH, *supra* note 10 (containing four volumes).

46. In the 1980s, medical malpractice premiums for neurosurgeons and obstetricians approached two hundred thousand dollars annually. *See* Milt Freudenheim, *Costs of Medical Malpractice Drop After an 11-Year Climb*, N.Y. TIMES, June 11, 1989, § 1, at 1.

47. *See* James I. Sullivan, *Impact of Ethical Rules and Other Quasi-Standards on Standard of Care*, 61 DEF. COUNS. J. 100, 101 (1994) ("Analysis of the legal malpractice standard of care frequently requires consideration of the potential impact of ethical rules."). "The fundamental concept of a general standard of care is essentially an unchanging principle that proscribes negligent or other wrongful conduct on the part of the attorney. The general standard attaches with the commencement of the attorney-client relationship." *Id.* at 100. "Practical recommendations and guidelines relating to many areas of law practice are found in a broad range of publications authored for the practicing lawyer." *Id.* at 104. "In a legal malpractice case, admission of statements from a practice manual or a continuing legal education handbook suggesting the proper method of handling the task at issue will have a major impact in determination of the specific standard of care." *Id.* at 105; *see* Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 33 (1998).

indication that anxiety about legal malpractice litigation has caused a lawyer to abandon his practice. The same cannot be said about doctors.[48]

The divergence in the impact of tort litigation on two of the nation's most important professions would be benign if it could be credibly established that there is less legal malpractice than medical malpractice.[49] Unfortunately, there is no practical reason to believe that lawyers are more attentive to their clients' needs than doctors are to their patients' needs.[50] In fact, the increased concern about the quality of representation among those in professional legal organizations strongly suggests that the legal profession has as much of a malpractice problem,[51] if not more,

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48. *See* Sara C. Charles et al., *Sued and Nonsued Physicians' Self-Reported Reactions to Malpractice Litigation*, 142 AM. J. PSYCHIATRY 437, 440 (1985) (stating that many doctors who have been sued avoid seeing certain kinds of patients); Howard R. French, *New York Obstetricians Report a Crisis*, N.Y. TIMES, Oct. 6, 1988, at B1 ("A study by the New York chapter of the American College of Obstetricians and Gynecologists shows that nearly 10 percent of the state's approximately 2,000 obstetricians are abandoning baby delivery each year. . . .").

49. Less complimentary possibilities, of course, abound: (1) lawyers are protected by their colleagues on the bench who have created rules beneficial to an attorney/defendant; (2) the legal community has no consensus of what constitutes professional standards; (3) lawyers may be more adept than doctors in hiding their inept performance; (4) clients may not wish to sue lawyers; (5) lawyers may not wish to sue other lawyers and, thus, refuse to take legal malpractice cases; and (6) lawyers don't do much anyway. Some argue that lawyers create special rules for themselves. *See* Brickman & Cunningham, *supra* note 12, at 151 n.9.

50. *See generally* Fern Schair Sussman, *Lawyer Regulation for a New Century*, N.Y. L.J., Dec. 8, 1993, at 2 (discussing client dissatisfaction with the legal profession). There is virtually no way to quantify the incidence of legal malpractice outside of counting legal cases. Anecdotal evidence of incompetence abounds, however. In any gathering of trial attorneys, comments such as the following, taken from a luncheon of trial advocacy teachers at the National Institute for Trial Advocacy's 1995 Northeast Regional Intensive Trial Advocacy Program at Hofstra Law School, are routinely heard: "That guy didn't have the slightest idea of what he was doing"; "I can't believe that I got away with that"; "He agreed to the settlement without even talking to his client"; "Can you believe that she didn't ask for a jury trial with those injuries?"; "He let discovery end without ever finding out the name of the defendant company's doctor, although his complaint alleged that the company should be responsible for that doctor's intentional infliction of emotional harm"; "She let the case be placed on the trial calendar without having obtained the client's complete medical records from his own treating physician."

51. *See* Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1114 (1996) ("Observers have, in fact, suggested that legal malpractice victims are systematically under compensated."). In a footnote, the author elaborates on the point:

> This conclusion was based on two facts: first, legal malpractice doctrine gives lawyers greater protection than medical malpractice doctrine gives doctors (for example, lawyers have less expansive duties to third parties than doctors do); and second, in medicine, malpractice usually creates a new injury that makes it relatively easy to establish causation of harm, whereas legal malpractice usually involves a failure to remedy an existing problem—a failure that can result from any number of factors.

Id. at 1114 n.94. For a sampling of case-within-a-case issues in legal malpractice cases, see Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961); Coon v.

than the medical profession.

Even the most heavily publicized cases reveal obvious incidences of shoddy representation. Lawyers in major criminal cases involving wealthy clients—cases that are so extensively covered by the media that the attorneys are clearly on notice that their conduct will be exactingly scrutinized—routinely fail to comply with the simplest and most obvious professional requirements.[52] There is simply no credible basis upon which to believe that the difference between the impact of malpractice litigation on the legal profession as opposed to the medical profession is a reflection of the greater competence of the bar.

The medical and legal malpractice torts share a common purpose. Both protect individuals who claim to have been injured by inept professionals, as well as controlling the conduct of a profession. In thirty years, the medical malpractice bar has gone from losing cases because of the "conspiracy of silence among doctors" to winning a seemingly endless stream of million-dollar verdicts.[53] In contrast, there has been no similar progression in the legal malpractice tort.[54]

B. The Special Impact of Tort Law on Medical Practice

There are several reasons for the substantial impact of medical malpractice litigation on the practice of medicine. The most important are: (1) the potential size of the verdicts; (2) access to medical experts; (3) the affluence of the defendants, which translates into an ability to pay

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Ginsberg, 509 P.2d 1293 (Colo. Ct. App. 1973); Weiner v. Moreno, 271 So. 2d 217 (Fla. Dist. Ct. App. 1973); Gladden v. Logan, 284 N.Y.S.2d 920 (App. Div. 1967).

52. In the Michael Tyson rape prosecution, for example, defense attorneys failed to comply with a 48-hour discovery rule. The result was that potentially valuable witnesses were not allowed to testify for the defendant. *See* Tyson v. State, 619 N.E.2d 276, 283-84 (Ind. Ct. App. 1993). In the William Kennedy Smith rape prosecution, the consensus of media and professional analysis was that the prosecutor was unable to adequately represent the interests of the public in either cross-examination or final argument. *See* Christine Evans, *Prosecutor Faulted by Analysts*, MIAMI HERALD, Dec. 12, 1991, at A20; David Zeman, *Misconduct Alleged in Rape Case*, MIAMI HERALD, June 14, 1991, at B4.

53. *See* Michael Hoenig, *Random Thoughts on Damage Issues*, N.Y. L.J., Dec. 9, 1991, at 3 ("Although it still makes headlines, the million dollar recovery is no longer an oddity nor is it the exclusive domain of a few skilled practitioners.").

54. There is clearly a bias in the legal system. It is purely a semantic debate to discuss whether the bias is discrimination in favor of attorneys, as suggested herein, or discrimination against doctors. *See* Dale L. Moore, *Disparate Treatment of the Allocation of Power Between Judge and Jury in Legal and Medical Malpractice Cases*, 61 TEMP. L. REV. 353, 356 (1988).

large verdicts; (4) the highly developed dissemination of malpractice litigation results, via medical publications and continuing education programs directed to the profession's members; (5) the ability of doctors to conquer disease being significantly oversold; and (6) the success of the malpractice bar in obtaining judicial and legislative modifications of traditional tort rules that ease the task of obtaining large verdicts.

1. Potential Verdicts

Medical malpractice litigation is fueled by the opportunity for huge verdicts which necessarily translates into substantial profits for attorneys. With large verdicts and contingent fee payment arrangements, both lawyers and clients have an incentive to litigate. The "invisible hand" of the capitalistic profit motive provides all parties with a chance to profit from litigation. This profit incentive encompasses any medical case with substantial injuries because, even if the chances of demonstrating negligence or causation are slim, long shots sometimes win.

That the opportunity for substantial profit exists as an incentive is both appropriate and important. It has been argued that the best way the legal system can provide compensation for those who cannot afford the high cost of a lawyer's hourly billings is the contingent fee arrangement.[55] This is not a criticism, but rather a reflection of the genius of the common law system in developing such a simple and effective engine for social change and victim compensation. Attorneys have an incentive to invest the money necessary to bring the action because of the prospect of enormous profits on their investment.[56] Clients are given a chance to gain compensation without enduring the anxiety of economic risk.

The economic potential of litigating has created mechanisms that heighten the chances of plaintiffs succeeding in medical malpractice litigation. Several decades ago, the medical malpractice plaintiff was afflicted by what was called "the conspiracy of silence."[57] That term referred to the reluctance of doctors to testify against their colleagues.

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55. For a defense of contingency fee arrangements in legal cases, see Michael Napier, *For Many, English Rule Impedes Access to Justice*, WALL ST. J., Sept. 24, 1992, at A17.

56. A consortium of plaintiff malpractice attorneys organizing the funding of a litigation campaign against the cigarette industry is just one example of the type of investment that the contingent fee system encourages. In 1994, a group of 65 law firms committed to invest $100,000 per firm for this purpose. *See* Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N.Y. TIMES, Mar. 10, 1999, at A1; *see also* Glenn Collins, *Judge Allows Big Lawsuit on Tobacco*, N.Y. TIMES, Feb. 18, 1995, at A1.

57. *See* Leubsdorf, *supra* note 13, at 144-45 ("Starting in the nineteenth century, the medical profession sought to protect itself from malpractice claims by discouraging doctors from testifying against each other.").

Because expert testimony is virtually always necessary to establish professional malpractice, meritorious lawsuits were often lost because of the inability to find a doctor willing to testify for the plaintiff.[58] The flow of cash into the malpractice bar eventually solved the problem. Now, there is so much medical malpractice litigation that medical professionals can make a comfortable living by becoming professional experts.[59] These medical professionals derive their income as forensic experts.[60] Thus, the economics of medical malpractice litigation has created an industry of captive doctors whose livelihood depends upon litigation. Plaintiffs can now select among available experts rather than suffer from the inability to find even one.[61] In fact, the economics of these cases has contributed to the creation of the new legal and social problem of junk science.[62]

2. *Access to Medical Experts*

The availability of medical experts has given the medical malpractice plaintiff's bar the information to establish causation baselines. The data provided by the experts have made it possible to prove the hypothetical outcome of nonnegligent treatment. Substantial economic resources

58. *See* Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases,* 61 TEMP. L. REV. 1351, 1367 (1988) ("The need for a specialist expert witness can create additional problems to the malpractice client already troubled by the difficulty of finding attorneys to testify against fellow attorneys . . . .").

59. It is not difficult to find advertising from such professional experts. *See Legal Experts and Services,* N.Y. L.J., July 30, 1999, at 8 (containing six advertisements for experts willing to testify).

60. *See id. See generally* AMERICAN LAWYER MEDIA, 1999 NEW YORK DIRECTORY OF EXPERT WITNESSES AND CONSULTANTS (1999); THE NATIONAL DIRECTORY OF EXPERT WITNESSES (1999) (containing 304 pages of detailed information on named experts).

61. Indicative of the nature of this industry is the, perhaps apocryphal, remark of an unidentified plaintiffs' personal injury attorney who claimed that experts who testified frequently could be divided into three categories: "There are plaintiff's whores, defendant's whores, and testifying whores."

62. The Supreme Court recently strengthened the power of judges to reject opinion evidence in an effort to keep "junk science" out of the courtroom. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1992). However, some have argued that *Daubert* and its progeny have had the opposite effect. According to Robin S. Conrad, attorney for the U.S. Chamber of Commerce, "The problem has been that these so-called experts can march into court and testify to just about anything . . . . Often, these people have degrees that might impress a jury, but their conclusions are not based on scientific evidence." David G. Savage, *High Court Limits 'Junk Science' Claims,* L.A. TIMES, Dec. 16, 1997, at A29.

have enhanced the plaintiff's ability to meet the burden of proving what would have happened but for the doctor's negligence.

3. *Affluence of Defendants*

Medical malpractice defendants come from some of the most affluent segments of society—doctors and hospitals. While large verdicts could routinely be gained against criminals who rape, rob, and murder, those verdicts would never be collected. Verdicts against the medical profession are routinely collected because the doctors have the assets to pay or to obtain insurance.[63] That fact obviously enhances the incentive to sue, as large jury verdicts translate into large payments.

4. *Information Transfer*

Doctors are bombarded with information regarding malpractice issues in drug company advertising, professional magazines, and continuing education programs.[64] These abundant sources of information are also vehicles for intimidation. The perception is that the medical profession is overwhelmed with malpractice lawsuits.[65] The reality is that they are not.[66]

5. *Public Perception of a Doctor's Abilities*

The fact that lawyers are encouraged to litigate malpractice actions does not mean that verdicts will be high. Certainly, the size of the verdict is affected by the nature of the injuries. Incapacity results in loss of income and the likelihood that future medical expenses will be incurred, which can lead to millions in damages. Part of the computation involves the public perception of the medical profession. If doctors were seen as people eager to help but generally unable to conquer fate, it would be far more difficult to establish negligence. Doctors, however, have developed an enormous body of knowledge and the ability to cure diseases that ravaged humanity for eons.[67] Surgical techniques have restored function and saved limbs in a way unheard of

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63. *See* Ramos, *supra* note 26, at 2583.

64. *See* Interview with Dr. Joel Weintrub, in Henmpstead, N.Y. (Apr. 5, 2000) (remarking on being "bathed" in unsolicited information about medical malpractice over 35 years of practice as an ophthalmologist).

65. *See* French, *supra* note 48, at B1.

66. *See id.* ("[T]he American College of Obstetricians and Gynecologists said 41 percent of the claims were dropped by plaintiffs or dismissed in court without an award . . . .").

67. The bubonic plague was wiped out with penicillin. Open heart surgeries, including valve and total heart transplants, defy the comprehension of the laity.

before World War II.[68] The lay belief is that doctors are virtually infallible. Thus, if a plaintiff has horrendous scarring after plastic surgery, the perception is that it must have been the doctor's fault. If a baby is born with a defect, it must have been the doctor's fault. Because the perception of the medical profession's miracle-performing ability may exceed its scope,[69] juries are easily persuaded that a "bad result" is not the unavoidable consequence of disease, but rather the consequence of inadequate medical care.[70]

The medical malpractice plaintiff's bar is readily able to obtain expertise sufficient to establish a prima facie case, and experience has shown that juries are not reluctant to find liability. Doctors are aware of every bizarre verdict and have developed an almost hysterical fear of liability.[71]

6. *Modification of Traditional Tort Rules*

A seriously injured person who can prove that medical malpractice prevented recovery will obtain compensation. The injured person, however, cannot always so easily establish liability. Despite the uncertainty, lawyers have been willing to invest time and money in the cases. They are willing to pay for depositions, investigators, and expert

68. The case of John Wayne Bobbitt is arguably the most notable example. *See* Lawrence K. Altman, *Artful Surgery: Reattaching a Penis*, N.Y. TIMES, July 13, 1993, at C3.

69. *See* David Plotkin & Francis Blankenberg, *Breast Cancer—Biology and Malpractice*, 14 AM. J. CLIN. ONCOL. 254, 264-65 (1991). Plotkin and Blankenberg state:

> The scientifically uninformed but ever hopeful public greets the purported breakthroughs [in breast cancer research] with enthusiasm. When treatment failure occurs following diagnosis which could have occurred earlier, there is a strong tendency to conclude that disability and/or death ensued because of a doctor's negligence. Until we correct the unduly high expectations of our diagnostic and therapeutic capabilities in this field, all of us will suffer the social consequences.

Id. at 265.

70. This issue is discussed in detail in *Mayhue v. Sparkman*, 653 N.E.2d 1384 (Ind. 1995), in which the doctor in charge failed to diagnose the patient's recurrence of cancer, and that failure drastically reduced the patient's chance of survival. *See id.* at 1385-86; *see also* Kuhn v. Banker, 13 N.E.2d 242, 243 (Ohio 1938) (describing the defendant's failure to take an x-ray until it was too late to reset the fractured bone in the patient's hip, despite having been informed by the patient that the broken bone was grating).

71. A doctor's worst fear is "an expensive court fight and a multimillion-dollar jury award." Chad Terhune, *Crisis Might Be Looming for Birth-Injury Program*, WALL ST. J., May 6, 1998, at F1.

witnesses. When all of these resources fail to establish a prima facie case, the attorneys are even willing to invest in litigation to change the law.[72] The potential for profit has encouraged investment in law reform litigation, which has been successful.[73]

Of the six factors discussed in this section, three are equally prevalent in legal malpractice litigation: the access to expert testimony, affluence of the defendants (lawyers versus doctors), and network of information about liability[74] are fundamentally the same. Certainly, there is a difference in the element relating to the attitude of the public toward lawyers and doctors. Doctors may be revered, whereas lawyers are more likely to be feared.[75] The two remaining factors have important differences in the legal malpractice arena: the predictable size of verdicts is less constant and the cases are harder to win.[76]

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72. *See* Collins, *supra* note 56, at A1; Tyler, *supra* note 56, at A1.

73. *See* William Glaberson, *Lawyers Feeling Society's Backlash*, NEW ORLEANS TIMES-PICAYUNE, Aug. 5, 1999, at A1 (noting that lawyers are sometimes more capable of tackling problems than government); Leslie Wayne, *Lawyers Set Sights on Beating Bush*, NEW ORLEANS TIMES-PICAYUNE, Mar. 26, 2000, at A1 ("[M]oney won in lawsuits is being strategically reinvested by plaintiffs' lawyers in . . . more litigation."); *see also* Perrochet et al., *supra* note 41, at 626 (discussing the potential impact of new health care legislation on recovery). The authors state:

> [J]urisdictions [that] have balked at barring recovery on causation grounds where a physician has acted negligently. . . . have taken two approaches to allow a patient to sue for damages even though the patient probably would have been in the same physical condition absent the defendant doctor's negligence. The first approach is to relax the reasonable medical probability causation standard and allow recovery where the patient proves the physician's conduct deprived the patient of a possibility of a medical result. . . .
>
> The alternative approach is to define the decreased possibility as a compensable *injury*. Jurisdictions which follow this course adhere to the "reasonable medical probability" standard of causation, but require the plaintiff to show that the physician's conduct probably caused a lost *chance* of improvement or cure.

Id. at 615-16.

74. *See* Leubsdorf, *supra* note 13, at 107-08 ("Finally, legal malpractice cases offer courts an unusual opportunity to effectuate the rules they promulgate by influencing lawyers' conduct. Lawyers read malpractice decisions, and will heed the possibility of personal liability."); *id.* at 102 ("The time has come to consider legal malpractice law as part of the system of lawyer regulation.").

75. *See* John Tierney, *Bar Sinister: Lawyers Earn Public's Wrath*, N.Y. TIMES, May 13, 1999, at B1.

76. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994). The author states:

> According to the ABA Study, only between 1.0 and 2.6[%] of lawyers each year face a claim or lawsuit for legal malpractice. A full [67%] of claimants or plaintiffs receive no compensation, [70%] of those who do settle receive less than $1,000, and only [1%] of those who go to trial win.

Id. at 1660 (footnote omitted). Professor Ramos presents data to show that the number of suits is actually higher. *See id.* at 1670.

III. THE LACK OF IMPACT OF MALPRACTICE LITIGATION ON THE LEGAL PROFESSION

A. A Wider Range of Verdicts

The size of verdicts is critical to the success of tort litigation as a mechanism for changing conduct. Verdict size has an impact on two different sets of actors: the class of potential defendants and the litigation attorneys.[77] In the American litigation system, most plaintiff's tort attorneys are paid a designated percentage of the recovery.[78] Part of the contingent fee attorney's responsibilities is the advancement of money to pay the costs of the litigation, such as expert witnesses and depositions.[79] The economic self-interest of the tort litigation bar is thereby utilized to further the social interests in gaining compensation for the injured party.[80] The collateral result of this system is that litigation interest shifts to the most profitable areas. The creation of economically maximizing conduct drives the attorney into profit-maximizing areas of work.[81] The smaller the verdict, the smaller the

77. *See* Latin, *supra* note 8, at 678-79 (introducing a sophisticated economic analysis of how different liability rules affect behavior, which, although explicitly referring to potential defendants, applies equally to attorneys whose "problem-solving" behavior is oriented to their personal profit). Utilitarian analysts would identify this type of conduct as driven by system based efficiencies. High potential verdicts drive a plaintiff's attorney to vindicate the rights of the poor and injured, maximizing social good. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 569 (1972).

78. *See* Burk E. Bishop, *Lawsuits, Contingent-Fee Contracts, and Bankruptcy*, 47 OKLA. L. REV. 515, 531 (1994); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 626-27 (1995); Note, *Settling for Less: Applying Law and Economics to Poor People*, 107 HARV. L. REV. 442, 448 & n.23 (1993).

79. *See* Tyler, *supra* note 56, at A1 (reviewing the impact of huge recoveries on the incentives for attorneys to pursue specific types of large-scale tort litigation with law-changing potential).

80. The relationship between the efficacy of malpractice litigation as a mechanism for changing defendant behavior and the economic self-interest of the actors is reflected in the development of a variety of proposals to enhance the chances of profit in suing attorneys. *See, e.g.*, Ramos, *supra* note 26, at 2583; Ramos, *supra* note 76, at 1682-86, 1725-31 (identifying greed as one of the most common reasons for legal malpractice litigation). Although mandatory insurance is a solution to the problem of collection, it does not solve the problems caused by the special defenses to liability and damages possessed by the legal malpractice defendant.

81. Such "unintended consequences" of legal rules is quite common. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory*

incentive to litigate and, likewise, the smaller the incentive for attorneys to spend money on law reform litigation.

It was the opportunity for financial success that fueled the legal community's willingness to fund medical malpractice and products liability law suits. Plaintiff's attorneys funded and brought seemingly endless medical malpractice and cigarette litigation despite the abundant precedent of defendant victories. Obviously, the attorneys would not front such costs if they did not believe that their money was invested soundly. They certainly were interested in prompting a change in the law that would benefit the public interest. However, the inducement to put up thousands, if not hundreds of thousands, of dollars of their own money was most likely not the potential law reform, but rather the belief that the investment would reap fees in the millions.

If legal malpractice suits tend to return smaller verdicts than other types of tort actions, then profit-maximizing conduct will drive attorneys away, into the more profitable areas.[82] Thus, a significant question is whether the size of legal malpractice verdicts is a function of client injury, or a result of legal rules controlling legal malpractice litigation.

Doctors often treat patients with diseases that endanger either their capacity to enjoy life or their life itself. Mistreatment can create physical distress that reduces earning capacity, requires additional medical treatment, and may lead to death. The damages caused by the negligent doctor can, therefore, be great. Compensation for loss of income in a death or incapacity case can be millions of dollars.[83]

Disclosure, 73 TEX. L. REV. 753, 785-86 (1995) (concluding that mandatory disclosure rules will have the opposite of the intended economic consequences); Rena I. Steinzor, *The Legislation of Unintended Consequences*, 9 DUKE ENVTL. L. & POL'Y F. 95, 104-09 (1998) (discussing the legislation of unintended consequences in environmental law). *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (discussing the unanticipated effects of new divorce rules on women and children).

82. This perception of the relationship between fee generation and lawyer litigation generation was so common that many legislatures adopted rules limiting recovery in medical malpractice litigation. The recovery of the client was not affected, but the attorney's fee was reduced to encourage settlements and deter litigation. The legislatures acted in an effort to reduce the rate of increase in medical malpractice premiums. *See* Frank P. Grad, *Medical Malpractice and the Crisis of Insurance Availability: The Waning Options*, 36 CASE W. RES. L. REV. 1058, 1083-84 (1986); Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOK. L. REV. 135, 173 (1986).

83. *See* McDougald v. Garber, 536 N.E.2d 372, 373 (N.Y. 1989) (regarding further proceedings on a $9.7 million jury award to a 31-year-old comatose plaintiff who suffered severe brain damage as a result of oxygen deprivation during a Caesarean birth, which award was reduced by the trial judge to $4.8 million); Cruz v. Mt. Sinai Hosp., 594 N.Y.S.2d 776, 777 (App. Div. 1993) (reducing to $6.5 million a $15 million jury award to a 17-year-old plaintiff who suffered from cerebral palsy and quadriplegia as a

Compensation for future medical expenses for a patient who has been disabled can be equally high. Of course, the award for pain and suffering can dwarf even substantial tangible injuries.[84]

Civil lawyers, on the other hand, seldom cause death or physical injuries. These lawyers deal primarily with economic losses. The litigator is trying either to avoid a loss or to gain compensation for a loss. The damages are therefore limited by the economic facts of the litigation itself.[85] A suit to recover $150,000 has a maximum value of that sum. There are no collateral injuries to enhance the amount of the judgment such as future medical expenses, loss of income, and the like.

Since the size of a legal malpractice verdict depends upon the value of the underlying case, some legal malpractice verdicts can be quite large. A successful legal malpractice claim in a medical malpractice case, for example, can result in the same dollar verdict against the attorney as that which would have been found against the original doctor. Similarly, a successful legal malpractice claim in a multimillion dollar corporate litigation would lead to a multimillion dollar award against the attorney.

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result of oxygen deprivation during and shortly following birth); Chazon v. Parkway Med. Group, 563 N.Y.S.2d 488, 489-90 (App. Div. 1990) (increasing to $3.1 million a $2.5 million stipulated damage award following a jury award of $4.3 million to father of child who suffered severe brain damage, retardation, paralysis, and cerebral palsy as a result of oxygen deprivation during birth); Pjetri v. New York City Health & Hosps. Corp., 558 N.Y.S.2d 818, 818-19 (Sup. Ct. 1990) (regarding interest on a $7 million damage award—reduced from a $24.5 million jury award—in favor of a 24-year-old man who suffered severe brain damage as a result of misplacement of an endotracheal tube during surgery on a broken leg).

84. *See* Bermeo v. Atakent, 671 N.Y.S.2d 727 (App. Div. 1998). In that case, the appellate court increased to $8.7 million a damage award that was reduced by the trial court to $4.5 million from the jury award of $45,295,573, which the jury had calculated as follows: $1,600,000 for 16 years of the child's past pain and suffering, $7,875,000 for 63 years of future pain and suffering, $4,070,573 for 29.8 years of loss of earning capacity, $252,000 for 63 years of future physicians' services and medical equipment, $472,000 for 63 years of future physical and occupational therapy, and $31,026,000 for 63 years of future group home or home care expenses. *See id.* at 730; *see also* Stevens v. Bronx Cross County Med. Group, 681 N.Y.S.2d 531, 532 (App. Div. 1998) (involving a $3 million award for past and future pain and suffering); DiMarco v. New York City Health & Hosps. Corp., 669 N.Y.S.2d 51, 51-52 (App. Div. 1998) (involving a $1,150,400 award for future medical expenses); *Court Decisions*, N.Y. L.J., Apr. 27, 1998, at 25; Nicole Goldstein, *Verdicts and Settlements*, N.Y. L.J., Mar. 17, 1998, at 4.

85. *See* John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1133 (1988). Thus, whatever damages, fines, surcharges, costs, fees, or exemplary damages resulted from the attorney's negligence are recoverable, once the plaintiff client demonstrates that the judgment in the underlying case is unmerited and attributable to the attorney's malpractice. *See id.*

On the other hand, legal malpractice verdicts in modest cases would lead to modest awards.

Legal malpractice verdicts are, therefore, less consistent than medical malpractice verdicts. The injuries caused by legal malpractice are limited to the damages of the underlying actions. There are attorneys who specialize in gaining compensation for children injured by birth trauma. It seems that every defendant is a doctor, every plaintiff is devastatingly injured, and every plaintiff's verdict is enormous. Other attorneys have "collected" asbestos, lead, or breast implant cases. All are areas in which verdicts are potentially high.[86] Such specialization is impossible in legal malpractice litigation; thus the verdicts will be less predictable and often lower. However, representation of legal malpractice plaintiffs can be very lucrative. The fact that it is a less predictable source of income in no way establishes that it is not profitable. Therefore, the difference in the scope of litigation in the two areas cannot be explained by differences in profitability.

B. Legal Impediments to Establishing Liability

The amount of recovery, however, is only one part of the calculation made by those whose conduct is influenced by legal outcomes. As in any business, certainty of profit combined with volume can compensate for smaller recoveries in individual transactions.

Actions for legal malpractice contain the same elements as any other negligence lawsuit. Plaintiffs must prove duty, breach, causation, and damages.[87] As in medical malpractice cases, to establish "breach" the plaintiff must prove that the attorney "fail[ed] to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated."[88]

Nonetheless, legal malpractice actions can be some of the most difficult cases to establish. One reason is inherent in the nature of legal representation. There are few set rules and fewer public perceptions of anticipated outcomes. For example, an operation that fails because of a suture failure is not an unavoidable accident; it is clearly an error that justifies compensation. Unfortunately, legal representation does not have the background of modern science. There is no public perception

86. *See* Daniel Wise, *Opt-Outs Stir Concern Over Breast Implant Settlement*, N.Y. L.J., July 18, 1994, at 1; Daniel Wise, *Plaintiffs' Bar Appears Wary of Breast Implant Settlement*, N.Y. L.J., Mar. 25, 1994, at 1; *$10.4 Million Award for Asbestos Claims*, N.Y. L.J., June 3, 1994, at 2.

87. *See* Shaun McParland Baldwin & Lisa C. Breen, *Malpractice Claims by Primary and Excess Insurers: Is the Honeymoon Over?*, 62 DEF. COUNS. J. 18, 18 (1995).

88. *Id.*

of attorneys as miracle workers. Indeed, the public does not think highly of attorneys.[89] Because the attorney is not considered a miracle worker, a bad litigation outcome is not automatically seen as the result of lawyer error.[90] Further, because lawyers do not base their conduct on science, complaining clients may be perceived as vindictive rather than abused.[91] Because the ease of getting a verdict is an important factor in the success of tort litigation as a tool to police the legal and medical professions, it is useful to identify the factors other than the innate differences between the nature of the professions that contribute to reduce access to compensation.

Many rules interact to reduce the size of potential verdicts. Attorneys have retained protections against payment for pain and suffering,[92] receive special consideration for erroneous strategic decisions,[93] and benefit from the deductibility of the unearned legal fee from a malpractice judgment.[94] There is, however, only one rule that significantly reduces the client's probability of winning the case. That rule is the traditional "cause in fact" rule that is applied to litigation malpractice.[95]

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89. The American Bar Association's Commission of Disciplinary Enforcement found that "lawyers are more likely to be criticized than many other professions." Sussman, *supra* note 50, at 2.

90. For example, in tax cases, the complexity of the Internal Revenue Service's tax computations or revenue rulings makes it difficult to establish the correct result, let alone the role that attorney error may have played. There is no "smoking gun" type of evidence that will appeal to a jury, no broken suture or erroneously read X-ray that will sit in front of them. Instead, the plaintiff must explain the nuances of the tax code and the tax system to the jury in order to win.

91. In a malpractice case stemming from an underlying criminal action, the convicted criminal is not likely to be seen as an attractive plaintiff. Likewise, in cases stemming from civil marital actions, the trauma of the divorce may be seen as causing the client to be so embittered that the malpractice action is little more than a spillover from the hostility directed at the former spouse.

92. *See* 2 MALLEN & SMITH, *supra* note 10, § 19.11, at 612.

93. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980); Allen Decorating, Inc. v. Oxendine, 483 S.E.2d 298, 301-02 (Ga. Ct. App. 1997); Simko v. Blake, 532 N.W.2d 842, 848 (Mich. 1995).

94. *See* Moores v. Greenberg, 834 F.2d 1105, 1113 (1st Cir. 1987). *But see* Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611, 611 (N.Y. 1990) (prohibiting attempted deduction for unearned legal fee).

95. The case-within-a-case requirement has obvious relevance to litigation malpractice claims, but is also a significant hurdle for plaintiffs suing negligent attorneys in other situations. For example, a failure to communicate a settlement offer can be defended by the claim that the offer would not have been accepted. *See* 675 Chelsea Corp. v. Lebensfeld, No. 95 Civ. 6239 (SS), 1997 U.S. Dist. LEXIS 14076, at *8 (S.D.N.Y. Sept. 16, 1997). Under this rationale, the failure to advise about possible

It is in the interpretation of this causation rule that the legal and medical malpractice torts differ. In difficult proof cases involving medical malpractice, causation burdens have been modified. Medical malpractice tort reform decisions are based on a consensus of belief among judges and legislators that certain medical malpractice plaintiffs deserve special protection.[96] These policy makers responded to injuries that were horrific, such as injuries involving death, disfigurement, and pain.[97] The appeal of reformulating legal rules to protect medical malpractice victims' interests was deep and visceral.[98] It has also been effective. Oncological diagnostic negligence would be unprovable if courts had rejected the alternative proof doctrine of loss of chance. Similarly, many types of injuries stemming from surgical malpractice would be virtually unprovable if the courts refused to switch proof burdens.[99] In these types of cases, the abandonment of traditional proof standards has been essential to the expansion in the use and impact of the medical malpractice tort.

The victims of legal malpractice do not bear the scars of an incompetent surgeon. An examination of the history of alternative duty and proof doctrines, however, will establish that their proof problems are indistinguishable from the type of proof problems that have led courts to develop the alternative doctrines.

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clauses that could be added to a contract to protect the client could be defended by the claim that the plaintiff cannot prove that the other side would have accepted the modifications.

96. Although not a medical malpractice action, the degree to which a common understanding of the danger caused by specific types of defendants can engender law changes is reflected in the legislative and judicial actions depriving cigarette manufacturers of the intervening cause or assumption of risk defenses in suits by the states seeking compensation for Medicare expenses. *See* Larry Rohter, *Florida Prepares New Basis to Sue Tobacco Industry*, N.Y. TIMES, May 27, 1994, at A1.

97. *See, e.g.*, Correa v. Hospital S.F., 69 F.3d 1184, 1188-89 (1st Cir. 1995) (involving woman with reported chest pains and dizziness who, after having been given a number by hospital personnel and told to wait, left two hours later to seek other assistance and died soon thereafter); Salathiel v. State, 411 N.Y.S.2d 175, 176-77 (Ct. Cl. 1978) (involving a doctor's puncture of the plaintiff's cribiform plate while attempting to insert a nasogastric tube into plaintiff's nostril, and the required corrective surgery which severed the plaintiff's olfactory nerve).

98. Only after the medical profession became sophisticated in lobbying was there a change in the progress of legal change. Using the claimed malpractice insurance crisis, the medical profession was able to gain statutory modifications of pro-patient common law rule changes of the prior decade, such as continuation of the statute of limitations until the date of discovery of an injury. *See* Cheryl A. Fisher, Comment, *Is There Light at the End of the Tunnel? Putting a Stop to the Controversy of Which Statute of Limitations to Use in a Medical Malpractice Action in Texas:* Bala v. Maxwell, *909 S.W.2d 889 (Tex. 1995)*, 22 T. MARSHALL L. REV. 345, 376 (1997); Rosen, *supra* note 82, at 137-44.

99. *See infra* Part IV.D.

IV. THE DEVELOPMENT OF ALTERNATIVE PROOF DOCTRINES: HOW MEDICAL MALPRACTICE PLAINTIFFS HAVE BECOME THE BENEFICIARIES OF ALTERNATIVE PROOF OPPORTUNITIES

A. Historical Development of a Complex Legal System

The common law system is dynamic. Law develops through an accumulation of decisions in individual cases. The rule of precedent limits chaos, but does not prevent change. Some rules appear and flourish[100] while others disappear[101] or are dramatically modified over time.[102] Any serious endeavor to propose change must consider the factors that support existing doctrines and the forces, if any, that have been found sufficient to justify changes in these doctrines.

The case-within-a-case segment of the legal malpractice tort is merely the causation element of the negligence tort. The recommendation to adopt alternative causation doctrines can be accepted only if the traditional causation doctrine is modified. It is thus necessary to investigate the sources of that doctrine to identify both how it developed and what has been held sufficient to justify changes.

Because the cause in fact standard has its roots in moral, historical, and natural law developments unique to the Anglo-American culture, it has won broad acceptance in the legal academy.[103] This standard

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100. Prior to a single judicial decision in 1960, strict liability was not the law in products liability litigation. The decision in *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), revolutionized the duty of manufacturers. *See id.* at 77 (replacing negligence with strict liability). It was quickly followed in some form in almost every jurisdiction. *See* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-99 (1966).

101. Mitior sensus arose several hundred years ago as a mechanism to reduce the amount of slander litigation. It required dismissal of actions when the underlying statement was susceptible to a non-defamatory interpretation. It was never adopted in libel actions and has been abandoned. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1115 (6th ed. 1995) (citing J. BOWER, ACTIONABLE DEFAMATION 332-35 (1908)).

102. The contributory negligence doctrine, for example, once dominated the negligence liability world, but has now been replaced by comparative negligence. *See* SCHWARTZ, *supra* note 2, at 1-3.

103. *See* Zweir, *supra* note 17, at 785-95. Zweir identifies five cultural foundations for the traditional proof allocation of cause in fact: (1) the Puritan tradition of protection of individuals from the State; (2) the sixteenth century battles of the courts against the King's discretionary powers; (3) natural law theories espousing the supremacy of individual rights; (4) the political theory of social contract; and (5) the frontier tradition

represents a definition of fairness that maximizes individual rights, which is known as individualism.[104] Careful analysis yields little basis to dispute the claim that a view of fairness dominated by individualistic concepts had an influence on doctrinal development in this area. Morally based perceptions of individual responsibility and dignity[105] engendered the cause in fact element in the personal injury tort and the decision to allocate proof of that element to the plaintiff. Concerns about excessive governmental intrusions also played a critical role in the development of proof of causation standards.[106] Thus, proof of causation as a predicate to liability is morally and philosophically mandated in our culture. Before an individual can be held accountable by the State for her actions, she must be proven to have caused injury.[107] According to the legal academy, the mandate is so ingrained in the culture that it has been referred to as the decree of the divine hand. There are, however, other value systems that can be used to determine fairness in the allocation of tort law obligations.[108] Status, defined as an identification of fairness with reference to groups of people, has generally been

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of independence. *See id.*

104. *See* POUND, *supra* note 32, at 37.

105. *See* Bush, *supra* note 29, at 1474, Zweir, *supra* note 17, at 809.

106. *See* Zweir, *supra* note 17, at 785-95.

107. *See id.* at 809.

108. There has been virtually endless analysis of the underlying conceptual bases and fundamental purposes of tort law. Deterrence, distributive justice, compensation, loss spreading, economic efficiency, and the like have been compared, contrasted, and dissected. *See generally* Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313 (1994); Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919 (1994). Although such analytic efforts are critical to a general understanding of tort law, they are academic exercises that seldom further the achievement of significant change in existing doctrines because the analyses are so complex and interwoven that virtually any result can be justified or criticized by their application. Whether causation issues are thought to be pure policy issues, perceived as factual inquiries, or thought to be derived from the social purposes of the law matters little, because all of these are primarily analytic fulcrums by which the proponent's view of fairness can be furthered. *See* Morton J. Horwitz, *The Doctrine of Objective Causation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 201, 211 (David Kairys ed., 1982) (regarding causation issues as pure policy issues); Bush, *supra* note 29, at 1475 (dividing the social policy bases of causation into utilitarian and corrective justice categories); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1739 (1985) (regarding causation issues as factual inquiries); Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 578 (1987) (regarding causation issues as pure policy issues). The proposed changes in litigation malpractice doctrine, however, can be supported under any of these competing perspectives. Indeed, the intellectual furor surrounding the proper goals of tort law may well be the result of the widespread acceptance of liability insurance. Insurance undermines the need to protect the individualistic interests of the defendant. Damage awards will be paid by insurance, not the individual. This reality leaves the goals of a tort system open for reinterpretation. The catalogue of theories represents a segment of the ideas that have been offered to fill the gap vacated as insurance undermines individualistic values.

perceived as the alternative to individualism in the development of tort law.[109] The historic causation doctrine has been analyzed as exclusively based on a vision of fairness centered on the desire to protect the individual.[110]

However, an understanding of one element of the tort law cannot be complete without an examination of the factors that influence the other elements. The law is a composite of various elements that combine to create duties and rights. The personal injury tort obviously consists of elements other than cause in fact. Individualistic values influenced the creation of the causation doctrine.[111] The examination of causation out of the context of the entire tort might lead to an overestimation of the impact of individualistic values and an underestimation of the consistent importance of status values. To determine the extent to which individualism influenced judicial rule making, the interplay between causation and the other tort elements must be analyzed. Substantive rules must be considered in their interplay with the procedural rules.

A system of law incorporates substantive and procedural rules. The substantive rules establish the element of proof while the procedural rules define the quantum of proof; the substantive rules are only effectuated in the procedural system created for their enforcement. An element of proof based on individualistic concerns could exist but would have little practical effect if the quantum of proof were extremely low. The element, if too easily proven, would amount to little more than a statement of principle.[112] It could only be of substantive impact if it were buttressed by a quantum of evidence requirement that made it difficult to prove. In other words, the quantum of proof standard could be used to balance the degree to which the tort protected individualistic interests at

109. The status role focuses legal rule making on the "role voluntarily assumed by the defendant and the defendant's relationship, arising out of the role assumed, to the general class of persons who may be affected by one who plays such a role." Barbara B. Rintala, *"Status" Concepts in the Law of Torts*, 58 CAL. L. REV. 80, 86 (1970). *See generally* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 222-51 (1970) (discussing collective liability as an alternative to individualism as the source of just legal rules); Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247 (1967).

110. See Zweir, *supra* note 17, at 809.

111. *See supra* note 105 and accompanying text.

112. The claim that no person could be convicted of a crime unless he were proven guilty "beyond a reasonable doubt," for example, would have nothing but rhetorical value if the courts held that there was no reasonable doubt when the defendant's guilt was "more likely than not."

the expense of other values. Individualism, as suggested in the academic literature, may have been the ultimate value in tort causation rule generation.[113] However, it may have been but one of many values that were balanced against each other to formulate the tort. The issue is whether other value systems can be found in the set of rules controlling causation and its proof.

Divergent sources of rules in tort law are reflected in the quantum of evidence standards. A comparison of proof standards in criminal and civil cases readily reveals differing value bases. The Puritan, natural law, and "pioneer spirit of individualism" values explain the standard of proof in criminal cases. This standard, proof to a moral certainty,[114] embodies the purity of thought and crucial concern with protecting the individual from the crushing burden of State intervention.[115] The standard incorporates a definition of fairness that is centered upon the protection of the individual against the State with the force of Puritan or natural law "moral" conviction. The preponderance standard of civil cases, on the other hand, is far less protective of the individual.[116] It permits State intrusion without rigorous barriers of certainty. The rule is so permissive in its slim barrier against governmental intrusion that individualistic values do not seem protected. The preponderance of evidence standard is far more readily explained by utilitarian or social welfare-based definitions of fairness.[117] Although academic analyses

113. *See supra* note 105 and accompanying text.

114. The "proof beyond a reasonable doubt" standard is often defined as proof to a moral certainty. *See* Amy K. Collignon, Note, *Searching for an Acceptable Reasonable Doubt Jury Instruction in Light of* Victor v. Nebraska, 40 ST. LOUIS U. L.J. 145, 148-49 (1996) (discussing how many states have now put the language of moral certainty into pattern jury instructions).

115. *See* Zweir, *supra* note 17, at 785-95.

116. Burden of proof standards combine two distinct issues. The first is the measurement of the amount of proof or certainty that is required. The second is the allocation of burden. This discussion is limited to the first aspect of the civil standard, the amount of proof. The decision to allocate proof burdens on the plaintiff is clearly a continuation of the common law concern with the protection of individual rights. "The preponderance of the evidence standard reflects society's 'minimal concern with the outcome' as well as the conclusion that the parties should 'share the risk of error in a roughly equal fashion.'" Michele L. Jacobson, Note, *RICO Post-Indictment Restraining Orders: The Process Due Defendants*, 60 N.Y.U. L. REV. 1162, 1183 (1985) (footnote omitted) (quoting Santosky v. Kramer, 455 U.S. 745, 755 (1982) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979))); *see* Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1160 (1983) ("Professor Kaye defended the preponderance-of-the-evidence standard by pointing out that it results, overall, in fewer dollars being erroneously paid."); Vern R. Walker, *Preponderance, Probability and Warranted Factfinding*, 62 BROOK. L. REV. 1075, 1076-78 (1996) (discussing burden of proof problems and solutions in tort law).

117. *See* Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656, 656 (1974-1975); Fletcher, *supra* note 77, at 567; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972); David Rosenberg, *The Causal Connection*

have suggested that status values were abandoned for centuries and only recently resurrected as a source of tort rule making,[118] the preponderance of evidence standard is a reflection of the continuity of status influences. This substantial distinction between proof burdens in civil and criminal cases suggests the need to reconsider the role of status in early tort development. The divergence between the concepts of fairness represented in the individualist-based criminal standard and the utilitarian-based civil standard could not have gone unnoticed by the common law courts. They could not have been oblivious to the impact of procedural rules on substantive rights. The preponderance standard is sufficiently removed from individualistic protective values that its adoption must be considered an intentional mitigation of the rigors of individual-rights-based elements of the system. Of the sources identified as leading the individualistic tradition,[119] only the English courts in their battles with the Crown would seem to find a limited preponderance scope of protection sufficient. Their battle was against the unfettered discretion of the Crown; the imposition of any obligation to a hearing before royal action was a great victory.[120]

On the other hand, the frontier influence and the pioneer spirit are hard to reconcile with such a meager standard of proof. It is unlikely that those frontier individualists whose spirit supported the cause in fact standard would have been appeased if they understood the more subtle reality of the preponderance definition of proof. Furthermore, that the Puritans in their zeal to ensure that every individual was judged by the "inflexible rule of the strict law"[121] would have felt that their interests were protected by the very permissive preponderance standard is even harder to believe.

The standard of proof seems to stem from pragmatic utilitarian values. A dispute resolution system, like the judicial system, must gain the confidence of the public if it is to succeed as an alternative to self-help or other primitive compensation schemes. Plaintiffs must win a substantial percentage of cases or they will not have a sufficient

in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 HARV. L. REV. 851, 861-62 (1984).

118. *See* Tobriner & Grodin, *supra* note 109, at 1249.

119. *See* Zweir, *supra* note 17, at 785-95.

120. *See id.* at 789 ("The court ruled that the king violated the law of the land because a person's property could not be forfeited without *adjudication* and an *opportunity to be heard.*" (emphasis added)).

121. POUND, *supra* note 32, at 51.

incentive to use the system. Potential litigants are individuals whose conduct can be molded by legal incentives.[122] The divergence between the criminal and civil standards can be explained by the fact that the utilitarian concern of molding a system so that adversaries will be induced to use it exists only in the civil litigation environment.

The criminal justice system need not create incentives for disputants to use the system. It is a tool of the State and the opposing parties are not willingly present. In the criminal system, the Puritan, natural law, and English court tradition of individualism are truly represented in both the concept of individual responsibility and the standard of proof. On the civil side, however, the status of the parties—injured plaintiffs deserving a forum to resolve disputes about compensation—mandate a different degree of protection. Whether the lawyers exploited the popular rhetoric of individualism to gain acceptance of their rulings or believed in those values while finding that they had to be balanced against other interests of justice can, of course, never be known.[123] It is certain, however, that the causation values of individualism were substantially eviscerated by the standard of certainty that was developed to define them. The preponderance of evidence standard permitted the courts to maintain a terminology[124] consistent with the individualistic concerns engendering the causation requirement, but was also far more flexible. Once the preponderance standard was applied, proof of causation was diminished to facts sufficient for a reasonable person to believe that it was a little more likely than not that the defendant caused injury.[125] The common law courts' response to the mandate that the law should protect individualism was, in the modern argot, to define proof down.[126]

When the entire system of regulating personal injury disputes is considered, the degree of influence of individualistic concerns appears

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122. *See* Latin, *supra* note 8, at 679.

123. *See* Richard H. Weisberg, *Three Lessons from Law and Literature*, 27 LOY. L.A. L. REV. 286, 291 (1993). *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980); ROMAN JAKOBSON, LANGUAGE IN LITERATURE (Krystyna Pomorska & Stephen Rudy eds., 1987).

124. *See generally* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 90-92 (1991) (discussing how terminology creates a complex system because of the expectations people have about institutional competence).

125. Whether the 51% certainty standard survived individualistic attacks because even the most fervid of Puritans understood that accommodations to reality would be required if the system were to retain general support, or because so few could read that the significance of the procedural rule was not generally understood, is buried in history.

126. *See* Amy L. Wax, *Against Nature—On Robert Wright's* The Moral Animal, 63 U. CHI. L. REV. 307, 339 (1996) (discussing Senator Daniel Patrick Moynihan's description of the normalization of previously unacceptable behavior as "defin[ing] deviancy down," meaning accepting behavior as it becomes more common).

modest. The common law courts have been responsive to varying perceptions of fairness and to diverse audiences. Thus, the courts formulated a system of law that simultaneously balances competing concerns. Some rules are responsive to concerns of individualism, others to social justice or utilitarian values. The total product always has been a sophisticated amalgam of competing influences—the total more nuanced than any individual rule.[127]

A further example of the intertwining of status and individualistic values in the formation of tort doctrines is found in the "vicarious liability" doctrine. Pursuant to this master-servant doctrine, an employer can be found liable as a result of the negligent conduct of an employee.[128] This liability exists without regard to the conduct of the employer. Because the doctrine does not require proof of wrongful conduct by the employer, it cannot be attributed to the law's concern with the protection of individualism; rather, it reflects status values.[129] The group threatened by the conduct of employees was seen as requiring substantive protections against the group of employers.[130] The only thread connecting the doctrine to individualism was rationalizing language found in some early decisions.[131]

Therefore, courts have always considered both individualistic and status concerns, and tort law reflects a continuing process of balancing the competing interests. The individualistic causation standard was balanced by the status-based proof standard, and the negligence standard[132] was ameliorated by the status-based vicarious liability

127. *See* POUND, *supra* note 32, at 20 (explaining that status values dominated the legal system in the feudal era); R.H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. REV. 261, 272 (1941).

128. *See* KEETON ET AL., *supra* note 8, § 69, at 499-501.

129. The precise origin of the respondeat superior doctrine is unknown; however, its roots have been traced to Roman times. The traditional Anglo-American doctrine combines status values of fairness in the basic imposition of liability with individualistic values in the scope of employment concept (a limitation on the employer's liability). The latter is a doctrine of the English courts and was developed by Lord Holt. *See* Douglas McGhee, *Once Bitten, Twice Bitten: The Minnesota Court of Appeals Limits the Recovery of Sex Abuse Victims in* Oelschlager v. Magnuson, 15 LAW & INEQ. J. 191, 200 & n.69 (1997).

130. *See* FEINBERG, *supra* note 109, at 233.

131. *See* Bush, *supra* note 29, at 1477.

132. Whether the negligence standard itself is an individual rights based rule is a matter of debate. *Compare* KEETON ET AL., *supra* note 8, § 30.4, at 165 & n.8 (asserting individualistic basis), *with* HOLMES, *supra* note 17, at 81-82 (finding utilitarian and deterrence justifications), *and* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 180-81 (2d ed. 1977) (attributing the doctrine to a judicial intuition of economic efficiencies).

doctrine—together creating a system of justice responsive to all.

The interplay between values that produced the cause in fact and preponderance of evidence compromise did not end the tensions between individualistic and status-based concepts of fairness. The development of legal doctrine is an endless continuum of rule creation and modification. Often the initial rule stemmed from concepts of fairness evolving from one set of values, while the subsequent modifications were engendered by considerations of different value sets.[133]

B. The Pattern of Judicial Value Selection

The critical issue in unraveling the nature of this value switching is to separate the "fact sets" that induce application of status values from those that lead to the creation of individualistic rules. Fact sets are the core facts that courts use to classify problems.[134] The purpose is to identify the fact sets that have persuaded courts to classify a problem as one of group interests—a legal problem that must be solved by application of status based rules. Because courts have modified rules in the effort to create legal doctrines that fairly balance the interests of the parties and society, the resources that must be examined to discover these critical fact sets are the cases in which doctrines have been changed. Of course, the repository of decisions in the Anglo-American jurisprudence is vast; however, the concern in this exploration is limited. It is to determine whether the litigation malpractice tort is the type of case in which individualistically based rules should be modified. Thus, it is only necessary to analyze cases in which courts have made status-

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Under any analysis, the non-individual rights themes cannot be completely ignored. The addition of an element focusing on the defendant's state of mind—negligence—rather than basing liability solely on conduct represents a submersion of personal responsibility values to those of group interest.

133. *See* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 73 (1956) ("All rules of conduct . . . exist for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks. . . . The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises.").

134. Theorists tend to develop their arguments by premising values and then incorporating fact types. *See generally* Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987); Robert Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI.-KENT L. REV. 523 (1987); Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579 (1987); Michael S. Moore, *Thomson's Preliminaries About Causation and Rights*, 63 CHI.-KENT L. REV. 497 (1987); Alan Schwartz, *Causation in Private Tort Law: A Comment on Kelman*, 63 CHI.-KENT L. REV. 639 (1987); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987). However, judges follow a different pattern of analysis. Their work requires them to start with the facts and, *thereafter*, discover the relevant policy.

justified modifications to individualistically based rules. By looking at cases in which courts have changed or abandoned doctrinal paths based on individualistic value systems, the fact sets motivating the courts to switch can be identified. These critical moments of judicial change are the windows into the courts' core value system. In these cases the underlying pattern, which the courts have cycled through value system rule making, can be discerned.[135]

There are many cases in which individualistically justified tort rules have been modified because the balance of equities reflected in the cause in fact and preponderance rules did not end the tension between competing values.[136] Although concerns over the fairness of proof allocations were satisfied through this compromise for well over a century, substantive law issues and issues of sufficiency of proof continued to create perplexing problems.[137] Doctrines that had been crafted to achieve fairness goals, as defined by individual rights standards, were attacked because they did not produce acceptable results in certain types of cases.[138]

The core problem confronting the courts in these cases was the rigidity of the individualistically based doctrines. Individual rights concepts achieved acceptable results in most situations. Over time, however, the courts began to encounter a significant number of situations in which application of the individual-rights-based rule did not lead to acceptable

135. Unfortunately, in this effort, analysis at the most abstract levels will not be sufficient. Professor Bush, for example, persuasively argues that communitarian concepts were best suited to balance rule development between the twin dangers of collectivistic and individualistic excesses. *See* Bush, *supra* note 29, at 1529-63. He and other scholars have explored the language of judicial decisions to discern the "judicial intuitions" of the courts, *id.* at 1530 n.189, considering the degree to which the courts are "committed to ensuring that legal rules express and effectuate transcendent values of human dignity." *Id.* at 1532 n.194. His conclusions, and those of other scholars, are extremely helpful in explaining the past. *See generally* Gerald E. Frug, *The City as a Legal Concept,* 93 HARV. L. REV. 1057 (1980); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence,* 94 YALE L.J. 1567, 1590-99 (1985). Many of these scholars assume that judges seldom consciously apply an academic analysis to the cases before them. If true, the authors and their work stand little chance of significantly persuading courts and affecting the future development of doctrine. Similarly, the corrective justice analysts attempt to explain the entire complexity of tort law with a single theory that was never articulated by a judge. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Richard A. Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151 (1973),

136. *See* Bush, *supra* note 29, at 1480-1502 (examining tort cases that modified traditional cause in fact and burden of proof rules).

137. *See id.*

138. *See id.*

results. In these exceptional cases, status values seemed to dominate the court's perception of the appropriate result.[139] Thus, individualistically based rules were not perceived as leading to equitable results. The judicial response was to create exceptions to the original doctrine.[140]

These problematic cases often arose because changing patterns of commerce and technological development altered the nature of human interactions upon which the original decision to apply individual-rights-based rules had been premised.[141] Individualistically justified rules are based on the belief that discrete actors in society are similarly situated. The predicate for imposing rules based on fairness values that stem from individualistic premises is a perception of human interaction in which the individual is an autonomous entity with freedom to act.[142] Under this view, each has "individual" control over her destiny; each is an autonomous being. Thus, individualistically justified rules protect the individual by imposing identical responsibilities on all parties to a transaction. Whether the transaction is the sale of a commodity, the security of one's property, or proof of fault in a legal action, each individual has the same rights and obligations. However, changes in social structure caused by or reflected in changes in technology produce many situations in which individuals are not equally empowered. In these situations, the individualistically justified rules lack fairness. When the parties are not equal, rules of fairness predicated upon equality fail.[143]

This inquiry will not be limited to causation cases because the substantive law development in the area of duties—specifically strict liability—and the procedural law development in alternative liability share common themes. They are similar in two ways: they both contain doctrines that were created as exceptions to rules based on individualistic values, and the doctrines were created in cases containing fact sets in which the courts were required to decide problems that stemmed from similar relationships between the parties.

An examination of these crucial cases reveals a common theme. The critical component of the fact set in which status values have been found to dominate arises when the relationship between the parties contains

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139. *See infra* Part IV.C.

140. *See* Bush, *supra* note 29, at 1480-1502.

141. *See* Tobriner & Grodin, *supra* note 109, at 1247 (presenting the theory that legal change is an effort to adjust to changing patterns of industrial development).

142. *See* Zweir, *supra* note 17, at 781-84.

143. Literature contains encapsulations of this distinction that are clearer than the most august legal analyses. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." JACQUES ANATOLE FRANCOIS THIBAULT, *Le Lys Rouge*, *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 655, 655 (15th ed 1980).

three elements: (1) conduct by the defendant, (2) that monopolizes access to information, and (3) deprives the plaintiff of independent resources sufficient to protect her interests.[144]

Information domination that produces helplessness is a fact set that cannot be resolved by reference to individualistic values. When the defendant's conduct imposes a dependant status on the plaintiff, the defendant may argue for protection of her individual rights, but the plaintiff's dependence deprives such arguments of moral force.[145] When that dependent status has been caused by the conduct of the defendant, the courts have been persuaded for more than a century that individualistic rules must be modified to protect the plaintiff.[146] The pattern by which strict liability, loss of chance, burden switching, and other status-based doctrines developed can be traced through a continuum of decisions over almost two hundred years.[147]

C. The Pattern of Doctrinal Change

The doctrines most obviously affected by the tension between individualistic and status values are the doctrines of duty and sufficiency of proof. Their connection in this area is that changes in these doctrines were induced by the desire to assist plaintiffs who were seen as

144. *See* Joseph H. King, Jr., *"Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine*, 28 U. MEM. L. REV. 491, 495 (1998) (discussing a set of similar factors that should identify the loss of chance doctrine).

145. The general belief that the individual must be protected against the State does not vary. However, since that concern is only one of the value sets that courts refer to when rules are made, the importance of individual rights protection is always balanced against other social goals. As economic and social development produce changes in the relationship between groups of individuals, the relative importance of the need to protect the individual varies. Thus, in 1956 Professor Malone could write that "attempts to use the substantial factor formula in malpractice cases (where the similar claim is made that the physician's treatment substantially enhanced the danger of the patient's death) have not met with any success." Malone, *supra* note 133, at 95. Forty years later, that statement no longer reflects the state of the law. In medical malpractice cases the courts are now extremely willing to use substantial factor and other proof easing rules. *See infra* Part IV.D. The difference is a change in perception about the relationship between the doctor and the patient. The doctor is now seen as far more powerful, because technological advances have created resources to diagnose and *routinely* cure illnesses that had been invariably fatal. This scientific development changed the perception of the doctor patient relationship. When that changed, the patient became the dependent and the doctor the controlling member. As a result, the same claim that had been rejected for decades suddenly "met with success."

146. *See* Bush, *supra* note 29, at 1480-1502.

147. *See infra* Part IV.C.

victimized by individualistically based rules. A change in the standard of proof assists plaintiffs in surmounting their information deficit with respect to that which has already happened, so that they may gain compensation in court. A change in the scope of the defendant's duty assists a plaintiff in two ways: (1) it reduces the chance of being injured, and (2) increases the chance of gaining compensation when injured. The increased chance of gaining compensation occurs because there is a direct relationship between the scope of duty and the plaintiff's burden of proof. The greater the defendant's duties, the less onerous the plaintiff's burden of proof.[148] The decreased chance of being injured arises because defendants as a whole have a greater responsibility to protect potential plaintiffs.

The issue of duty became an early battlefield between individualistic and status-based rule systems.[149] This was a central area of judicial analysis because of its critical role in defining the scope of an individual's responsibility. Rules that limit duty are based on an assumption that plaintiffs are not at serious risk because they are autonomous and can take effective action to protect themselves.[150] They are thus individualistically justified doctrines. The decision to impose greater duties reflects the judicial view that the group of potential plaintiffs does not have the ability to adequately protect its safety, and that the tort law must be invoked to create a greater degree of safety-related conduct by the defendants.

Sufficiency of proof became a significant issue because the

148. The most obvious example of the relation between duty and burden of proof is a change in duty to strict liability from negligence. In this instance, the plaintiff's burden of proof is simplified by the removal of an entire element. The plaintiff is now freed from having to establish that the defendant was negligent. This type of increase in duty is the most dramatic type of change in the burden of proof. The plaintiff is not merely assisted in proving a fact; the need to prove that fact is totally removed.

149. *See infra* Part IV.C.1

150. The autonomy assumption even explains the "no duty to trespasser" rule. This duty-limiting rule is based on the perception that the plaintiff group is, by definition, a group that has voluntarily acted in a manner that places them outside of the scope of legal protections—trespassing. They were free to make the choice and chose to act in violation of their legal obligations. Exemptions such as the "attractive nuisance" doctrine and the "known trespasser" doctrine are based on factual analyses, which indicate that the trespasser was not truly acting as an autonomous entity or was not acting against the law, the children were not autonomous, and the owner's tolerance of the trespassing made it less pernicious. *See generally* Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873) (regarding the attractive nuisance doctrine); Excelsior Wire Rope Co. v. Callan, 1930 App. Cas. 404 (appeal taken from Eng.) (regarding the known trespasser doctrine). In states in which the "no duty to trespasser" rule has been eliminated, the courts have clearly based their judgments on the view that the volitional act is not sufficiently heinous to lead to exclusion from safety protections provided by tort law duties and remedies. *See* Pridgen v. Boston Hous. Auth., 308 N.E.2d 467, 476-77 (Mass. 1974); Basso v. Miller, 352 N.E.2d 868, 871-73 (N.Y. 1976).

compromise between causation and preponderance of evidence did not satisfy the problems of proving the "breach of duty" element in certain types of cases.[151] Causation inherently involves establishing probabilities.[152] Breach, on the other hand, appears to focus on more concrete matters. Breach of duty is a combination of two elements: (1) the defendant's conduct and (2) the noncompliance of that conduct with the legal standard.[153] The first is a purely factual issue. Nonetheless, litigation involving defendant conduct requires that the courts resolve tensions between standards of fairness and allocations of proof.

Establishing what the defendant did became entangled in an entirely different problem of access to information. The parties had radically different degrees of access to information in certain types of cases.[154] In these difficult cases, the plaintiff was increasingly seen as lacking either the capacity to protect herself against the risks created by the defendant or the resources to acquire facts necessary to prove that the defendant's conduct violated a legal standard. The information-deprived plaintiffs were not autonomous, and the individualistically justified rules did not lead to results perceived to be fair.

In both types of cases—those where the plaintiff was perceived as lacking the ability to protect herself against risks created by the defendant, and those in which the plaintiff was perceived as lacking the ability to acquire necessary facts regarding the defendant's conduct—status-justified rules were adopted.[155] Duties changed when the information-dependent plaintiff was deprived of the capacity to protect herself, and burdens of proof changed when the deficit was limited to establishing breach.[156] Decisions to alter duty and proof standards are thus different means of responding to the same problem. Within the common law can be found an endless series of rules, exceptions, codifications, and recodifications; the entire range exceeds the scope of any single analysis. However, the unifying themes that induce similar problems to be resolved through similar legal devices can be identified.

The nature of the balancing process, as it has evolved in this mixed

151. *See infra* Part IV.C.4.
152. Malone identifies the critical causation proof question as follows: "How great must be the affinity of causal likelihood between the defendant's wrong and the plaintiff's injury . . . ?" Malone, *supra* note 133, at 72.
153. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1965).
154. *See infra* Part IV.C.4.
155. *See infra* Part IV.C.4.
156. *See infra* Part IV.C.4.

area of proof and standard of care, is revealed in the core cases in which changes have been dramatically wrought by a single influential decision. These areas are examined in the following sections.

Three related duty[157] doctrines are particularly revealing. They demonstrate the critical role of the dependency fact set on the common law courts' decisions to impose greater duties on defendants. The three doctrines are: (1) privity in torts, (2) artificial impoundments, and (3) strict products liability.[158]

1. Duty: Thomas v. Winchester

Privity in tort law is a doctrine limiting a party's duty to those with whom she was in direct contact. It represents an extension of contract principles into tort law. Two centuries ago, privity was an impenetrable barrier protecting manufacturers and merchants from suit by any person not a party to the sales contract. If a person hired a carpenter to build a bridge over his stream, others who used the bridge could not sue the carpenter for defects in the bridge's construction. The carpenter's duty was solely to the purchaser. However, the lack of a remedy for all those injured by defective construction seems harsh by modern standards of duty. In the past, products were not mass-produced; they were specifically created for the individual purchaser. Because the carpenter constructed the bridge according to the purchaser's desires, the purchaser's satisfaction was the predominant economic reality for the carpenter. Limited legal duties simply made the law a reflection of the economic realities of the time. The privity doctrine thus reflected the perception that individuals had the capacity to care for themselves. It was one of the many legal rules based upon individualistic concepts of fairness.

As industry centralized at the end of the eighteenth century, the pattern of economic interaction changed. Goods were often created

157. The duty cases are particularly important in assessing the proper standards for judging the conduct of litigation attorneys, because the service provided by the attorneys shares some of the same attributes of the products sold in the duty cases. The products involved in the privity and products liability cases were distributed in a manner that prevented independent scrutiny by the consumer. Legal representation in litigation is similarly inaccessible and cannot readily be reviewed by the client. Both the products and the service are bought in reliance upon the care of the provider.

158. The commonality between the factors that convinced courts to switch proof burdens and impose strict liability is not a novel perception. Ezra Ripley Thayer made an early and clear analysis of this relationship. *See generally* Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916) (arguing that the adoption of a strict liability standard for artificial impoundments was unnecessary since cases could have been decided in the plaintiff's favor more expediently through the application of res ipsa loquitur).

without regard to a specific purchaser. The goods were packaged, labeled, and sent into a newly created stream of commerce. The face to face relationship that supported individual rights concepts, and thus the privity rule, was no longer the prevailing type of commercial relationship.

In *Thomas v. Winchester*,[159] the court had to consider the viability of an individualistically based rule in the context of this newly unfolding economic universe.[160] The defendant prepared, bottled, and labeled a jar of medical herbs. Unfortunately the jar was mislabeled; it contained a poison. The defendant sold the jar to a pharmacist who then resold it to the plaintiff's husband. The plaintiff consumed the herbs and was injured.[161] In reviewing the case law precluding liability outside of the ambit of privity, the court noted that the limitation on liability was based on the general perception that the purchaser would be the one injured by a defectively fabricated product.[162] The court distinguished those cases,[163] stating that the mislabeled poison "put human life in imminent danger."[164] The threat was not limited to the dealer who purchased the drug—in fact, the dealer in this case was not likely to be harmed.[165] Rather, drug consumers faced the greatest risk of injury. Because of the pernicious nature of mislabeled commodities, users are not autonomous; no consumer can protect against this type of danger. The court, therefore, created an exception to the privity rule.

The three factors necessary to reject individualistic value-based rules were all present in *Thomas*. The defendant's conduct—mislabeling the bottle of herbs—limited the plaintiff's access to necessary information and thereby deprived the plaintiff of independent resources sufficient to protect her interests. This plaintiff was not an independent agent capable of protecting her interests. Thus, the legal obligations of those who placed her in this dependent position were expanded.

The subsequent expansion of this exception further demonstrates the way that individualistically based legal rules are changed when the

159. 6 N.Y. 396 (1852).
160. As noted by California's Judge Traynor in a different case, "The manufacturer's obligation to the consumer must keep pace with the changing relationship between them . . . ." Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).
161. *See Thomas*, 6 N.Y at 398.
162. *See id.* at 407-08.
163. *See id.* at 408.
164. *Id.* at 409.
165. *See id.*

economic realities upon which they are based change. In the famous case of *MacPherson v. Buick Motor Co.*,[166] Justice Cardozo carefully reviewed almost one hundred years of doctrinal development following the decision in *Thomas*. In distinguishing one case among several in which the *Thomas* exception had not been applied, Cardozo noted that "[t]he buyer in that case had not only accepted the boiler, but had tested it. The manufacturer knew that his own test was not the final one."[167] Cases such as this did not require the application of status-based rules because the plaintiff was not incapacitated by the defendant's conduct.

2. *Strict Liability:* Rylands v. Fletcher

In *Rylands v. Fletcher*,[168] a reservoir flooded because it had been built too close to unused mine shafts. The waters flowed onto the plaintiff's property, causing injury by preventing the mining of coal.[169] The resulting litigation forced the court to choose between trespass and negligence doctrines, which imposed different duties on the defendant. The plaintiff in *Rylands* argued for strict liability on the theory that the underground entry of the waters onto his property constituted a trespass or a nuisance.[170] The defendants urged the court to apply a negligence standard.[171]

The lower court chose to apply a negligence standard.[172] Trespass and nuisance theories were rejected on technical grounds.[173] The court proceeded to consider whether it would be appropriate to impose a greater duty on the defendants by regarding them as members of the class of "insurers." The court refused to treat the defendants as insurers, because to do so would be contrary to "the ordinary rule of law."[174]

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166. 111 N.E. 1050 (N.Y. 1916).
167. *Id.* at 1052.
168. Fletcher v. Rylands, 159 Eng. Rep. 737 (Ex. D. 1865), *rev'd*, 1 L.R.-Ex. 265 (1866), *aff'd*, Rylands v. Fletcher, 3 L.R.-E. & I. App. 330 (1868).
169. *See Rylands*, 3 L.R.-E. & I. App. at 332.
170. *See id.* at 335-37; 159 Eng. Rep. at 740-42.
171. *See Rylands*, 3 L.R.-E. & I. App. at 332-35; 159 Eng. Rep. at 742-43.
172. *See Rylands*, 159 Eng. Rep. at 744-47.
173. *See id.* at 745. The Court of Exchequer held that there was no trespass because the release of the waters was the indirect, not direct, result of defendant's conduct. *See id.* at 746. The release was indirect because the defendant's conduct was the building of the reservoir; the release was the result of the collapse of nearby mine shafts. *See id.* Nuisance was rejected because the building of a reservoir was a lawful act and because the level of the waters never rose above that of the "natural surface of the land." *Id.* at 745. Thus, the court reasoned that the released waters would have descended onto the plaintiff's land in any event, by the work of "gravitation." *Id.* The court stated that "there is no better established rule of law than that when damage is done . . . there must be negligence in the party doing the damage to render him legally responsible, and if there be no negligence the party sustaining the damage must bear with it." *Id.*
174. *Id.* at 745. However, innkeepers and common carriers were held to a higher

It is clear that the court was aware of the tension between status and individualistic concepts of fairness, which was the central issue in this case. The court confronted the matter by reviewing the treatment of common carriers and innkeepers.[175] By the middle of the nineteenth century, the English courts had already decided that the responsibilities of common carriers and innkeepers were too great to permit suits against them to be determined by individualistically based rules.[176] The prevailing individualistically based right to be free from liability, and thus free from responsibility, for other than reasonable care had been found to be inapplicable to these types of defendants.[177] The need to impose higher standards of responsibility on these defendants had been judged more important than protection of their individualism. The decision to apply status-based concepts to the conduct of innkeepers and common carriers was based on the common law courts' view of a common sense allocation of duty commensurate with power. Common carriers of goods for hire, by definition, had complete control over the goods. The plaintiff-owner had no power to protect those goods once they were in the possession of the common carrier. Similarly, the innkeeper had the sole ability to maintain the premises and guard against injury to those who paid for their night's rest. Both trades necessarily placed the recipients of their services in a dependent relationship. The legal result of actual dependency was the imposition of status-based duties.

The lower court in *Rylands*, however, in a remarkable example of concrete thinking, refused to look to the policy of these status-based rules.[178] The subsequent decisions by the intermediate appellate court and the House of Lords also grappled with the problem of choosing between status and individualistic rule bases. Justice Blackburn, writing for the intermediate appellate court, focused on the critical facts demonstrating that the plaintiff had been rendered dependent by the conduct of the defendants:

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standard of care than negligence because they were considered to be quasi insurers. *See id.*

175. *See id.*

176. The special duties imposed on these defendants were the "custom of the realm." *Id.*

177. *See id.*

178. Judge Martin actually said that the existence of exceptions to negligence standards for innkeepers and common carriers proved the rule that "there must be negligence in the party doing the damage to render him legally responsible." *Id.*

> But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.[179]

He specifically discussed the heightened dependency status of the plaintiff in the case, as distinguished from that of the typical plaintiff:

> Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . . .[180]

Justice Blackburn's analytic distinction focuses the choice between the two paradigms on the fact of dependency and domination. The typical plaintiff is aware of the risks and has a degree of control to minimize them. In that fact set the individualistically based negligence standard is appropriate. However, the plaintiff in this case had no control. The paradigm of individualism was not appropriate when the plaintiff did not have the autonomous power to control exposure to injury. Status values were more consistent with the nature of the relationship between the parties. The court thus rejected negligence and imposed strict liability.[181]

The three factors of the dependency relationship radiate from this fact set. The defendant's conduct—creating an artificial impoundment of water on his property—deprived the plaintiff of information needed to control the risk, and thereby further deprived the plaintiff of independent resources sufficient to protect his interests. This plaintiff was not an independent agent capable of protecting his interests. The legal obligations of those who placed him in this dependency position were therefore expanded.

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179. Fletcher v. Rylands, 1 L.R.-Ex. 265, 287 (1866).

180. *Id.* at 286.

181. Although the significance of *Rylands* has been seriously contested, once this set of facts had been identified as one that justified the application of status-based rules, its general application and the development of a broader doctrine of strict liability became inevitable. *See* A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209, 244 (1984) (describing the context in which the case was heard); *see also* Clark-Aiken Co. v. Cromwell-Wright Co., 323 N.E.2d 876, 877-78 (Mass. 1975) (affirming that a cause of action in strict liability, as articulated in *Rylands v. Fletcher*, exists in Massachusetts). The doctrine of strict liability focused on the use and control of ultrahazardous instrumentalities. *See* Indiana Harbor Belt R.R. Co. v. American Cyanamid Co., 916 F.2d 1174, 1176-77 (7th Cir. 1990); RESTATEMENT (SECOND) OF TORTS § 519 (1977).

3. *Strict Liability in Products:* Escola v. Coca-Cola Bottling Co.

The manufacturer-created dependency status of the consumer recognized in *Thomas* was rare in the nineteenth century; the privity exception was therefore narrow. However, the development of the centralized manufacturing and distribution process escalated during the next century.[182] By the middle of the twentieth century Justice Traynor could say, in his influential concurrence in *Escola v. Coca-Cola Bottling Co.*,[183] that:

> The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark.[184]

In 1944, Justice Traynor's perception was that the commercial world was one in which all consumers had been placed in a dependent status. The sophisticated technical nature of products, the custom of sealed packaging, and the development of broadly disseminated advertising combined to preclude the possibility of consumer independence. The product had to be accepted on faith or not at all. Justice Traynor was ahead of his time; however, by the 1960s, the rest of the legal world agreed.[185]

The change in the commercial relationship mandated that individualistically justified protection for manufacturers be abandoned. Although Traynor relied upon many technical legal theories to justify his conclusion that strict liability was essential if justice was to be achieved when consumers were injured by manufactured products,[186] the importance of the status relationship fact set was central to his analysis

182. *See* Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) ("As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.").

183. 150 P.2d 436 (Cal. 1944).

184. *Id.* at 443 (citations omitted) (Traynor, J., concurring).

185. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77 (N.J. 1960); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

186. *See* David G. Owen, *Rethinking the Policies of Strict Products Liability,* 33 VAND. L. REV. 681, 681 (1980) (discussing how Justice Traynor "shifted the inquiry from warranty to tort law").

and is reflected throughout the decision.[187] The dependent status of the consumer mandated the development of status-based legal doctrines. Strict liability, which abandons the requirement that plaintiffs prove a lack of due care, reflects such a status-based rule.

With the development of strict products liability, the threads of duty and proof burdens intertwined. Removing an element of proof—fault—eases a plaintiff's proof problems while simultaneously increasing a defendant's duties. This dual impact represents the inherent connection between duty and burden of proof rules. Individualistically justified rules limit a defendant's duties and increase a plaintiff's proof burdens. The conversion to status-justified rules can occur with changes in either doctrine; changes in duty rules, however, always impact proof burdens. Increasing duties reduce proof requirements.

As technological changes expanded the scope of the dependency relationship, the judicial response became more robust.[188] The individualistic values inherent in the negligence standard itself—the requirement that moral fault must be proved before a person could be held accountable[189]—were forced to yield to the status-based strict liability standard.

The dependency fact set can now be found in all consumer sales. The manufacturer's conduct—mass manufacture and distribution of products—dominates access to information—central design, sleek casings, shrink wrap packaging, etc.—precluding the plaintiff from acquiring the information necessary for *both* protection and acquisition of proof to obtain compensation in a negligence action. Plaintiffs in this

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187. Justice Traynor stated:

> [I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings....
>
> ....
>
> An injured person, however, is not ordinarily in a position to refute such evidence... for he can hardly be familiar with the manufacturing process....
>
> ....
>
> Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public.

Escola, 150 P.2d at 440-43 (Traynor, J., concurring).

188. Subtle shifts in proof burdens such as those in the res ipsa loquitur doctrine had previously been created to modify the extent of individualistic protections for dependency-creating defendants. The increased pace of centralized manufacture and distribution of products rendered such tentative measures insufficient. *See generally* Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377 (1985) (discussing the problems in large scale joint liability scenarios).

189. According to Holmes, "the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen." HOLMES, *supra* note 17, at 95.

scenario are doubly dependent. They are without information to protect themselves from injury, and they are without information necessary to prove fault in court. The response of the legal system was to reduce the impact of both types of dependence by eliminating the requirement of proving wrongfulness.[190] The removal of a due care defense was designed to stimulate the class of manufacturing defendants to enhance product safety, while simultaneously reducing the plaintiff's dependency-created proof problems.[191]

4. *Burden of Proof Cases: Dependency Status Induces Twin Exceptions to Traditional Proof Burdens—Loss of Chance and Burden Switching*

A review of the duty cases demonstrates the essential role that the judicial perception of dependency has on decisions to adopt status-justified rules. Rules of proof differ from substantive rules predominantly because proof rules are technical. They affect conduct indirectly through their impact on the probabilities of winning or losing in court. The relationship between the conduct of the parties and the rules of proof is thus more attenuated. The impact of the dependency fact set, however, may still be seen in the development of alternative proof doctrines.

The balance represented by the preponderance of evidence standard of proof satisfied the status interests in the large majority of fact sets. However, over time, fact sets began to appear in which the dependency of the plaintiff was especially severe. When the traditional individualistically defined burden of proof was applied to these cases, the results were inequitable. The defendant prevailed *because* of her control of information. The mere fact that the defendant won was not the problem; such a result would be considered fair if the parties were autonomous actors.[192] However, when a defendant's verdict is not the result of innocence but, rather, results from the defendant acting in a manner that prevents the plaintiff from acquiring the necessary proof to establish the conduct as wrongful, the result is unacceptable. The verdict is unacceptable because the dependent status of the plaintiff

190. *See supra* notes 182-87 and accompanying text.
191. *See generally* EPSTEIN, *supra* note 101, at 745-46.
192. *See* HOLMES, *supra* note 17, at 94 ("The general principle of our law is that loss from accident must lie where it falls . . . .").

dominates the perception of fairness. In such fact sets even the preponderance compromise is insufficient to protect the dependent, injured plaintiff. When plaintiffs are forced into a dependent status by the conduct of the defendant, courts cannot tolerate the result produced by individualistically justified legal doctrines.

The specific facts held to justify the further imposition of status-justified rules of proof vary. When the burden was impossible to meet because of the interaction of multiple parties, the preponderance burden was modified.[193] When the hypothetical past was simply impossible to prove, such as in the "seat belt" defense cases, the preponderance burden was modified.[194] When the defendants had a special relationship with the plaintiff through which defendants dominated the acquisition of information, such as surgical malpractice cases, the burden was modified.[195]

The judicial response to plaintiff dependence has been to revise the individualistically influenced preponderance standard of proof and adopt standards more consistent with status values. The doctrinal changes produced by the application of these new standards range from minimal to radical. The amount of change is a function of the degree of dependence. The less autonomy retained by the plaintiff, the greater the need for protection and the greater the deviation from the individualistically influenced preponderance of evidence rule.

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193. *See, e.g.*, Summers v. Tice, 199 P.2d 1, 4-5 (Cal. 1948).

194. *See* Partman v. Budget Rent-A-Car, 649 A.2d 275, 277 (Conn. Super. Ct. 1994); Lawrence v. Westchester Fire Ins. Co., 213 So. 2d 784, 786 (La. Ct. App. 1968); Carson v. De Lorenzo, 657 N.Y.S.2d 469, 471 (App. Div. 1997); Ryan v. Gold Cross Servs., Inc., 903 P.2d 423, 424 n.1 (Utah 1995). The "seat belt" defense arises when the defendant says that the plaintiff would not have suffered injuries in an automobile accident if she had been wearing her seatbelt. Many jurisdictions have prohibited the "seat belt" defense on the grounds that this hypothetical is impossible to determine. *See, e.g.*, Swajian v. General Motors Corp., 559 A.2d 1041, 1046 (R.I. 1989). Some jurisdictions permit defendants to introduce proof concerning the aggravation of damages caused by the failure to wear a seat belt in the damages segment of the trial. *See, e.g.*, Law v. Superior Court, 755 P.2d 1135, 1145 (Ariz. 1988).

195. The Supreme Court of Alaska stated:

> The scope of disclosure required under [the statute] must be measured by what a reasonable patient would need to know in order to make an informed and intelligent decision about the proposed treatment.
>
> Under the reasonable patient rule, a physician must disclose those risks which are "material" to a reasonable patient's decision concerning treatment.
>
> > The determination of materiality is a two-step process. The first step is to define the existence and nature of the risk and the likelihood of its occurrence.... The second prong of the materiality test is for the trier of fact to decide whether the probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment.

Korman v. Mallin, 858 P.2d 1145, 1149 (Alaska 1993) (quoting Hondroulis v. Schuhmacher, 553 So. 2d 398, 412 (La. 1989)).

The revisions have been both imaginative and varied. They include: (1) acceptance of certain types of circumstantial proof (the res ipsa loquitur doctrine and its "non-delegable duty" modification);[196] (2) revision of the definition of "causing" injury (the "substantial factor test");[197] (3) revision of the definition of joint action (the treatment of co-tortfeasors as vicariously liable);[198] (4) shifting the burden of proof on cause in fact to the defendant;[199] and (5) recognition of loss of chance as a compensable injury.[200]

A review of several significant cases demonstrates that judicial decisions in these critical cases are actually based on the perceived dependency relationship. The critical role of the dependency fact set is not a theoretical explanation developed with the enhanced wisdom of hindsight. Rather, the courts specifically support their adoption of status-based exceptions to the traditional doctrines with reference to the dependency relationship afflicting the plaintiffs.

a. Res Ipsa Loquitur: Byrne v. Boadle

The quintessential proof rule that represents a sense of fairness attributable to individualism is the rule that imposes the burden of proof on the plaintiff. As with all individualistically justified rules, the underlying presumption is that the parties have equal access to information. If the plaintiff cannot introduce sufficient facts to obtain a verdict, then the natural allocation of assets should not be changed. When the lack of equality is caused by the negligent conduct itself, however, the equities shift. Individualistic values no longer reflect the reality of the underlying events. Status values become more appropriate.

The res ipsa loquitur doctrine is an example of how exceptions to individualistically based rules have been developed when the underlying paradigm shifts. In *Byrne v. Boadle*,[201] a barrel of flour being lowered from the defendant's premises precipitously fell and injured the plaintiff. The proven conduct alone might have been considered sufficient

196. *See infra* Part IV.C.4.a.
197. *See infra* Part IV.C.4.b.
198. *See infra* Part IV.C.4.c.
199. *See infra* Part IV.C.4.d.
200. *See infra* Part IV.C.4.c. Professor Robertson has identified eight separate alternative proof doctrines that have been developed to deal with the problem of multiplicity. *See* Robertson, *supra* note 19, at 1775-94.
201. 159 Eng. Rep. 299 (Ex. 1863).

circumstantial proof of negligence,[202] but the court felt it necessary to develop a formal exception to traditional sufficiency of proof doctrines. Instead of simply holding that the proven facts were sufficient, because "the accident alone would be prim[a] facie evidence of negligence,"[203] the court went on to hold that "the plaintiff who was injured by it is not bound to sh[o]w that it could not fall without negligence."[204]

The new rule is partially based on the logical inference that inert objects cannot move without human intervention and, in this type of situation, that carelessness is a likely cause of the object's movement.[205] But the analogies used by the court reveal another dimension to the decision that created the res ipsa doctrine. The court used hypotheticals to explain the wisdom of the new rule. One hypothetical concerns a barrel rolling out of a warehouse onto the plaintiff, the other a person putting pots on chimneys that injure a person passing on the road.[206] The importance of these analogies is that they modify the specific facts of *Byrne* so that the dependency of the plaintiff is more starkly presented. In the actual case, the plaintiff *could* have observed the lowering of the barrel that caused the injuries.[207] In the hypothetical, the barrel rolls out of a window.[208] The change in facts creates a plaintiff with no opportunity to observe and take evasive action. Pots high on a chimney are equally unobservable by the typical passerby. The use of these analogies reveals the court's concern with the dependency relationship.

As far as the court was concerned, the plaintiff had no choice but to rely on the care of the defendant. As a dependent, the plaintiff cannot be fairly judged by rules that assume autonomy. The status of dependency

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202. *See id.* at 301 ("A barrel could not roll out of a warehouse without some negligence . . . .").

203. *Id.*

204. *Id.*

205. There is much rhetoric in the res ipsa cases suggesting that the doctrine is based upon a logical assessment of probabilities. "[If] the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence . . . that the accident arose from want of care." Scott v. London & St. Katherine Docks Co., 159 Eng. Rep. 665, 667 (Ex. 1865). However, careful analysis has demonstrated that the doctrine does not truly reflect the statistical likelihood that the defendant was negligent. *See* David Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH. L. REV. 1456, 1465 (1979). Despite the sophistication of modern probability analyses, it is unlikely that the common law judges were oblivious to the fact that references to "the ordinary course of things" did not eliminate uncertainty. The issue for them was which party deserved the benefit of the uncertainty. Expressed in this fashion, the choice can be seen as one of values, not statistics. The individualistic value reflected in the traditional plaintiff burden was balanced against the status value.

206. *See Byrne*, 159 Eng. Rep. at 301.

207. *See id.* at 299 ("[T]he declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour . . . ."). However, at trial the plaintiff testified that he "saw nothing to warn [him] of danger." *Id.*

208. *See id.* at 301.

mandated application of rules of fairness that reflected this status. The court concluded that "those whose duty it was to put it in the right place are prim[a] facie responsible."[209] The individual's right yields to the status value.

The factors emphasized by the court were those of the dependency fact set. The conduct of defendant's servants—putting the barrel in a dangerously high position and then lowering it—dominated access to information about the activity. As a result of the defendant's control, through its servants, of both the barrel and the information about its own activities, the plaintiff was unable to acquire the proof necessary to gain compensation for the injuries.[210] The defendant placed the plaintiff in a dependent position. The plaintiff's deprivation of information was solely the result of defendant's conduct. Thus, an exception to the traditional rule was justified.[211]

The status-justified rule that the court adopted was more limited than the rules that changed duties. The defendant's conduct, in the actual case as distinguished from the court's hypotheticals, did not deprive the plaintiff of an opportunity to protect himself from injury. The barrel was visible to the public. The plaintiff had an opportunity to avoid relying on the defendant for his safety by avoiding the area. The plaintiff's incapacity was thus limited to proof of fault. The court's remedy was to modify the proof requirements while leaving the duty unchanged.[212]

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209. *Id.*

210. *See id.* ("Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, *how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out*...." (emphasis added)).

211. The *Byrne* court was careful to distinguish the exception created in *Byrne* from strict liability. "[I]f there are any facts inconsistent with negligence it is for the defendant to prove them." *Id.* The specific allocation of burden of proof on the defendant accomplished the goal of creating a legal vehicle to protect those in a type of status-dependent condition. The dependency was sufficient for the application of this new doctrine, but not so severe that further incursion into the proof-based protections of defendants was unnecessary. However, the vehicle that was created, the switching of proof burdens, was now available for expansion in future cases. *See, e.g.*, Summers v. Tice, 199 P.2d 1, 4-5 (Cal. 1948). *See generally* Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717 (1993) (analyzing the way in which tort doctrines develop).

212. In this regard, the non-delegable duty res ipsa cases reveal the way in which the scope of doctrinal change responds to the degree of the dependence. In the non-delegable duty case, the plaintiff has been forced to depend upon the defendant for safety as well as for information to establish liability. But the defendant claims that her conduct was reasonable because she reasonably relied on another to prevent the plaintiff from being exposed to an unreasonable degree of risk. Thus, in *Miles v. St. Regis Paper Co.*, 467 P.2d 307 (Wash. 1970), the defendant railroad relied on others to guide the

b. *The Substantial Factor Test:* Reynolds v. Texas & Pacific Railway Co.

A modest information deficit caused by dependency induced a modest change in the causation doctrine in *Reynolds v. Texas & Pacific Railway Co.*[213] More than one hundred years ago, a woman hurried down a stairway to board her train before it left the station. As she descended the stairway, she fell. She sued the railroad that was responsible for maintaining the stairs.[214] The case has become a common staple of law school torts classes. Liability was premised on the fact that the stairway was not properly illuminated.[215] The defense was based on the fact that Mrs. Reynolds was unable to identify the exact reason she fell.[216] Her ignorance created a potentially fatal evidence problem. Although she had proven that the absence of lighting created a danger, she could not prove by a preponderance of the evidence that the darkness caused her to fall.[217] Mrs. Reynolds was a heavy woman[218] and she was hurrying down the stairs.[219] These factors could cause a fall without regard to adequate lighting.

Further impediments to Mrs. Reynolds' meeting her burden were created by the fact that there was no record of her testifying that she stepped on, tripped over, or slid on any object on the stairs that might have escaped her inspection because of the dim lighting. The fall might have been caused by inadequate lighting, or it might have been caused by the plaintiff's inattention. It might have been a pure accident. These other causes could not be eliminated because she lacked knowledge. Without such proof, the evidence presented would be insufficient under

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movement of its train during the unloading of logs. It was alleged that the train's movement caused the death of plaintiff's decedent. *See id.* at 308. In this type of case, the plaintiff is dependent upon the defendant for safety. If delegation of duty was a permissible defense, the railroad would avoid responsibility. By delegating its duty, the railroad sought both to create the peril and avoid liability for injury. The court protected those dependent upon the careful movement of trains by rejecting the claim that control was delegated. *See id.* at 310. This implies that the duty could not be delegated. Thus, to protect the *safety*-dependent plaintiff, the res ipsa doctrine was expanded, changing the duty owed by the defendant. *See, e.g.*, Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1113 (1st Cir. 1986).

213. 37 La. Ann. 694 (1885). This case has been chosen, although it does not represent a critical change in doctrine, because it has been extensively analyzed by Professor Malone in his seminal work, *Ruminations on Cause-in-Fact. See* Malone, *supra* note 133, at 74.

214. *See Reynolds,* 37 La. Ann. at 696-98.

215. Although employees of the defendant may have been holding lamps, there was no fixed lighting for the stairs or platform below. *See id.* at 697.

216. *See id.* at 698.

217. *See id.*

218. Mrs. Reynolds weighed 250 pounds. *See id.* at 697-98.

219. *See id.*

the preponderance standard. This result, however, was unacceptable. Rather than dismiss the action for insufficiency, the court modified proof standards. The court's rhetoric focused on probability:

> [W]here the negligence of the defendant greatly multiplies the chances of accident . . . and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect . . . .[220]

The "greatly multiplies" language implies a high probability of causality. However, the court did not explain how dim lighting was *more* likely the cause than any other probable cause.[221] The chance that the plaintiff fell because of her own inadvertence was as likely as any other cause. She had not introduced proof sufficient to meet the individualistically justified standard of fairness known as a prima facie case. The defendant, therefore, should have been granted the verdict. By identifying a new way of describing sufficient proof, a "possibility," the court departed from the traditional proof requirement. The status of the plaintiff as dependent on the defendant railroad was found to be such an important factor that a rule of proof based on a premise of autonomy was perceived to be unjust. The dependency of the plaintiff had to become part of the legal rule used to judge the defendant's conduct. The connection between the previously discussed duty cases and this proof case has been developed in the academic literature explaining the development of alternative proof rules.[222]

The decision clearly articulated the importance of dependency in motivating the adoption of the substantial factor standard. The court noted the location of the passenger train track in relation to the depot, which required customers like the plaintiff to proceed from a well-lit

220. *Id.* at 698. The relevant language is "[t]he whole *tendency* of the evidence connects the accident with the negligence." *Id.* (emphasis added).

221. *See* Malone, *supra* note 133, at 74 ("It is noteworthy that the court has neatly avoided all reference to the probabilities requirement.").

222. This ruling has been described as the creation of a special duty. *See id.* at 74. The adoption of the "substantial factor" test was described as a "special duty" because substantial factors are not logically the "preponderant" factor. For proof to be sufficient the jury should have been able to prove that the accident was more likely than not to have been avoided but for the lack of lighting. This conclusion is impossible on the plaintiff's proof. Thus, the decision to permit the case to be considered by the jury effectively nullifies the contribution of the other possible independent causes: her hurrying, her weight, and her inattention. In other words, there is a duty to "protect hurrying stout passengers." *Id.*

"sitting-room" down the stairway to their train before it left.[223] The plaintiff was encouraged to hurry down poorly lighted stairs.[224] The plaintiff was not an autonomous actor; she was under the control of the defendant.[225] Dependency caused the imposition of a status-based rule of fairness. Whether analyzed as a modification of proof burdens or a change in duty, the substantial factor test protects status-based interests to a greater degree than the pure preponderance standard.

It seems that the essential factor motivating the court to adopt this status-justified rule was the dependency of the plaintiff. The three factors of the dependency fact set are present. The conduct of the defendant (encouraging a hurried passage down a poorly illuminated stairway) dominated access to information (the darkness prevented plaintiff from observing essential details of the accident), and thus deprived the plaintiff of access to information necessary to exclude non-negligent causes. The plaintiff's lack of information was the result of the defendant's conduct in encouraging the plaintiff to hurry through the dark.

c. *Multiple Causes: The Roots of the Burden Switching and Loss of Chance Doctrines*

A fact set that often creates tension between individualistic values and status values is the multiple cause scenario. Because individualistically based burdens of proof require the plaintiff to prove that each defendant was individually responsible for the plaintiff's injuries, the involvement of multiple defendants can create fatal proof problems. These problems are especially obvious when the conduct of several actors merges to cause an undifferentiated injury. The plaintiff must prove that each

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223. *See Reynolds*, 37 La. Ann. at 697-698.

224. *See id.* at 697. The court stated:

> The train was behind time. Several witnesses testif[ied] that passengers were warned to 'hurry up.' Mrs. Reynolds, a corpulent woman, weighing two hundred and fifty pounds, emerg[ed] from the bright light of the sitting-room, which naturally exaggerated the outside darkness, and hasten[ed] down these unlighted steps, ma[king] a misstep in some way . . . [and] incurring the serious injuries . . . .

Id. at 697-98.

225. The degree to which this language incorporates the dependency relationship into the standard of proof is reflected in the following analysis. Assume that the defendant wished to argue that plaintiff's decision to hurry down the stairs and proceed before her eyes adjusted completely to the dark were critical factors in her fall, and that those actions would prevent her from winning the case. The court's holding that the absence of illumination was an event "of a character naturally leading" to the fall, *id.* at 698, effectively eliminates that argument. The defendant caused the plaintiff to hurry. It is the defendant's responsibility to avoid dangers that "naturally lead" to persons being careless. The dependency relationship changes the duty, even if the change in duty is a minor one.

defendant caused the injury; however, it is often not possible to know exactly which defendant or defendants caused injury and how much injury was caused by each.

The problem of multiple causes of indivisible injuries has produced the most remarkable changes in proof standards in the tort system. The specific facts in cases raising this problem have been enormously varied. They include: multiple cause cases, such as when twin fires destroy the plaintiff's property;[226] indivisible injury cases, such as when two cars strike the plaintiff in near succession;[227] impossible allocation cases, such as when hundreds of manufacturers sell diethylstilbestrol (DES) in a generic form;[228] and even statistically imponderable cases, such as when the defendant's conduct raises the probability of a person contracting cancer.[229] In these cases the courts have adopted remedial devices such as burden switching and loss of chance.

The origin of burden switching and alternative liability doctrines comes from the concern that it is inequitable for a plaintiff to bear a loss occasioned by the intersection of multiple negligent actors. If two defendants act simultaneously and their conduct causes a single, indivisible injury to the plaintiff, the plaintiff may not be able to prove the liability of either defendant. The problem in these combined forces

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226. *See* Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co., 179 N.W. 45 (Minn. 1920), *overruled in part by* Borsheim v. Great N. Ry. Co., 183 N.W. 519 (Minn. 1921).

227. *See, e.g.*, Eramdjian v. Interstate Bakery Corp., 315 P.2d 19, 20-21 (Cal. Ct. App. 1957) (regarding injuries suffered by a motorcycle passenger who, having been thrown from the bike when its driver failed properly to negotiate a curve, was subsequently run over by a truck while lying unconscious in the street); Cummings v. Kendall, 107 P.2d 282, 283-84 (Cal. Ct. App. 1940) (involving a passenger injured when the automobile in which he was riding was involved in an accident with another automobile and shortly thereafter struck by the defendant's vehicle); Maddux v. Donaldson, 108 N.W.2d 33, 34 (Mich. 1961) (regarding injuries suffered by a driver and passengers of a car that was struck by two vehicles in succession).

228. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1071-72 (N.Y. 1989).

229. *See* Rubanick v. Witco Chem. Corp., 593 A.2d 733 (N.J. 1991). In this case, the survivors of deceased employees brought suit against Witco Chemical Corp., alleging that the decedents' exposure to certain chemicals inside the Witco plant in which they worked was responsible for their death. In this case, the court recognized that causation is the most difficult element to prove in toxic tort cases because of the time period that might elapse before the injury is discovered:

> [B]ecause of the current inability of science to fully comprehend carcinogenesis, plaintiffs in toxic tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to await general acceptance by the scientific community of a reasonable, but as not yet certain, theory of causation.

Id. at 739 (citation omitted).

cases stems from the individualistic "but for" causation requirement that no defendant can be found liable unless the plaintiff proves that the defendant caused her injuries.[230] In these circumstances, the plaintiff is confronted with the unenviable prospect of the negligent defendants prevailing because the defendants' simultaneous conduct precludes proof that either one of them caused the injury. Either defendant could have caused all of the injury, but because the analysis can be reversed—neither one can be shown to have been *the* cause—the injury would have happened anyway. Without the conduct of one defendant, the other would have caused the same injury. Thus, because both caused the injury, neither can be proved to be the "but for" cause.

The combined forces cases must be separated into two groups. The first involves the intersection of natural events and injurious conditions caused by human actors. The second involves the intersection of conditions caused by multiple human actors. The judicial concern with multiplicity started with an exploration of the first type of case: the twin fires case.[231] The "dueling motorcycles" cases of the early twentieth century[232] sparked the courts' analysis of the second type.

In both types of multiplicity cases, the defendants argued that they could not be found liable because the harm would have happened without their conduct.[233] This proposition was an accurate statement of the facts in a case in which human and natural forces combine. The defense in these "natural cause" cases rested on proof that the injury would have occurred by the hand of God.[234] The premise of the defense was that whether or not the defendant intervened negligently, the injuries would have been caused by flood or lightning-induced fire.[235] Initially,

230. The specific events causing this deficit may involve identical conduct by the multiple defendants, such as setting fires, or entirely different types of conduct. See, for example, *Smith v. J.C. Penney Co.*, 525 P.2d 1299 (Or. 1974), where the plaintiff brought a products liability action for injuries suffered when a gasoline fire broke out at a gas station and ignited her coat. The fabric supplier's defective product combined with the negligence of the gas station owner to prevent the plaintiff from being able to apportion her injuries between the two. *See id.* at 1305. However, in *Smith* the court resolved this situation by finding the defendant's jointly liable. *See id.* at 1305-07. Thus, if unchecked, the defendant would prevail in the legalistic parallel to the famous Thomas Nast cartoon of the Tweed Ring, in which the members were pictured facing inward in a large circle denying responsibility by pointing their thumbs outward at their neighbor on each side. *See* Scott Schrader, *Icons and Aliens:* Law, Aesthetics, and Environmental Change, 89 MICH. L. REV. 1789, 1793 n.17 (1991) (book review) (citing M. KELLER, THE ART AND POLITICS OF THOMAS NAST 177 (1968)).

231. *See, e.g., Anderson*, 179 N.W. at 45.

232. *See, e.g.*, Corey v. Havener, 65 N.E. 69, 69 (Mass. 1902).

233. *See* Adams v. Hall, 2 Vt. 9, 11 (1829).

234. *See, e.g.*, City of Piqua v. Morris, 120 N.E. 300, 301 (Ohio 1918) (outlining the requirements of the "Act of God" defense).

235. *See id.*

the courts resolved those problems by reference to rules influenced by individualistic values. The human actor had caused no injuries.[236]

This analysis was rejected in the cases involving multiple human actors. The pure individualistic standard, requiring the vindication of the defendant unless proven liable pursuant to the "but for" test, was found not to be appropriate.[237] The basis for the rejection of the individualistic standard rests in the multiplicity fact set. Human action often leaves a murky trail that precludes proof.[238] In the normal circumstance, the positions of the plaintiff and defendant are evenly balanced—both have access to information. If events have unfolded naturally and witnesses are not available, then there is no inequity. The lack of evidence is, in individualistic justice language, "God's will." But in the "combined human forces" cases it is the very wrongful conduct of the defendants that has deprived the plaintiff of information. The defendants' joint activity may have been coincidental, but it is their joint negligence that has caused evidentiary problems for the plaintiff. The gap in proof is not part of the divine order; it is the result of the human actors' negligent conduct.

Critical to the outcome in cases of "combined human forces" is that defendants who participate in causing an injury have no equitable claim upon which they can justify a denial of liability. There is no equitable argument available to the defendants because two facts are present in all of these cases. The first is that each defendant was negligent. The second is that their joint negligence was the cause in fact of the injuries. The defendants are thus proven wrongdoers who would evade responsibility for their wrongful conduct because that very conduct simultaneously caused the injuries and prevented the plaintiff from obtaining proof of causation.

Thus the combined forces cases involving multiple human actors contain the dependency fact set. The negligent conduct of the defendants—the simultaneous setting of fires or the simultaneous

236. *See id.* at 303.

237. *See, e.g.*, Kingston v. Chicago & N.W. Ry. Co., 211 N.W. 913, 915 (Wis. 1927) (rejecting the "but for" test when its use would permit "both wrongdoers to escape and penalize the innocent party").

238. To further complicate matters, such decisions are left to the jury:

> This question of 'fact' ordinarily is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.

KEETON, *supra* note 8, § 41, at 264-65.

incautious behavior of passing motorcyclists—dominated access to information by making the apportionment of responsibility for injuries impossible, and thereby deprived the plaintiff of the resources necessary to prove her case—namely, proof of causation.

This scenario presented the courts with a facet of dependency that was exquisitely limited to acquisition of proof. In the traditional dependency cases, the defendant's conduct deprived the plaintiff of both the independent capacity for self-protection and access to proof. Even in the substantial factor and res ipsa cases both deficits are present,[239] although they differ in degree. In these combined forces cases the defendant's conduct only deprived the plaintiff of the ability to prove causation.

Thus, it was not found to be significant that the combined forces cases presented a narrower scope of the dependency-induced dangers. The autonomous actor model, essential for individualistically based concepts of justice, was still inapplicable. The multiplicity fact set is different, but the problem and remedy are the same as in the other dependency scenarios. Whenever individualistic standards are inappropriate, dependency status-based alternative liability standards are applied. This has been the trend for nearly two centuries.[240] In the combined forces fact set, alternative proof rules, rather than alternative duty rules, were developed.

The scope of these proof rules varied. Some courts altered traditional standards by expanding the joint tortfeasor doctrine to include actors who neither conspired nor acted in furtherance of a joint venture.[241] By this expedient, the two parties were jointly responsible for the actions of the other. Thus, each would be responsible for the full amount of the injuries and no proof segregating the damages would be needed.[242] Other courts converted the "but for" test into a "substantial factor" test. In this manner, the issue was no longer whether each defendant was responsible for the damage, but whether the amount of fire caused by each was a substantial factor in causing the damage.[243]

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239. *See supra* Part IV.C.4.a-b.

240. For an overview of this trend, see the cases discussed *supra* Part IV.C.

241. *See* Malone, *supra* note 133, at 831; *see also* Benson v. Ross, 106 N.W. 1120, 1120 (Mich. 1906) (involving a plaintiff injured by a stray bullet fired by one of three persons shooting at a mark).

242. In effect, this also expanded the duty of the negligent defendants. Since the defendants became jointly liable, a violation of duty occurred if they failed to protect the plaintiff against the conduct of the co-defendant. Negligent conduct imposed a duty to protect against others' negligent conduct if it caused an indivisible injury. *But see* Adams v. Hall, 2 Vt. 9, 11 (1829) ("[Defendant] was under no obligation to keep the other defendant's dog from killing sheep; nor *vice versa*.").

243. *See* Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co., 179 N.W. 45, 46 (Minn. 1920), *overruled on other grounds by* Borsheim v. Great N. Ry. Co., 183 N.W. 519 (Minn. 1921); Malone, *supra* note 133, at 89.

These expedients were effective, but they did not satisfy the courts' desire to arrive at a rule that appropriately balanced individualistic values and status values in this type of fact set. The continuing concern was that application of the pure substantial factor or "expanded joint tortfeasor" tests previously described might impose liability too broadly. The negligent defendant did render the plaintiff "proof dependent" in all cases. However, in those cases in which the alternative cause was not of human origin, although the plaintiff may have been rendered dependent by the defendant's negligence, that negligence might not have caused a compensable loss. If a simultaneous fire or flood of natural cause would have caused all of the damage[244] despite the defendant's conduct, the plaintiff who gains compensation from the negligent defendant in that situation acquires a windfall. Without any human intervention, the damage would have been the same. The movement toward dependency-based rules had gone too far. A more nuanced approach to balancing status and individualistic concepts of fairness was needed in these "natural force" cases.

The effort to solve the problems caused by the type of multiple causation case that includes a natural cause contained the seeds of the burden-switching and loss of chance doctrines.[245] The burden-switching approach to alternative causation was initially applied in the multiplicity fact set cases in *Kingston v. Chicago & Northwestern Railway Co.*[246] The loss of chance approach applied in medical malpractice cases was not applied to personal injury cases until substantially later.[247]

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244. One court demonstrated the appropriate role of individualistically based concepts of fairness in a "combined forces" case by providing the following analogy:

> An apt illustration which has been suggested is that if a river levee had been maintained at the height of 10 feet, and the custodians of the levee had been warned that flood waters might require a levee 16 feet in height, and they neglected to so increase the height of the levee, and an unprecedented flood should ensue, during which it should appear that a levee 26 feet in height would not have held the flood waters, the parties responsible for the levee would not be liable for negligence in failing to maintain a 16-foot levee, when a 26-foot levee would have been unavailing.

City of Piqua v. Morris, 120 N.E. 300, 303 (Ohio 1918).

245. These cases are particularly critical to the analysis of the role of alternative causation in legal malpractice. The malpractice defendant routinely claims that the loss was not attributable to her negligence—that it was unavoidable. This is a claim of dual causation identical to these "combined forces" cases. The behavior of a human actor—the attorney's negligence—intersected with a natural cause—a weak case—and should, therefore, not lead to liability. *See infra* text Part IV.D.3.

246. 211 N.W. 913 (Wis. 1927).

247. *See* Herskovits v. Group Health Coop., 664 P.2d 474, 477 (Wash. 1983); *see*

d. *Burden Switching*

In *Kingston*, the court confronted the task of developing an appropriate balance between status and individualistic rules. Two fires joined to destroy the plaintiff's property.[248] One fire was clearly caused by the defendant; the cause of the other was not known.[249] The court focused on the critical factors that had created the dependency relationship. The defendant's fire was negligently set.[250] However, the court refused to hold the defendant liable solely because its conduct had created a substantial factor that might have caused the harm. Such a finding would have ignored the fact that the other fire might have been of natural origin and caused all of the damage. Imposing liability would protect the dependent plaintiff; however, this defendant's equitable claims were not insubstantial. Rejecting the individualistic mandate of individualized proof might sanction a windfall. Rather than engage in a fiction that the defendant's fire was *the* cause,[251] the court reiterated previous doctrine that stated the defendant should not be liable if the other fire was of a natural cause.[252]

The court devised an evidence rule that would balance the competing claims. The court protected individualistic values by retaining the defendant's right to be free from liability unless there was proof of causation. Status concerns were protected by switching to the negligent defendant the burden of establishing the cause of the other fire. The party that was the "substantial cause" might not be liable, but it should have the burden of disproving causation in fact.[253] The existence of the

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also Linda M. Roubik, Recent Development, *Recovery for "Loss of Chance" in a Wrongful Death Action*—Herskovits v. Group Health, *99 Wn. 2d 609, 664 P.2d 474 (1983)*, 59 WASH. L. REV. 981, 981 (1984).

248. *See Kingston*, 211 N.W. at 913.

249. *See id.* at 915.

250. *See id.*

251. The pure "substantial factor" approach as applied in *Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 179 N.W. 45 (Minn.1920), *overruled on other grounds by Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921), resulted in the defendant being held liable, without regard to the independent role of the natural fire, if the defendant's fire "'was a material or substantial element in causing plaintiff's damage.'" *Id.* at 46 (quoting trial court jury instructions); *see id.* at 49 (upholding the trial court jury instructions).

252. *See Kingston*, 211 N.W. at 914-15.

253. The court said:

> Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability, because the origin of the northwest fire is not identified.... An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up

defendant's fire eliminated evidence necessary to allocate responsibility between the two fires, thereby depriving the plaintiff of information necessary to prove causation. Thus, it is this Article's view that the decision to switch the burden was based largely on this factor.

Individualistic substantive elements were retained, but their impact was limited by alterations in proof allocations. The combined forces cases demonstrate a synthesis of the techniques used in the earlier development of status-based exceptions to individualistic proof and duty rules. This synthesis takes the switching of proof burdens from the res ipsa cases. It also takes the determination that proof of a substantial factor justifies legal recognition from the early multiplicity cases. The amalgamation of these doctrines likely led to the holding. When the negligent conduct of the defendant deprives the plaintiff of proof of causation, the probability that the negligence caused injury is sufficient to establish a prima facie case. Proof of negligence plus substantial factor causation creates a rebuttable presumption of liability.

The combined forces cases involving human actors had presented the courts with a simple proof problem. Both defendants were clearly negligent; only the indivisibility of the injuries barred the plaintiff's recovery. A more problematic set of cases remained to be considered. In these cases, the negligence of the defendants was provable but the nature of the injuries established that only one of them could possibly have been the cause.[254] Rather than having twin "causers" whose roles could not be severed, these cases presented the court with an "innocent" wrongdoer. Both actors were negligent, but one did not cause injury. One of the defendants was neither the proximate cause nor the cause in fact of the plaintiff's injuries. The proof problem exists because the causative role of one of the defendants is certain, while the identification of the "innocent" defendant is impossible. Of the two or more negligent defendants, one caused the injury and one did not. To add to the logical conundrum, the defendants acted simultaneously.[255]

The causation issue cannot be resolved in these difficult cases without

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> to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin . . . is available as a defense, the burden is on the defendant to show that, by reason of such union with a fire of such character, the fire set by him was not the proximate cause of the damage.

Id. at 915.

254. *See, e.g.*, Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948).

255. *See id.*

creating the appearance of inequity. If the plaintiff loses because of insufficient proof of causation, a certainly liable defendant has been erroneously absolved. If both defendants are held liable, a certainly innocent defendant has been intentionally penalized. The case cannot be resolved without sacrificing the equitable claims of either the innocent plaintiff or the non-causing defendant. If the case is decided by rules generated out of individualistic values, the innocent defendant would be absolved along with the responsible defendant. If the case is resolved pursuant to status-based rules, the plaintiff would prevail against the non-causing defendant.

In a case of monumental importance, the court resolved this apparently unsolvable dilemma by applying the *Kingston* compromise. In *Summers v. Tice*,[256] the California Supreme Court held that proof that the defendants' simultaneous and negligent conduct had caused the plaintiff's injury created a prima facie case against both defendants.[257] Individual causation was not ignored. The burden of proving which of the two defendants actually caused the injuries was simply switched to the defendants.[258]

The facts generating this seminal decision were mundane. Three men went hunting.[259] Two negligently discharged their shotguns, simultaneously, in the direction of the plaintiff. One hit the plaintiff.[260] It was impossible for the plaintiff to identify the person who had actually caused the injury.[261] The defendants sought dismissal for insufficient proof of causation.[262] That argument was rejected, and the court held that given "the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest."[263] This holding has been adopted by the *Restatement (Second) of Torts*.[264] It has been followed and expanded to resolve controversies involving thousands of plaintiffs and scores of defendants.[265]

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256. 199 P.2d 1 (Cal. 1948).
257. *See id.* at 4.
258. *See id.* at 4-5.
259. *See id.* at 2.
260. *See id.*
261. *See id.* at 4.
262. *See id.* at 2.
263. *Id.* at 4.
264. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).
265. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924, 937 (Cal. 1980) (creating the market share liability doctrine); Hymowitz v. Eli Lilly & Co., 539 N.E. 2d 1069, 1075-78 (N.Y. 1989); Martin v. Abbott Lab., 689 P.2d 368, 381-82 (Wash. 1984); Andrew R. Klein, *Beyond DES: Rejecting the Application of Market Share Liability in Blood Products Litigation*, 68 TULANE L. REV. 883, 885-905 (1994); William J. Warfel,

The court's statement that switching the burden was mandated because of the "results that would flow" only indirectly reflects the policy basis of the opinion. One of the "results that would flow" from an application of traditional proof burdens would be that the defendant who had not been proven to have caused harm, *and* who had not caused harm, would be exonerated. Pursuant to a conception of justice based on individualism, a verdict for that defendant would be a triumph of fairness. No proof existed to show that pellets from his gun hit the plaintiff; in fact, no pellets from his gun hit the plaintiff. The decision that this defendant's just claim for vindication should be rejected can be justified only by the existence of a greater claim. The claim is based on individualistic values. Liability should not be imposed on those who have not caused harm. Individuals should be liable only when they have caused injury. The decision to switch the burden to the defendants constitutes a rejection of this sense of equity. The choice was purely one of policy.[266] The factual setting precludes a fact-based resolution of the cause issue.[267] Some particular aspect of the parties' conduct induced the court to adopt a rule that would impose liability on a person who caused no harm.

In analyzing the problem, the court first, following the pattern established in *Kingston*, refused to adopt a rule that would have rejected even *de jure* protections for individualistic interests.[268] The rejected rule

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Adoption of the Market Share Approach in Long-Tail Product Liability Litigation—The Transformation of the Tort System into a Compensation System, 17 OHIO N.U. L. REV. 785, 787-800 (1991). The judicial journey from *Summers* to *Sindell* and beyond represents the genius of the Anglo-American legal system. A minor case involving three hunters is "uncollapsed" and becomes the foundational precedent for resolution of class action defective product litigation and for reforming multi-defendant tort litigation. *Summers* established the foundation through which the personal injury jurisprudence for the second half of the twentieth century has been reformed along dependency value based standards. *See* Terry, *supra* note 211, at 717. However, the expansion into doctrines such as market share liability has not come without criticism. *See* David M. Schultz, *Market Share Liability in DES Cases: The Unwarranted Erosion of Causation in Fact*, 40 DEPAUL L. REV. 771, 786-88 (1991); Aaron D. Twerski, *Market Share—A Tale of Two Centuries*, 55 BROOK. L. REV. 869, 875 (1989); Christopher J. McGuire, Note, *Market-Share Liability After* Hymowitz *and* Conley*: Exploring the Limits of Judicial Power*, 24 U. MICH. J.L. REF. 759, 759-83 (1991).

266. *See Summers*, 199 P.2d at 5.

267. For a similar problem in loss of chance cases, see Vern R. Walker, *Direct Inference in the Lost Chance Cases: Factfinding Constraints Under Minimal Fairness to Parties*, 23 HOFSTRA L. REV. 247, 300 (1994).

268. *See Summers*, 199 P.2d at 3.

was an expanded, and factually fictitious, joint tortfeasor theory.[269] The court then identified the factors it found sufficient to justify sacrificing the innocent defendant on the altar of fairness to the injured plaintiff:

> They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless.[270]

The factors that motivated the court to abandon the individual in order to compensate the plaintiff are identical to those traditionally found in cases in which the courts have abandoned individualistic proof and duty rules. The jointly negligent shooting caused the injuries and created a dependency that deprived the plaintiff of information necessary to protect his interests. The defendants' conduct (bringing about a situation where one of them negligently injured the plaintiff) dominated access to information (whose pellet caused the injury), and deprived the plaintiff of the independent resources necessary to prove causation—placing him in "the unfair position of pointing to which defendant caused the harm."[271] The court concluded that the absence of proof would lead to the unjust result of both defendants escaping liability, leaving the plaintiff remediless.[272]

The joint nature of the defendants' negligent conduct rendered the plaintiff their dependent, and fairness to dependents mandates an exception to individualism. The burden switching remedy in *Summers* was not a novel judicial solution to a unique problem; it was the same solution that had been used in *Byrne* and *Kingston*. The unique aspect of *Summers* is that it expanded the scope of alternative proof doctrines so that they could be applied even to a defendant who, although unidentified, had been "proven" to have caused no harm. The plight of the dependent plaintiff was too great to be ignored.

No matter how innocent the sacrificed defendant in *Summers*, he still had clearly acted negligently. His innocence was limited to causation. The rule of *Summers* is thus not significantly different from that of *Kingston*. When the defendants' negligent conduct has deprived the plaintiff of access to information, alternative doctrines are applicable. They are fairer because the defendants created the information deficit and because *the defendants* were more likely to have whatever

269. *See id.* ("These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept . . . .").
270. *Id.* at 4.
271. *Id.*
272. *See id.*

information existed. The defendants, if anyone, know what they did.[273] The court's application of a burden-switching rule in *Summers* rippled broadly throughout the world of tort litigation.[274] However, *Summers* did not require the court to resolve the ultimate conflict of causation between individualistic claims and the status claims of multiplicity-afflicted plaintiffs.

All multiplicity cases involve concurrent action by a group of potential defendants whose conduct prevents the plaintiff from proving causation. There has, however, been a steady expansion of the types of cases in which the courts have been willing to reject individualistic claims and apply alternative proof doctrines. *Benson v. Ross*[275] involved three human causes. All were negligent and their conduct caused injury.[276] Alternative proof was deemed appropriate because of the indivisibility of the injury.[277] *Kingston* involved two causes. One cause was a negligent party whose fire burned down the plaintiff's home.[278] Alternative proof was deemed appropriate because it was not proven that the other cause was an act of nature.[279] *Summers* involved two negligent human actors. One caused the injury and one did not.[280] Alternative proof was deemed appropriate because the simultaneous and negligent conduct of the two defendants deprived the plaintiff of access to information.[281]

In every situation discussed so far, however, the defendants upon whom proof burdens have been imposed had committed a negligent act.

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273. The most important single explanation for the decision to switch the burden may be the factual finding that "[o]rdinarily defendants are in a far better position to offer evidence to determine which one caused the injury." *Id.* The reference to the theoretical knowledge of the defendants enhances the significance of an information deficit as the essence of the dependency, which was created by the defendant's negligent conduct. The presumption of knowledge was, of course, fictional. There had been a trial. At the trial the evidence failed to show which defendant shot which pellet. *See id.* at 2. This theoretical allocation of information strongly influenced the extension of the *Summers* doctrine in the later DES product liability cases. Like the hunter defendants in *Summers*, the courts found it feasible to assume that the manufacturers had more information than the plaintiffs. *See* Warfel, *supra* note 265, at 788.

274. *See* Sindell v. Abbott Lab., 607 P.2d 924, 929 (1980) ("The rule developed in *Summers* has been emboddied in the Restatement of Torts.").

275. 106 N.W. 1120 (Mich. 1906).

276. *See id.* at 1121.

277. *See id.*

278. *See* Kingston v. Chicago & N.W. Ry. Co., 211 N.W. 913, 915 (Wis. 1927).

279. *See id.*

280. *See* Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948).

281. *See id.* at 4.

In the ultimate burden-switching scenario, an innocent plaintiff suffers an injury that *may* have been caused by one negligent actor and seeks the imposition of proof burdens on others who *may* not either have been negligent or have caused harm. This most difficult causation problem arises because the actor who *may* have been negligent cannot be identified in a group of non-negligent actors. This fact set represents the ultimate test of the claims made by dependent plaintiffs. A decision to apply a status-based rule of proof would imply that it is fairer to permit *totally innocent* defendants to be held liable than it would be to deny compensation to an injured dependent plaintiff.

D. Alternative Proof Doctrines and Medical Malpractice

In *Ybarra v. Spangard*,[282] the court confronted the problem of applying alternative proof doctrines to a group of defendants that included individuals who were innocent of any wrongdoing. The fact set that compelled the court to consider this issue was surgical medical malpractice. During an operation, the unconscious patient suffered nerve injury to his shoulder.[283] The injured area had not been involved in the operation, and the injury was not a foreseeable consequence thereof.[284] The plaintiff said that he felt something pressing at his shoulders, an inch or so below his neck, just before he was anesthetized.[285] What caused the pressure, how plaintiff was subjected to such pressure, and who was responsible were not clear.[286]

Nonetheless, the plaintiff sought exemption from traditional proof requirements and to switch the proof burdens to the defendants. The plaintiff persuaded the court that two ameliorative doctrines should be applied: (1) the res ipsa doctrine on the issue of negligence and (2) the alternative proof—burden switching—doctrine on the issue of causation.[287] Both pleas were successful. In switching the proof burdens the court pragmatically eviscerated, for members of a surgical team, the individualistically justified right to be free from liability unless one has been the perpetrator of a proven wrong that causes injury.[288]

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282. 154 P.2d 687 (Cal. 1944).

283. *See id.* at 688.

284. Ybarra underwent an appendectomy. After the operation, the muscles around his right shoulder developed paralysis and atrophied. *See id.*

285. *See id.*

286. *See id.* at 690. Although the court concluded that "[i]t may appear at the trial that . . . one or more defendants will be found liable and others absolved, . . . *this should not preclude the application of res ipsa loquitur*." *Id.* (emphasis added).

287. *See id.*

288. The *Ybarra* decision incorporates a rejection of individualistic rights exceeding anything found in the enterprise liability cases that rely on *Summers*. All of the defendants in those cases had been wrongdoers—marketing defective products. The

The *Ybarra* decision's abandonment of individualistic rights cannot be justified on the grounds of the defendant's improper conduct. The plaintiff was unable to prove negligence by *any of the defendants*. The absence of proof of negligence significantly alters the equitable standing of the defendants. In *Summers*, both defendants were negligent although one had not caused injury. The *Summers* policy, that the burden should be switched to prevent two wrongful actors from blocking recovery by pointing to each other, is simply inapplicable. When the court switched the burden to the *Ybarra* defendants, it imposed a burden on several defendants who had neither been negligent nor caused injury.

The *Ybarra* fact set created a unique problem. For the first time, most—if not all—of the defendants were likely innocent.[289] It is likely that all but one of them had acted with care and had not caused harm. The court was confronted with a true Hobson's choice. On one side, the court could impose individualistic rules and dismiss the case, knowing that the injured plaintiff would be left without compensation and that the negligent defendant would escape. On the other side, the court could impose dependency-based rules that would almost certainly impose liability on innocent defendants as well as on the negligent ones. The choice was thus between true innocents on both sides.

Throughout the development of alternative proof and duty doctrines, the equity problem had been to distinguish the situation in which the innocent defendant deserved a preference—individualism—from that in which the innocent plaintiff deserved a preference—dependency. In these analyses, though, the defendant's *innocence* had always been theoretical. Her innocence was not the result of any doubt about her having committed wrongful acts. Innocence was the individualistic innocence of one who has not yet been proven to have caused harm.

The status-justified claim of equity proposed by the dependent plaintiff had two prongs. The helplessness of the plaintiff generated sympathy and the skullduggery of the defendants deprived them of any equitable claim. The *Ybarra* defendants, however, were doctors and

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imposition of alternative proof doctrines was limited to the causation element of the tort. Even in the subset of cases imposing market share liability and precluding exculpatory evidence, all the defendants had wrongfully distributed a defective product. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989); Epstein, *supra* note 188, at 1377, 1381-82; Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the* DES *Cases*, 68 VA. L. REV. 713, 739-40 (1982).

289. The court did not squarely address this issue in the opinion. *See Ybarra*, 154 P.2d at 687-91.

nurses who had not engaged in skullduggery. Nonetheless, the status-dependent plaintiff obtained a status-justified rule.

As in the *Summers* decision, the court in *Ybarra* asserted its policy in conclusory language: "it is manifestly unreasonable for them to insist that [the plaintiff] identify any one of them as the person who did the alleged negligent act."[290] This language is both conclusory and unpersuasive because, pursuant to individualistically defined standards of justice, such a result would not be unreasonable. Even dependent plaintiffs have the right of discovery. They have the right to obtain the hospital records and take depositions of everyone present. The dependent plaintiff's access to information equals that of the defendants, who would have to acquire most of their information through the same means. The real problem in *Ybarra* was not access to information—discovery had been completed. There simply was no information concerning either malpractice or causation. Thus, *Ybarra* creates a new duty of care for members of a surgical team. The dependency-generating medical defendants will now be required either to guarantee that the dependent surgical patient will not be injured or to bear the burden of proving that they are not negligent.

The dependency—resulting from the administration of anesthesia—of the plaintiff did not actually cause an information deficit that prevented proof of facts known to those who were awake. Thus, the nature of the "manifest unreasonableness" that motivated the imposition of this new duty must be derived from the other facts of the opinion.

The perception of unreasonableness stems from the court's view of the status relationship between the surgeons and the patient. The patient was helpless; the surgeons were in control. The court therefore concluded that status-justified rules of proof and duty should be imposed. Without any proof of wrongdoing and without any pragmatic information deficit, the total dependency of the plaintiff induced the court to apply both duty- and proof-switching doctrines. The following critical language in the decision reveals the central role that the plaintiff's dependent status played in forming the policy that underlies the decision: "The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant . . . . Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants . . . ."[291]

The three dependency factors that historically have driven courts to create status-based exceptions to individualistically justified rights are

290. *Id.* at 690.
291. *Id.*

apparent from these words. The defendants' conduct—placing plaintiff under anesthesia—dominated access to information; only the defendants were able to make observations due to the plaintiff's unconsciousness, thus depriving the plaintiff of sufficient resources to protect her interest in gaining compensation for the malpractice.

The court's perception was that the dependency relationship was so overwhelming that it dominated all other factors.[292] The defendant medical professionals had the professional and legal responsibility to protect the plaintiff. Even if they had not personally erred, imposing duty and proof burdens on those with the contractual and moral responsibility would not recreate the real-world duties of the surgeon. The members of surgical teams should have legal duties consonant with their level of control over patients. The fairness of this perception was corroborated by the two hundred years of doctrinal development of status-justified proof and duty theories. Legal doctrines were available to achieve the court's perception of a fair result in this type of situation. Surgical patients needed special protection against medical malpractice; alternative proof and duty doctrines were applied to provide patients that level of protection.

1. The Ultimate Development: Alternative Proof Doctrine Transposed into Alternative Duties of Care

The doctrine in all of these alternative proof cases commits the courts to rules that balance competing concepts of fairness. Protection is given to plaintiffs who are in a dependent status, while courts continue to verbalize a commitment to individualistic protections for defendants. The compromise has been reflected in switching the burden of proof rather than eliminating any relevance to proof of causation. Retention of the causation element is emblematic of the commitment to the belief that liability should not be imposed if the defendant's conduct did not cause the injuries. Although the facts of cases such as *Summers* and *Ybarra* strongly suggest that the proof opportunity is more *de jure* than *de facto*—in *Summers*, the trial clearly indicated that nobody knew who fired the injury-causing shot[293]—the factual possibility has been retained.[294]

292. *See id.* at 689.
293. *See* Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948).
294. *See* Klein, *supra* note 265, at 886 ("[The] requirements [for shifting the burden

The alternative liability doctrine, however, has been extended in limited situations so that it has virtually become a strict liability doctrine. In the market share cases,[295] liability was imposed without consideration of the causative role, or lack of such role, in the plaintiff's injuries. The perceived need to find a mechanism for ensuring compensation, perhaps augmented by the affluent and insured status of the defendants, led to the abandonment of the compromise. The dependent status, combined with proof that the defendants had distributed a defective product, led to a judicial mandate for compensation.[296]

In *Anderson v. Somberg*,[297] the court made a further extension of the alternative liability doctrine. The plaintiff was injured when a clamp broke during surgery, and the plaintiff sued the operating team and the manufacturer.[298] Discovery revealed that individuals who were not the defendants might have damaged the clamp.[299] The clamp was owned by the hospital, was used by as many as twenty surgeons, and might have been damaged by non-defendants during prior surgeries.[300] Further, the damage may not have been detectable by reasonable inspection.[301] The court suggested that at least one of the defendants should be held liable. It reversed a jury verdict in favor of the defendants and remanded for a finding of liability against at least one of the defendants.[302] In *Anderson*, even *de jure* adherence to individualism was abandoned. The murky connection between alternative proof rules and alternative duty rules was clarified. The defendants were liable because they had the duty to protect one placed in a dependent status. For those involved in surgical procedures, that duty became absolute.

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of proving causation from the plaintiff to the defendant] closely connect *Summers* to the tradition of individualism by maximizing the possibility that a defendant will bear responsibility only for damages caused by its own actions.").

295. *See, e.g.*, McMormack v. Abbott Lab., 617 F. Supp. 1521 (D. Mass. 1985); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

296. *See* Andrew B. Nace, Note, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395, 395 (1991).

297. 338 A.2d 1 (N.J. 1975).

298. *See id.* at 3.

299. *See id.* at 4.

300. *See id.* at 9 (Mountain, J., dissenting).

301. *See id.* at 2 (noting surgeon's visual inspection).

302. *See id.* at 8. The *Anderson* decision fundamentally changed the duty of those who supply surgical implements and those who perform operations. The form of res ipsa that was applied made their duty to the patient *non-delegable*. The fact that others may actually have damaged the clamp, even if done in a way that could not be detected through the use of reasonable care, did not prevent the imposition of liability. *Cf.* Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1891 (1997) (discussing imposition of liability for conduct that creates uncertainty).

2. *The Alternative Liability Remedy of Burden Switching Liberated from Its Multiplicity Roots*

Although often criticized,[303] the growth of alternative liability doctrines has continued throughout the gamut of fact sets. The relationship between dependency and the application of alternative proof and duty doctrines is clear. The particular alternative proof remedy of switching the burden of proof, however, has been so popularly connected to the specific proof problems caused by multiplicity, that special consideration must be given to whether precedent or policy requires multiplicity as a predicate for its use.[304]

The legitimacy of such a restriction on the scope of this doctrine is negated by an examination of analogous tort law doctrines. Tort law is filled with fact sets in which proof inequities have induced the court to switch proof burdens to the defendant without regard to multiplicity. The development of the res ipsa loquitur doctrine is one example of burden shifting.[305] The classic example, however, may be the allocation of the burdens of proof in defamation. The fact set of defamation contains a systemic inequity. The plaintiff's right is limited to protection against false statements that damage her reputation.[306] She

303. *See* O.C. Adamson, II, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043, 1043 (1962); Klein, *supra* note 265, at 892-93; Schultz, *supra* note 265, at 771, 773. Although alternative liability represented a substantial relaxation of the cause in fact rule, it remained connected to the tradition of individualism. Indeed, a careful reading of *Summers* shows at least three strong links to the maxim that an individual should be responsible only for what he does. As discussed below, a plaintiff's burden to prove cause in fact should be relaxed under *Summers* only if: "(1) all possible 'culpable' entities are joined in the action; (2) each defendant has an opportunity to exculpate itself by proving that its conduct did not cause the plaintiff's injury; and (3) each instrumentality that may have injured the plaintiff carried a uniform risk of harm." Klein, *supra* note 265, at 885-86 (footnotes omitted).

304. *See* Melinda H. Van der Reis, Comment, *An Amendment for the Environment: Alternative Liability and the Resource Conservation and Recovery Act*, 34 SANTA CLARA L. REV. 1269 (1994). Discussing comment h of section 433(B) of the RESTATEMENT (SECOND) OF TORTS, the author wrote:

> Cases might arise where some modification of the rule would be necessary because of the effect of lapse of time, the risks the defendants created, or other circumstances.
>
> The drafters of the Restatement internalized the purpose of the alternative liability theory and embodied the intent of the *Summers* decision. Courts may now use the Restatement as a flexible guide in providing redress for injured parties.

Id. at 1280 (footnote omitted).

305. *See supra* Part IV.C.4.a.

306. *See, e.g.*, Arthaud v. Mutual of Omaha Ins. Co., 170 F.3d 860, 862 (8th Cir.

must, therefore, prove a negative: that the statement is not true. Further, reputation is an intangible. Proof of its existence and its demise is extremely difficult. Courts, therefore, have switched both the burden of proving the truth of a statement and the burden of proving the lack of injuries.[307] In theory, liability is based upon the publication of a false statement. Proof of the publication of a defamatory statement, however, satisfies all of the plaintiff's proof burdens. The proof of the publication of a defamatory statement satisfies her burden on the issue of damages as well as falsity. There is a presumption that all individuals have a good reputation and that libel and per se slander injures the reputation.[308] In other words, the burdens of proving fault (falsity) and causation (damages) are switched to the defendant. Whether referred to as a presumption or as a switched burden of proof, there is no practical difference between defamation burden switching and the burden switching in multiplicity cases.[309]

The issue of multiplicity simply does not exist in these defamation cases. The courts' use of alternative proof remedies without regard to the multiplicity of causes is undeniable. Thus, the use of alternative proof doctrines depends not on multiplicity of defendants, but upon the existence of the dependent plaintiff whose status as such was created by the action of the defendant.[310]

Even when attention is turned to judicial uses of the specific form of the alternative proof doctrine attributed to *Summers*, multiplicity has not been found to be a limiting factor.[311] Although both *Summers* and *Sindell v. Abbott Laboratories*[312] involved multiple defendants, the doctrine has been applied in scenarios that did not involve multiplicity. The first instance of such application may well have been the decision in *Haft v. Lone Palm Hotel*.[313] The court in that case found the essential elements of a dependency situation. Once the plaintiff was viewed as a

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1999).

307. *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977). *But see* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986) (rejecting this doctrine in the setting of constitutional privilege); *cf.* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1339-43 (1992).

308. *See* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984) (quoting Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 127 (1934)).

309. *See* EPSTEIN, *supra* note 101, at 1141 ("[T]he issues in a defamation case often parallel those found with toxic torts, since the plaintiff must show a causal connection between the defendant's false statements and plaintiff's loss or injury and thereafter quantify the level of the loss.").

310. *See supra* Part IV.C.4.

311. *See* Zweir, *supra* note 17, at 816 ("*Sindell* left unanswered the question of whether its holding could be applied to an individual defendant.").

312. 607 P.2d 924 (Cal. 1980).

313. 478 P.2d 465 (Cal. 1970).

dependent of the negligent defendant, the court rejected individualistic rules and applied alternative liability concepts.

In *Haft*, the plaintiffs sued because of the tragic drowning of a father and son in a hotel pool.[314] The wrongful death action was based upon the violation of a safety statute requiring pool owners either to have a lifeguard on duty or to post a warning sign alerting users that no lifeguard was on duty.[315] Although the case technically had more than one defendant, multiplicity did not create the plaintiffs' problems in proving causation. The problem was caused by the failure of the defendant owners and managers of the motel to comply with the duties imposed by the statute. There was neither a sign nor a lifeguard. The responsibility was that of all defendants. The proof problem inducing the court to apply alternative proof rules had a different genesis. The defendants claimed that compliance with the requirement of posting a sign could not be proven to have caused the drowning.[316]

Despite the lack of multiplicity, the court analyzed the relationship between the parties as one in which the plaintiffs had been dependent upon the defendants:

> To require plaintiffs to establish "proximate causation" to a greater certainty than they have in the instant case, would permit defendants to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created. Under these circumstances the burden of proof on the issue of causation should be shifted to defendants to absolve themselves if they can.[317]

Haft is a situation in which the defendants' conduct had a direct and logical relationship to the unfortunate events.[318] The ability to prove that relationship by a preponderance of the evidence had been impaired by

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314. *See id.* at 466.

315. *See id.* at 468.

316. The pool area was unattended and nobody was around at the time of the drowning. Thus, the defendants argued that the father had actual notice that there was no lifeguard and a sign would have been redundant. Factual awareness having been proven by the circumstances, the sign would not have stopped the use of the pool. The sign would have made no difference. *See id.* at 468, 472.

317. *Id.* at 475 (citations omitted).

318. An alternative path to the court's verdict could have been to find that the sign was a "substantial factor" in the injury. The legislative decision to impose the duty of erecting the sign would have been a sufficient basis for such a finding. Once held to be a substantial factor, proof of the absence of the sign would then become sufficient proof so that the plaintiff would have established a prima facie case. Use of the *Summers* alternative proof theory and switching of the burden was, of course, equally effective. Either theory pragmatically imposes a duty to have the sign, without regard to its effectiveness in avoiding specific drownings.

the defendants' negligent conduct. The statute imposed a duty to protect those who used the pool. The very act of violating the statute was the act that deprived the plaintiffs of proof. The presence of a lifeguard would have both protected plaintiffs' decedents and provided information about the cause of their death. Thus, even without multiplicity, *Haft* fits the profile of an alternative proof case. Dependent plaintiffs are denied compensation by the very act that could have caused their injuries.[319]

In a particularly apt decision for the consideration of the uniform application of alternative liability to litigation malpractice, the court in *Kituskie v. Corbman*[320] switched the burden of proof on causation. *Kituskie* was a legal malpractice case. The burden of proving that the malpractice did not cause economic harm, which was asserted by Corbman in defense, was placed on the attorney defendant.[321] *Kituskie* did not, however, involve the typical case-within-a-case defense. The attorney did not rely on a claim that the underlying action could not have been won. The claim, instead, was that any judgment would have been uncollectable.[322] The court held that the plaintiff did not have to prove collectability. The burden of showing that the misfeasance had not caused harm because of uncollectabililty was allocated to the defendant.[323]

The court's decision was consistent with the factors that have historically induced courts to apply alternative causation doctrines. The attorney had controlled the litigation, and the negligence was at least a substantial factor in creating the likelihood of harm.[324]

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319. The *Haft* court stated:

> [T]he evidentiary void in the instant action results primarily from defendants' failure to provide a lifeguard to observe occurrences within the pool area.... The absence of such a lifeguard in the instant case thus not only stripped decedents of a significant degree of protection to which they were entitled, but also deprived the present plaintiffs of a means of definitively establishing the facts leading to the drownings.

Haft, 478 P.2d at 474-75.

320. 714 A.2d 1027 (1998).

321. *See id.* at 1028.

322. *See id.* at 1028-29.

323. *See id.* at 1032.

324. For an interesting review of legal neglect in client cases, see Loren E. Mulraine, *Professional Responsibility: The Imminent Peril of Neglecting a Legal Matter*, 33 How. L.J. 411 (1991). The essence of the lawyer client relationship in a litigation matter fits the policy applied by the California court in *Haft*:

> [T]he shift of the burden of proof... may be said to rest on a policy judgment that when there is a substantial probability that a defendant's negligence was a cause of an accident, and when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove "proximate causation" conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery....

Multiplicity is one scenario that has led courts to switch burdens of proof. Throughout the history of the development of alternative causation, however, it has never been the dispositive factor.[325]

3. *Loss of Chance*

Switching the burden of proof was one resolution for the problem of combined forces multiplicity. However, burden switching was not the only resolution to this problem. Other fact sets exist that involve multiplicity of causes but do not necessarily generate personal injuries. The equitable dilemma caused by multiplicity has long been resolved in an entirely different fashion in a series of English contract cases.[326] This English resolution focuses on the intersection of human and natural causes of a loss.[327]

In the personal injury fact set, *Kingston* resolved the proof problem of the dependent plaintiff by switching proof burdens. The negligent human actor was given the burden of proving that the other cause was of a natural origin.[328] This solution, however, is only just if the existence of a natural cause absolves the defendant. Thus, when the existence of a natural fire automatically leads to the conclusion that the negligently set fire caused no avoidable harm, the *Kingston* rule logically solves the proof problems. If the existence of a probable natural cause of the loss does not absolve the defendant, then burden switching is ineffective.

The multiplicity fact set beyond *Kingston* arises when the relationship between the loss and the defendant's conduct is merely proportional. Rather than creating a fire that may have burned a home, the defendant may have set in motion an action that merely increased the chance of the home being burned. In this fact set, the plaintiff concedes that the loss might have happened without the act of the defendant. However, the act of the defendant increases the chance of the loss occurring and compensation is sought for that impact.

The modern fact set raising this issue is the medical malpractice tort.

Haft, 478 P.2d at 476 n.19.

325. *See supra* Part IV.C.4.

326. *See* Howard Ross Feldman, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 U. BALT. L. REV. 139, 140-41 (1987); Margaret T. Mangan, Comment, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 285-86 (1996-1997).

327. *See* Mangan, *supra* note 326, at 283-86.

328. *See supra* Part IV.C.4.d.

The most common scenario involves negligence in cancer diagnosis. The delay in diagnosis is associated with an increase in the severity of the disease prior to treatment. The increased severity of the cancer decreases the chances of survival. The multiplicity problem exists because the natural outcome of the disease is death. The eventual death may have resulted from the natural cause, the disease, or from the delay in treatment, the malpractice. The evidence issue is easily resolved in fact sets in which the plaintiff had a fifty-one percent chance of survival prior to the malpractice. Because the delay in treatment is a substantial factor in the causation, earlier alternative proof doctrines would readily permit the finding of a prima facie case. However, when the plaintiff did not have a fifty-one percent chance of survival before the negligent failure to diagnose, the substantial factor model was useless. The statistical probabilities make it impossible to prove that the doctor's negligence caused the death.[329] Switching the burden of proof to the defendant would not resolve the statistical impediment to knowing whether the malpractice was a cause in a specific case. Since the plaintiff had a less than a fifty-one percent chance of survival before the negligence, the doctor can easily meet the preponderance of evidence threshold. The plaintiff was "dead already." The doctor can prove that her negligence could not have been the "more likely than not" cause of the death.

However sufficient the proof, this resolution can only be judged to be fair if individualistic standards of justice are applied. The cancer may naturally have caused the death, but those with small chances sometimes survive. By definition, a person with a ten percent chance of survival survives ten percent of the time. Whether the actual plaintiff in a medical malpractice case would have been among the lucky survivors is a fact that is unknowable solely because of the negligence of the doctor.

In this fact set the human cause does not join with the natural cause. Rather, the human cause stymies efforts to halt the natural cause. In this sense, these cases are more like the failure to rescue cases.[330] When a sailor falls into the sea, a natural peril exists. Unless saved, the sailor will eventually drown.[331] When negligence prevents the sailor from being saved, the death is the product of combined forces. The natural

329. *See* Walker, *supra* note 267, at 261-71 (discussing the impact of requiring proof of "specific" propositions about specific individuals on loss of chance cases).

330. *See* Malone, *supra* note 133, at 75-81 (discussing the duty to rescue).

331. In many of these cases, the sailor is at risk because he cannot swim. *See, e.g.*, New York Cent. R. Co. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920). The ability to swim, however, is not relevant to the analysis. The inability to swim was important in such cases because the sailor was close to shore. If the sailor is far from land or confronted by strong currents, death from drowning is inevitable absent rescue. The ultimate cause is the sea. *See id.*

cause is the sea; the human cause is the negligent failure to save. The most difficult failure to save cases are those in which the effort to save almost succeeds. For example, in *Kirincich v. Standard Dredging Co.*,[332] a seaman fell and was being pulled away from shore by perilous currents.[333] Lifelines were thrown to him. The lines were negligently prepared because no flotation devices were attached.[334] The lines came close to his hands but he was unable to grab them before being pulled out to sea.[335] The defendant claimed that proof of causation was speculative.[336] It was impossible to tell whether he would have been able to grab lines with flotation devices. Thus, the defendant claimed that no proof had been introduced to establish that death was caused by any factor other than the sea.[337] The court rejected this individualistically based argument, holding that

> [n]obody could, in the nature of things, be sure that the intestate would have seized the rope.... But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it.... [W]e think it a question about which reasonable men might at least differ whether the intestate would not have been saved, had it been there.[338]

In *Kirincich*, the court was able to find that the evidence was sufficient, despite the inherent impossibility of truly knowing, by application of a factual determination that everyone has an instinct of self-preservation.[339] Such intuitive approaches are not, however, possible in the statistic-laden world of modern medicine.

The courts cannot hold that reasonable men might at least differ as to whether decedents victimized by delayed diagnoses would survive. Scientific evidence supplants instinct and the probability of survival is known. Reasonable people could differ as to whether a patient with late stage cancer would have lived if he had not been the victim of medical

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332. 112 F.2d 163 (3d Cir. 1940).
333. *See id.* at 163.
334. *See id.* at 165-66.
335. *See id.* at 163.
336. *See id.* at 164.
337. *See id.*
338. *Id.* at 164 (quoting Zinnel v. United States Shipping Bd. Emergency Fleet Corp., 10 F.2d 47, 49 (2d Cir. 1925)). The court emphasizes the importance of the defendant's control over the plaintiff. *See id.* at 165 ("'There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea.'" (quoting Harris v. Pennsylvania R.R. Co., 50 F.2d 866, 868 (4th Cir. 1931))).
339. *See id.* at 164.

malpractice, but such differing is akin to differing about which horse will win a race. The probabilities are clear. In the medical malpractice cases the issue is the compensation of the loss of a chance to be a long shot, because long shots are not more likely than not to survive in the world of cancer recovery. The simple solution of ignoring the imponderable sufficed to protect the dependent plaintiff in *Kirincich*, but that solution is not viable in analogous cases.

However, the dependent status that induced the *Kirincinch* court to emphasize the "instinct of self-preservation" cannot be ignored.[340] Despite the miraculous increase in data, the patient with cancer is as dependent upon the medical diagnostician as the patient during an operation is dependent upon the surgeon. The dependent status, which led to the res ipsa and burden-switching variants of alternative proof in surgical malpractice cases, demands that the plaintiff be protected. If the dependency of the plaintiff is made the core of the judgment, a victory by the negligent doctor cannot be deemed just. Burden switching will not satisfy the needs of these dependent plaintiffs. If, however, another alternative proof doctrine will protect them, the dependent status of the plaintiff would justify its application.

Loss of chance is such a status-based alternative. It stems from a 1911 English case, *Chaplin v. Hicks*.[341] The multiplicity causation problem was created in *Chaplin* by a contract between the plaintiff and defendant. The terms of the contract entitled the plaintiff to become one of the finalists in a beauty contest.[342] The defendant breached by failing to notify the plaintiff of the time to appear for the mandated interviews.[343] The defendant claimed that no damages should be awarded, because the lost opportunity to become a finalist did not guarantee winning a prize.[344] In other words, the defendant asserted that a chance of winning that was less than one in four[345] meant that the plaintiff was less than likely to win. Because one chance out of four was considerably less than a preponderance of evidence, the defendant alleged that he should win.[346] However, the court rejected the defendant's analysis; the lost chance was ruled independently compensable.[347]

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340. *Id.*
341. 2 K.B. 786 (Crim. App. 1911).
342. *See id.* at 791.
343. *See id.*
344. *See id.*
345. Only 12 out of 50 contestants would be chosen. *See id.*
346. *See id.*
347. *See id.* at 793. Although the court acknowledged that each of the fifty finalists' chance of being chosen was only about one in four, and thus no better than even, it held that such a lost chance to obtain the acting position was worthy of legal protection. *See id.*; Darrel L. Keith, *Loss of Chance: A Modern Proportional Approach*

The *Chaplin* court perceived the critical facts to be those actions of the defendant that placed the plaintiff in a dependent status—reliance followed by the breach.[348] The three factors that have induced courts to reject individualistic rules permeate the case. The conduct of the defendant in breaching the contract dominated the access to information because without having appeared at the interviews, it was impossible for plaintiff to prove whether she would have won. Thus, the defendant deprived her of the opportunity to protect her rights.

Compensating the lost chance represented a compromise between the competing standards by which fairness has been evaluated. Permitting compensation for a proportion of the potential loss limits defendant's liability to that amount for which he is individualistically responsible. Of course, the doctrine creates a difficult proof problem, as evaluating the lost chance is a difficult matter. In contract violations, the courts adopting this doctrine took the simple expedient of evaluating the lost chance as the percentage of the full amount represented by the chance.[349]

The development of the loss of chance doctrine was restricted to contract actions for decades.[350] The language of loss of chance was first applied in a medical malpractice action in *Hamil v. Bashline*.[351] In *Bashline*, however, the difficult causation issue was not confronted. The plaintiff had a seventy-five percent chance of survival before the malpractice.[352] The holding that the loss of this chance was compensable[353] did not require analysis of the difficult causation problem created by the loss of chance that was less than fifty percent.

The first case adopting the loss of chance doctrine in such a fact set

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to Damages in Texas, 44 BAYLOR L. REV. 759, 823 (1992).

348. *See Chaplin*, 2 K.B. at 791.

349. *See* Mangan, *supra* note 326, at 285-86. The author describes the historical basis of loss of chance in contract law:

> The plaintiff was awarded damages on a pro-rata basis by receiving an award which reflected the percentage probability that the defendant had reduced the plaintiff's chances of receiving a more favorable outcome. American courts . . . eventually followed the English common law in allowing pro-rata recovery in contract litigation. Initially, American courts did not accept the concept of chances as protected interests in tort law. Currently, out of those American courts which have addressed the loss of chance doctrine, the majority of courts recognize chances as protected interests.

Id. (footnotes omitted).

350. *See id.*

351. 392 A.2d 1280 (Pa. 1978).

352. *See id.* at 1283.

353. *See id.* at 1289.

was *Herskovits v. Group Health Cooperative*.[354] Herskovits had cancer, and the defendant negligently failed to diagnose the condition upon Herskovits's initial examination.[355] When the cancer was diagnosed, the condition had progressed. At the time of diagnosis, the cancer had likely progressed from a "stage 1" tumor to "stage 2."[356] Herskovits introduced expert testimony proving that the progression of the cancer reduced the chance of survival from thirty-nine percent to twenty-five percent.[357] He did not survive.[358]

The *Herskovits* court clearly identified the dependent status of the plaintiff as the critical fact in its adoption of the loss of chance doctrine. "To decide otherwise would be a blanket release from liability for doctors and hospitals any time there was less than a [fifty] percent chance of survival, regardless of how flagrant the negligence."[359] This policy statement clearly rejects individualistic values.

Pursuant to individualistic values, the severity of Herskovits' cancer prior to the negligence should preclude the imposition of responsibility. Although the delay in diagnosis breached the defendant's duty to provide aid,[360] there is absolutely no way of knowing whether the plaintiff would have survived.[361] When the court identified the dependent status as central to the issue of the sufficiency of proof,[362] the adoption of alternative proof rules and the imposition of liability became inevitable. The three factors of dependency were present. The conduct of the defendant—the failure to diagnose the cancer competently—dominated the access to information. In other words, the negligence in diagnosis prevented the plaintiff's decedent from obtaining prompt treatment that might have stopped the progress of the disease, and simultaneously denied the plaintiff's decedent the capacity to protect himself by getting early treatment. Additionally, the negligent diagnosis denied the plaintiff's decedent of the chance to prove that the negligence

354. 664 P.2d 474 (Wash. 1983).
355. *See id.* at 475.
356. *Id.*
357. *See id.*
358. *See id.*
359. *Id.* at 477.
360. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1965) ("One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person . . . is subject to liability to the other . . . for physical harm resulting from his failure to exercise reasonable care . . . if [ ] his failure . . . increases the risk of such harm . . . .").
361. In *Hamil v. Bashline*, 392 A.2d 1280 (1978), the court permitted recovery for a lost chance of survival. *See id.* at 1283. The lost chance in that case, however, was a seventy-five percent chance of survival. *See id.* Thus, the rhetoric of lost chance was used in a case that was actually a "substantial factor" scenario.
362. *See Herskovits*, 664 P.2d at 477.

caused the harm, by eliminating the knowledge of whether earlier treatment would have succeeded.

The court's solution was to adopt the *Chaplin* balance. The individualistic value was maintained because the defendant's liability was limited to the damages that were proved, and proof of the value of the lost chance was the plaintiff's responsibility. Providing a mechanism through which the dependent victim gains some compensation for the loss that undeniably caused the lost chance protects the status value.[363]

Loss of chance is a compromise. However, it is a compromise that adheres far more closely to the spirit of status values than individualistic values. The doctrine almost guarantees a verdict for the plaintiff. The aspect of the rule that requires the plaintiff to prove the value of the lost chance exploits the language of individualism, but is hollow. The value of the lost chance is inherently speculative.[364] Loss of chance in the medical malpractice case thus has no factual justification. It is purely a rule of status policy. The rule functionally expands the duty of the doctor so that the doctor becomes a guarantor against negligence that deprives patients of a chance of survival.

The continuing tension between the twin perceptions of fairness is obvious in the language of both courts that have rejected this rule and those that have adopted the rule. One decision rejecting the rule in terms

363. Justice Pearson, in his concurrence in the *Herskovits* decision, wrote:

> A more rational approach, however, would allow recovery for the loss of the chance of cure even though the chance was not better than even. The probability of long-term survival would be reflected in the amount of damages awarded for the loss of the chance. While the plaintiff here could not prove by a preponderance of the evidence that he was denied a cure by the defendant's negligence, he could show by a preponderance that he was deprived of a 30% chance of a cure.

Id. at 486 (Pearson, J., concurring).

364. The lost "chance" is only statistically correlated to the lost case or life. A 39% chance of survival tells nothing about the fate of Herskovits. Whether he would have been among the 39% who survive or in the unfortunate 61% who do not cannot be known. Thus, two solutions for awarding damages exist: (1) allow the jury to give whatever damages it feels is appropriate; or (2) limit damages to the proportion of chance lost (e.g., if a 25% chance of winning a million dollars was lost, damages would be limited to $250,000). The latter approach emulates the resolution in the original contract loss of chance cases. It discounts the full value. Unfortunately, the assumption that the full value was ever attainable is hopelessly speculative. Loss of chance in medical malpractice cases thus represents a rational discounting of an irrationally selected number. *See id.* at 492 (Rosellini, J., concurring) (arguing that damages in loss of chance cases should be limited to the value of the percent of loss); *see also* Falcon v. Memorial Hosp., 462 N.W.2d 44, 57 (Mich. 1990).

that highlight concern for individualistic values is *Cooper v. Sisters of Charity*.[365] In *Cooper*, improper emergency room procedures failed to disclose a major head injury and the child patient died.[366] The Ohio Supreme Court stated that "[a] rule, which would permit a plaintiff to establish a jury question on the issue of proximate cause upon a showing of a 'substantial possibility' of survival, in our judgment, suffers the same infirmity as a rule which would permit proof of a 'chance of recovery' to be sufficient."[367] Although no longer the law of Ohio,[368] the decision still illustrates the concern for individualistic values.

Shively v. Klein[369] adopted the loss of chance doctrine. In that decision, the dependency of the plaintiff, and the perception that the law must permit others in that status to be protected, dominated.[370] The court said:

> This loss of a chance doctrine . . . has developed in part because of the difficulty in the medical malpractice area of proving precise degrees of causation, and in part because of the perceived unfairness in denying recovery when a doctor's negligence, although not shown to be the probable cause of the patient's malady or death, significantly decreased the patient's chance of recovery.[371]

Loss of chance is adopted by those courts that are influenced by the values of the dependent status of the plaintiff. The doctrine is slowly gaining acceptance.[372] In this area, as in the previously analyzed areas, the claim of dependency eventually mandates a modification of the individualistically justified rules of duty and proof. The further adoption of loss of chance rules thus appears inevitable.

V. THE LITIGATION ATTORNEY'S CLIENT IS IN A DEPENDENT RELATIONSHIP NECESSITATING APPLICATION OF ALTERNATIVE LIABILITY RULES OF PROOF

The client in a litigation matter is in a dependent relationship with the

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365. 272 N.E.2d 97 (Ohio 1971), *overruled by* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996); *see* Beth Clemens Boggs, *Lost Chance of Survival Doctrine: Should the Courts Ever Tinker with Chance?*, 16 S. ILL. U. L.J. 421, 429 (1992) ("To recover, the plaintiff must demonstrate that the defendant's negligence deprived the patient of a substantial or appreciable chance of survival. This approach incorporates the substantial factor test and asks whether the defendant has substantially decreased the plaintiff's chance of survival." (footnote omitted)).

366. *See Cooper*, 272 N.E.2d at 99.

367. *Id.* at 103.

368. *See Roberts*, 668 N.E.2d at 484.

369. 551 A.2d 41 (Del. 1988).

370. *See id.* at 43.

371. *Id.*

372. *See* Mangan, *supra* note 326, at 286 ("Currently, out of those American courts which have addressed the loss of chance doctrine, the majority of courts recognize chances as protected interests.").

attorney. Litigation fits within the fact sets of cases in which alternative proof doctrines have been applied. As discussed, alternative proof doctrines have been applied in two different types of medical malpractice cases. The alternative proof technique of switching the burden has been applied to certain types of surgical malpractice.[373] The relaxed causation doctrine of loss of chance has been applied to certain types of diagnostic malpractice.[374] The nature of the dependent status in litigation cases is similar to that created in these doctor-patient relationships.

The three critical factors of dependency that led courts to apply status-based doctrines in medical malpractice cases also exist in litigation malpractice cases. The conduct of the defendant (the representation of plaintiff in a litigation matter) dominates access to information (discovery and motion practice), and deprives the plaintiff of the ability to protect her interests or prove her loss. Alternative proof doctrines[375] have not, however, been adopted in legal malpractice actions.[376] The rationale is opaque. Some analysts believe that the reluctance is a sign of special favoritism.[377] It is likely that a more benign factor plays a

373. *See supra* Part IV.D.1.

374. *See* Stephen F. Brennwald, Comment, *Proving Causation in "Loss of a Chance" Cases: A Proportional Approach*, 34 CATH. U. L. REV. 747, 767 (1985); *supra* Part IV.D.3.

375. Dean Prosser may have coined this term for switching the burden of proof on the causation issue. *See* Bush, *supra* note 29, at 1483. The fact that these modified causation doctrines have existed for decades and have rarely been applied to a legal malpractice case suggests strong system-wide mechanisms that protect the interest of the attorney. The attitudes of judges towards attorney defendants is markedly different than the attitude of the judiciary towards other defendants. *See generally* Prudential Ins. Co. v. Dewey, Ballentine, Bushby, Palmer & Wood, 590 N.Y.S.2d 831 (1992) (extending special consideration and understanding to a large law firm to limit its liability for shoddy work). The legal profession is far less litigious in trying to effect legal change in the legal malpractice area. It is thus likely that the only solution to the legal malpractice debacle will be to remove the issue from the control of attorneys and their brethren on the bench.

376. *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 59-73 (1986) (discussing burden of proof standards in legal malpractice claims); *see also* Richard Carl Shoenstein, Note, *Standards of Conduct, Multiple Defendants, and Full Recovery of Damages in Tort Liability for the Transmission of Human Immunodeficiency Virus*, 18 HOFSTRA L. REV. 37, 66-68 (1989) (discussing how alternative liability would play out in a case where a plaintiff with AIDS claimed that multiple defendants were responsible).

377. For a scorching indictment of the degree to which legal rules favor attorneys, see Brickman & Cunningham, *supra* note 12, at 151, and particularly the following statements:

significant role. That factor is simple—judges and lawyers fail to see the lawyer-client relationship as one of dependence. However, the client's dependence in any lawyer-client relationship is substantial, and the degree of dependence in litigation representation is extreme.[378]

An evaluation of the degree of dependence in the lawyer-client relationship has already been made by the Supreme Court. The Court has developed the doctrine of lawyer-client confidentiality because of its belief that the client's need to trust the lawyer is essential to the relationship.[379] To enhance the lawyer-client relationship, the Sixth Amendment right to counsel has been extended to include a right of privacy in such communications.[380] Neither courts nor administrative bodies can compel the revelation of privileged attorney-client communications.[381] The articulated purpose for the privilege is to protect the client's expectation that the attorney can be trusted.[382] The value that our legal system places on protecting the trust of the client has been held to transcend all other interests.[383] When the integrity of the attorney is

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> This is not the only example of lawyers creating special rules to govern their own conduct different from those they have developed to regulate the conduct of others. Consider the rules promulgated by lawyers for the medical and legal system. The malpractice doctrine rule for doctors evaluates conduct in light of the customary practice of physicians in good standing and requires that "there must be a want of ordinary and reasonable care, leading to a bad result." Conversely, under the malpractice rule for lawyers the client must show that "but for" the lawyer's negligence, the client would have won.

Id. at 151 n.9 (citations omitted) (quoting Pike v. Honsinger, 49 N.E. 760, 762 (N.Y. 1898)).

378. The proposal to apply alternative proof doctrines only in litigation malpractice cases conforms to the history of the development of these doctrines. Selective application of alternative causation doctrines is inherent in these fact specific doctrines. In every situation in which the doctrines have been applied, their scope has been limited to the specific fact sets that create the dependent status. Burdens of proof are only switched when the specific facts of the case demonstrate the dependency relationship, such as surgical injuries to areas of the body unrelated to the operation. Res ipsa is only applied on a case by case basis. Even in diagnostic malpractice, "loss of chance" doctrine is not applied unless the "delayed diagnosis" scenario exists. *See supra* Part IV.D.3.

379. *See* Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983).

380. *See* Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) ("[T]he Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private . . . .").

381. *See* Upjohn v. United States, 449 U.S. 383, 395 (1981) (broadening the application of corporate counsel privilege).

382. *See id.* at 389.

383. The standard by which clients are protected against incompetent counsel is much less rigid than that protecting the client against the attorney's revealing privileged communications. For a detailed analysis, see *Strickland v. Washington*, 466 U.S. 668 (1984); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 421 (1995) ("In *Strickland v. Washington*, the Court held that errors of a defendant's attorney rise to the level of a constitutional deprivation only if the defendant establishes that (1) the attorney's

not at issue, the client's ability to trust the attorney has been held to be more important than the fundamental interest of both justice and law enforcement.[384] As recently as 1998, the Court held that the role of the lawyer in our society is so critical to the protection of rights and privileges that lawyer-client confidentiality must survive both the client's death and a prosecutor's need for information.[385] The Court has held that society's interest in effective representation is so important that the criminal should go free and the innocent should be convicted rather than force the attorney to breach the sanctity of the relationship.[386] Because of that veil of privacy, the client's right to trust and rely on the attorney is protected. The client's ability to trust the lawyer has been protected beyond the client's death because the success of the representation depends upon the client communicating all information to the attorney. The attorney will be making critical decisions. The scope of this communication protection is just one example of the dependency in the relationship.

The greater dependence of the litigation client on the attorney becomes apparent when the role of the attorney and the relationship to the client is examined. Attorneys, by the nature of their training, know more about litigation than any other group in society. The attorney has superior training and access to information about the legal system. Knowledge of the legal system is the single factor that empowers the legal profession, providing the utility for its services. It is the profession's *raison d'être*. However, transactional clients know more about the underlying facts of their cases. They also know more about the economic and social problems inherent in potential deals, purchases, or agreements. Therefore, the attorney's only asset is knowledge of the legal system. That knowledge, however, is sufficiently valuable to have

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performance was constitutionally 'deficient,' and (2) this deficient performance resulted in 'prejudice.'" (footnote omitted)).

384. *See generally* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601 (1990).

385. *See* Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998).

386. The Court in *Swidler* held that the attorney-client privilege survives the client's death, because the knowledge that the communication will remain confidential even after death encourages clients to communicate fully and frankly with counsel. *See id.* The Court further found that the fear of disclosure leading to withholding information might be reduced if disclosure is limited to posthumous disclosure in a criminal context, *see id.* at 410, but it would be unreasonable to assume that it would vanish altogether.

created a vast profession with substantial control and influence over many important events. It is now inconceivable that substantial contracts, mergers, securities offerings, and the like would be completed without the involvement of an attorney.

The dependent nature of the relationship between the lawyer and client is thus magnified in litigation representation.[387] The client in a transactional matter has more knowledge of that transaction than a client does in any litigation. Thus, the knowledgeable transaction client has a greater ability to monitor the attorney's conduct of the representation and to take action to protect her own interests.

Regardless of whether litigation involves the protection of individual rights or the recapture of assets, the essence of the lawyer-client relationship is the reliance of the client on the lawyer. The client is dependent on the attorney to wend a clear passage through the Kafkaesque quagmire of pleadings, motions, document discovery, interrogatories, and depositions. Those are but the preliminary hurdles created by the judicial bureaucracy. After those hurdles are overcome, the parties then face the rigors of a trial. Although each step in this tortuous process has been created to ensure the fairness of the result, its arcane formulations transcend the typical party's common experience. The technicalities of litigation strategy and procedure are so great that few laymen have become familiar with its idiosyncrasies. A client relinquishes power or control and relies on the attorney for guidance down the pathways and around the pitfalls of the litigation. The attorney controls discovery and the investigative stages of the litigation. It is the attorney who decides what factual investigations should be made and which techniques should be employed. The attorney decides whether depositions are to be taken, whether investigators should be hired, and whether interrogatories should be filed. The client depends on the attorney to prepare, defend, defuse, protect, and, when all else fails, vindicate the client's interests.

Parties normally cannot proceed through the process without the assistance of and reliance on the trained legal professional. The attorney's obligation in return is to protect the client.[388] The ethics of the profession require the attorney to place the client's interest above all

387. *See* Koffler, *supra* note 36, at 41-43.

388. *See* Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEX. L. REV. 275, 285-86 (1994); *see also* Thomas D. Eisele, *Avalon Ethics*, 67 NOTRE DAME L. REV. 1287, 1300-09 (1992) (reviewing THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION (1991)) (criticizing Shaffer's discussion of the ethics of the "gentleman-lawyer" as compared to the lawyer bringing family values over to the practice of law and using Italian-American immigrants as an example to follow).

else.[389]

Another judicially developed doctrine corroborates the dependent nature of the litigation relationship. To further the goal of litigation efficiency, the attorney has been obliged to take virtually complete control over the client's case.[390] The control is so complete that, despite specific instructions by the client, the Supreme Court has held that counsel can refuse to argue frivolous and even nonfrivolous issues.[391] The Court has held that decisions about the filing of motions and the structure of legal arguments belong to counsel.[392] The client is thus pragmatically dependent because of the disparity of knowledge about the litigation process, and legally dependent because of the profession's arrogation of power over litigation decisions.

The dependent nature of the relationship is so obvious that professional rules have been created in some jurisdictions to provide special protections to the litigation client. For example, the New York State Court of Appeals has imposed special restrictions on retainer agreements, fee agreements, and other aspects of the representational relationships for the matrimonial bar.[393] The court's order was based

389. It is not an accident that litigation attorneys are the most often sued segment of the bar. Their power leads to its abuse, while the client's dependency leads to suspicion. According to a 1983-1985 American Bar Association survey, 52.8% of all malpractice claims were filed against the litigation bar. *See* A.B.A. STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, THE LAWYER'S DESK GUIDE TO LEGAL MALPRACTICE 16-17, 23 (1992).

390. In a litigated matter, the attorney is completely in charge of legal actions taken in regard to the court. The control, and corresponding responsibility, is so complete that an attorney can be sanctioned for frivolous motion practice even if the client specifically requested that the motions be filed. "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney." Wainright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). The attorney takes responsibility for making the day-to-day major decisions and, "must, as a practical matter," do so without even consulting the client. *Id.*; *see* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.2(b), at 200 (3d ed. 1993) ("Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate."). The only exceptions to this exclusive province are the guilty plea, accepting a plea agreement, a jury waiver, the decision to testify, and the decision to appeal. *See id.* § 4-5.2(a), at 200.

391. *See* Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

392. *See id.*; Berger, *supra* note 376, at 11-12 ("By the early 1980s, . . . the Court had accorded the attorney almost plenary power to bind the defendant, both in cases of overt lawyer-client disagreement and in cases where counsel had 'waived' a client's rights without his approval or even knowledge, often by heedlessness rather than tactics.").

393. *See* Daniel Wise, *Divorce Lawyers Win Most Fee Disputes*, N.Y. L.J., Dec. 14, 1995, at 1 ("The new rule permitting clients to force lawyers to submit disputed fee

upon a study of the practices of the matrimonial bar.[394] The study revealed that the combination of indigence and the emotional stress caused by the matrimonial dispute left the clients vulnerable.[395] They were unable to protect their own interests in the relationship with their attorney.[396] As a result, the study recommended limitations on the matrimonial bar's right to seek nonrefundable retainers and to obtain liens on the marital residence as security for fee payment.[397] The special characteristics of matrimonial representation necessitated modifications in the traditional lawyer-client relationship.

The disparity of knowledge that generates power and the potential for abuse in matrimonial litigation is present in all other litigation as well. The members of other litigation bars similarly dominate their clients. The special relationship demands special duties.[398]

The underlying justification for these special rules regarding legal representation is the undisputed fact that representation makes a difference. The nature of the relationship imposes a dependent status on the client in large part because of the importance of representation to success. The importance of representation to a client's chances of winning a lawsuit is so clear that it has been enshrined in Supreme Court doctrine. There is an extensive line of Supreme Court decisions expressly based on the finding that counsel is essential to litigation success. Over thirty years ago, in *Gideon v. Wainright*,[399] the Court held that counsel's guiding hand was so critical to a fair trial that a trial without counsel was a per se violation of a defendant's rights.[400] "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in

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amounts to arbitration went into effect on Nov. 30, 1993, as part of a package of reforms designed to redress serious problems in handling matrimonial cases."); *infra* notes 496-97.

394. *See* N.Y. COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS REPORT (1993).

395. *See id.* at 1.

396. *See id.* at 6.

397. *See id.* at 11-23.

398. Courts have been reluctant to impose liability for merely failing to act, but have tended to find a duty of affirmative action when there is some "special relationship." *See* KEETON, *supra* note 8, § 56, at 373-75. Based on an analysis demonstrating that the traditional standard of proof is merely a "surrogate tending to ensure that [the] logical conditions [of direct inference] are met before liability is imposed," Walker, *supra* note 267, at 304, a compelling case is made for the adoption of a form of "substantial factor" causation that would permit plaintiffs to prevail in loss of chance cases.

399. 372 U.S. 335 (1963).

400. *See id.* at 344 ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him.").

ours."[401] In subsequent decisions, the Court made clear that the basis of the rule requiring appointment of counsel was that represented clients got better results.[402] The Supreme Court has correlated competent representation with success in litigation, and is so confident about the importance of the relationship that it has used the conclusion as the basis for its interpretation of the scope of the Sixth Amendment right to counsel.

This proposal to impose a special obligation on only the litigation bar is a tort reflection of the special role the Court has given litigation counsel. The attorney and her client share a special relationship forged by the disparity of power necessary for the attorney to do her job. As a result, the attorney enjoys a number of privileges designed to protect, enforce, and enhance that special relationship.[403] Unfortunately, the concomitant obligations of the attorney to her client are not similarly enforced. Once a malpractice action is filed, legal recognition of the special relationship disappears. The disparity of power created by the attorney's superior knowledge and control of the case do not obligate that attorney to relinquish any of that knowledge in the subsequent malpractice action.[404] In malpractice litigation, the previous special

401. *Id. Gideon* was a Sixth Amendment case; however, the critical issue for the court was the Fourteenth Amendment incorporation issue. Gideon had represented himself at his trial. A review of the transcript suggested that he did a reasonable job. *See id.* at 337. Indeed, he certainly did a better job than those attorneys who have been found incompetent. Thus, the Court dramatically underscored the vital role of the attorney in the adversary system, for even competent representation was deemed insufficient when performed by a layman.

402. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 31, 33 (1972). For an extensive review of counsel effectiveness studies, see generally Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853 (1996).

403. The single most dramatic legal rule evidencing the special significance of the litigation attorney's conduct and distinguishing the litigation attorney from other members of the bar is the rule that grants the attorney absolute privilege against defamation actions for statements made *in the course of a judicial proceeding*. *See* Kennedy v. Cannon, 182 A.2d 54, 58 (Md. 1962); Maulsby v. Reifsnider, 14 A. 505, 510 (Md. 1888); Irwin v. Ashurst, 74 P.2d 1127, 1130 (Or. 1938) (recognizing that the same privilege applies to a judge).

404. *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 570 (1978). The authors state:

> The lawyer's economic interest in the outcome may tempt him to use improper tactics for ensuring victory and to slight his duties as an officer of the court; further, the lawyer may find himself unable to act disinterestedly in advising his client and unwilling to allow client participation in controlling the lawsuit.

Id.

relationship becomes irrelevant. The lawyer is given all of the individualistically justified protections of the traditional duty and proof doctrines.

Under existing rules, the attorney's abandonment of her client in the malpractice action is furthered and legally sanctioned by various doctrines. These doctrines merge to lessen the chance of a client recovering.[405] Most significant among these is the traditional individualistically based cause in fact doctrine. Its effect in the malpractice tort is to give the benefit of the doubt to the defendant. It turns the legal table on the client.[406] During the underlying litigation, the attorney receives compensation and trust because the legal profession maintains itself as the repository of knowledge and skills that help the client.[407] In a malpractice action, the attorney's significance, although previously assumed, is eradicated. The causation doctrine requires the ex-client to prove the attorney's significance in the litigation, i.e., that the incompetent representation was a causative factor in her loss.

In effect, the individualistically justified causation doctrine is based upon a presumption that incompetence does not matter. Its logical underpinning is the assumption that competent and incompetent representation are equally likely to produce the same result. Malpractice

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405. And effective they are in protecting the bar. *See generally* Manuel R. Ramos, *A Post Conference Reflection: The "Third Parties" Would Have Wondered— Why Can't Lawyers Be Treated Like Everyone Else?*, 37 S. TEX. L. REV. 1277 (1996). Professor Ramos stated:

> However, even with insured lawyers there continues to exist unfair and special defenses that only lawyer defendants are entitled to assert against injured clients and nonclients seeking a remedy. Depending on the jurisdiction, clients can be denied their opportunity to hold a former lawyer accountable to a jury if they discover the malpractice after the expiration of "occurrence type" statutes of limitations or the short statutes of repose; if their lawyer can come under the judgment immunity rule regarding a "debatable" legal issue; if the claim is for negligent settlement advice; if years later they are unable to obtain the witnesses and evidence required to try the "case within a case"; if the legal malpractice claim has been assigned; or if lawyers are exempt from consumer protection statutes.

Id. at 1279-80 (footnotes omitted); *see* Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 784 (1996).

406. *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). Referring to ABA studies, the author reported that "[a]s of 1984, more than two thirds of all malpractice actions ended in no payment to the client.... [In addition,] only 32.6% [of the malpractice claims reported to insurance companies throughout the country between January 1981 and September 1985] resulted in indemnity payments." *Id.* at 831 n.129. "[L]itigation against lawyer-defendants is particularly difficult to win." *Id.* at 831; *see* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 591 n.449 (1985).

407. *See* Ramos, *supra* note 405, at 1278-79 ("[L]awyers pretend to be in a profession where lawyers owe the utmost loyalty to their clients and have obligations to society....").

does not establish prima facie proof that the loss in a lawsuit was caused by the attorney. As a result of this presumption of the irrelevance of competency, proof of malpractice has not been considered a substantial factor in causing a loss. Res ipsa loquitur has not been applied as a judicial recognition of the importance of competent representation. The courts have also refused to switch the burden of proof on causation to the defendant. Despite the judicial recognition of the critical role of representation and of the lawyer-client relationship, no shred of this recognition exists in the malpractice tort.

It has always been a tortuous process to attempt to reconcile these rules with the concept of professional ethics.[408] The attorney has every responsibility to the client until she breaches them.[409] Then, the attorney has no shred of responsibility to her client. The ex-client has the duty to pierce the attorney's records, pierce the solidarity of the profession, identify the errors, and prove that the errors were harmful.[410]

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408. *See* Note, *supra* note 51, at 1102. The author states:

> [C]ourts have been unable to gloss over the conflict between the client-protective function of the court-adopted ethics codes and their own refusal to permit clients who seek recovery for attorney-caused harms to invoke the codes' protection.... [A] variety of doctrinal and policy arguments have driven many judges to grant only minimal consideration to that conflict in determining the proper role of the ethics codes in malpractice proceedings....
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> ....
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> Such denial also causes unfairness to those whom the legal system is designed to serve. In effect, the legal profession offers to hold itself accountable to a defined code of conduct—as long as those in charge of the accounting are professional colleagues. When the power to demand accountability shifts to clients, however, plaintiffs must recreate the standard of care from the ground up in each case, without reference to any verifiable or pre-existing rules of conduct. At best, this divergence appears to be a de facto double standard; given the legal profession's unique responsibility to regulate itself, the appearance is less than ideal.

Id. at 1102, 1119 (footnote omitted).

409. It is not the purpose of this article to review the debate on responsibility. For such a debate, see generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991). However, Professor Glendon's book might well have been even more impressive if the legal profession's indifference to its responsibilities in the tort of legal malpractice was discussed in addition to her insightful analysis of the general tort "no duty" rules. The "no duty" of affirmative action rule is an unsightly aspect of the attempt of Anglo-American jurisprudence to balance competing interests, but the legal profession's shedding of its duties to a client, like a snake shedding its skin, affects far more people and is, thus, a more important aspect of our legal system.

410. Koffler provides:

> The test frequently favored by the courts is what "*would have*" been the result in the underlying action. However,... where the client was or would have been the plaintiff in the underlying action, it is observed that *Lewandowski v.*

This causation doctrine applies even if the attorney concedes that the representation was deficient. Without regard to the specific facts or the nature of the relationship, the malpractice plaintiff has the burden of proving that malpractice caused damage. Even if a client proves that an attorney breached the bond of trust and negligently attended to the client's legal needs, the client still must prove that the attorney billed for hundreds of hours of slipshod work, ignored the client's interest, or placed his or her own self-interest in front of the client's. The attorney, on the other hand, is granted the protections of the individualistically justified doctrines of proof. The causation defense is the best friend of the incompetent attorney.[411]

The rigid rules requiring the plaintiff to meet those proof burdens create an embarrassing aura of special treatment. An attorney can admit incompetence, keep the client's fee, and then exploit the ex-client's dependency-generated ignorance in the malpractice action. The attorney can prevail, not because the incompetence was irrelevant to the poor result, but because the very negligence that caused the injury deprived the client of the ability to meet a burden of proof. In no other area of the causation doctrine has the defendant been allowed to benefit from negligent conduct that deprives the plaintiff of access to information. Consideration of the appropriateness of creating a loss of chance option in legal malpractice cases, however, cannot end with the determination that there is a sound policy reason to impose a legally enforceable duty to carefully represent clients with weak cases.

Although the lawyer-client relationship imposes a dependent status on the client, before alternative liability doctrines can be adopted, the dependency must be shown to be detrimental to the plaintiff. The dependency must deny the plaintiff information and a fair opportunity to

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Continental Casualty Co., [276 N.W.2d 284 (Wis. 1979),] makes reference to the test of what "should have" been the result in the underlying action.

Koffler, *supra* note 36, at 58 (footnotes omitted).

411. In using the case-within-a-case defense, the attorney-defendant's goal is to diminish the value of the underlying case as much as possible. The defendant attempts to persuade the jury that the case had no value ("even a competent attorney would have made no difference with this dog"). This argument is made despite the fact that the attorney (the defendant) took this case to begin with and charged substantial fees while keeping it going. To maintain that a case has no merit or is of little pecuniary value at this stage of the game certainly reflects poorly on the well-compensated attorney. But it more greatly discredits the system that routinely encourages attorneys to interpose such a defense. With this defense the lawyer is trying to have her cake (the fee) and eat it too (deny that the activities the fees generated were worthwhile). *See* Fowler, *supra* note 14, at 25. The extent to which the individualistic burdens have been developed to protect attorneys is best exemplified in *Shaw v. State*, 861 P.2d 566 (Alaska 1993), in which the court found that in the majority of courts, the burden is placed upon the plaintiff in a malpractice action based on representation in a criminal case to prove *both* his actual innocence *and* that the malpractice caused the conviction. *See id.* at 572-73.

prove her case. The core of this question requires an analysis of the efficacy of the case-within-a-case component of the malpractice action, to determine whether it can reasonably recreate the malpractice-tainted proceeding.

The fundamental premise justifying the case-within-a-case element of legal malpractice is that the jury in a malpractice trial can come to a reasonable and fair determination of what would have happened if the underlying action had not been contaminated by the defendant attorney's negligence. With the acceptance of this presumption, the legal malpractice case presents no unfair proof problems for plaintiffs. The negligence of the attorney deprives the client of nothing. The evidence necessary to prove the case exists. It can simply be presented at the malpractice trial. If this view is accurate, the only detriment to the plaintiff is the loss of time between the underlying trial and the malpractice trial. However, the accuracy of this view must be carefully considered. Decisions to reject individualistically justified proof burdens are based upon the existence of a dependency that deprives the plaintiff of evidence.[412] If malpractice causes no information deficit, there is no dependency relationship sufficient to justify application of a status-based rule of proof.

Such a possibility does not exist in the type of alternative proof fact sets that led to the adoption of loss of chance in contract and diagnostic medical malpractice cases.[413] In a medical malpractice case, the jury can never know what would have happened to the patient if the doctor had not negligently delayed the commencement of treatment. The fundamental elements of corrupted medical treatment cannot be changed. The patient's health cannot be restored to its prenegligence status to determine the progress of the disease without the negligence. In the contract fact sets, a lost interview cannot be rescheduled to determine who would have won a contest.[414] Similarly, in the fact sets that led to the adoption of the substantial factor standard, the impediment to proving what happened cannot be surmounted.[415] Whether Ms. Reynolds would have fallen if the stairs were illuminated can never be known.[416] Which defendant's shotgun propelled the pellet

412. *See supra* Part IV.C.4.
413. *See supra* Part IV.D.3.
414. *See supra* notes 341-48 and accompanying text.
415. *See supra* Part IV.C.4.b.
416. *See supra* Part IV.C.4.b.

that hit Mr. Summers is not ascertainable.[417]

It seems that a similar logical barrier to replication does not exist in legal malpractice cases. The proof that should have been presented in the original case is available; in theory it can be presented to the malpractice jury. The client lives, the witnesses are available, and a jury can be found to decide the merits of the underlying case. It thus appears that the case can be tried, or retried as it should have been originally.

This analysis, however, is flawed in two ways. The first flaw stems from the fact that the only mechanism by which the legal malpractice plaintiff can obtain the information about her case is through discovery in the malpractice action. The ability of a party to obtain information through discovery is not unique to the legal malpractice fact set. In *Ybarra*, the anesthetized patient had access to discovery that would have provided all of the information known to any of the defendants. *Ybarra* was still considered dependent because of his helplessness during the operation.[418] Similarly, in the DES cases, the corporate defendants' records were available through discovery.[419] Nonetheless, alternative liability was imposed. Access to information through discovery is not a sufficient protection for the party who is in a dependent status.

The second flaw centers upon the viability of recreating the original result through the case-within-a-case component of a malpractice trial.[420] The belief that the original case can be replicated is an illusion. Legal malpractice defendants have been able to maintain the illusion only by avoiding careful analysis of the dispositive factors that are irreparably altered as a result of litigation malpractice.[421] The malpractice jury can never determine what would have happened in the underlying litigation.[422]

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417. *See supra* notes 256-73 and accompanying text.

418. *See supra* note 288 and accompanying text.

419. *See supra* notes 265 & 288.

420. *See* Koffler, *supra* note 36, at 47 ("If there is no damage to the client in the nature of emotional distress, and the client is not entitled to punitive damages, the 'suit within the suit' may be the only available refuge for the client seeking an award of damages . . . ."). Koffler also discussed *Gautam v. DeLuca*, 521 A.2d 1343 (N.J. Super. Ct. App. Div. 1987), in which the court implied that the case-within-a-case approach is not needed. *See* Koffler, *supra* note 36, at 47.

421. *See* Jody Keys, Comment, *The Use of Expert Testimony in Actions Against Litigation Attorneys*, 14 WILLAMETTE L. REV. 425, 440 (1977) ("The notion that a jury can determine the verdict an earlier jury would have rendered by considering psychological and other data on the first jury is at best debatable.").

422. The degree of special protection offered to the bar in malpractice litigation permeates decisions at every level. In a medical malpractice action, there is no dispute about the issue the jury is to decide. That issue is what would have happened but for the negligence. However, the bar has been successful in generating doubt about the standard in legal malpractice actions. The defense bar urges the court to charge the jury that their job is to decide what *should* have happened. Through this change, the litigation bar

A. The Malpractice Case-Within-a-Case Does Not Fairly Recreate the Lost Chance of the Negligently Lost Trial

The illusion of replicability is founded on the myth that cases are decided exclusively on their facts.[423] Although the facts are important, many other factors participate in the complex enterprise of a trial and sway the outcome. Among the collateral factors that are critical to the disposition of a lawsuit are the specific jurors and the specific judge. The clearest example of the critical role of the exact jury in case outcomes can be seen in the difference in damage awards different juries give to plaintiffs. The facts of a knee injury do not change if the case is tried in Bucks County, Pennsylvania or in Brooklyn, New York, but the people who are on the jury will be different. Their attitudes will be different and the size of their verdicts will likely be dramatically different. Even within the same jurisdiction, the compensation awarded for similar injuries varies widely because of the identity of the specific people who happen to be on the jury.

The belief that the identity of the specific jurors on a case is an important right of the parties is enshrined in the Fifth Amendment. The importance to the parties of the exact people who compromise the original jury in a lawsuit is such an important factor in the just outcome of a case that it has gained constitutional protection. The standard for determining when double jeopardy rights vest is the selection of the jury.[424] Once that jury is impaneled, a criminal defendant gains a

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would deprive the client of compensation for her actual loss. Her loss is the loss of what *would* have happened. What *should* have happened is an entirely different matter. Reality often provides individuals with more than they deserve. But the fact of malpractice is that it deprives people of exactly that— what they would have gotten. The impact of this confusion in the compensatory obligations of the bar helps to insulate the bar from the onerous requirement of fully compensating injured clients. *See* Charles M. Liebson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L.J. 1, 9 (1996) ("The question is whether the jury at the second trial should decide what the first jury *would* have done if the case had been properly tried, or simply what the first jury *should* have done.").

423. *See* Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 593-95 (1932); Karl N. Llewellyn, *A Realist Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 438 (1930). *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1930); K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

424. *See* Crist v. Bretz, 437 U.S. 28, 35-36 (1978). The Court held that once a jury is selected, a defendant has a "valued right to have his trial completed by a particular tribunal." *Id.* at 36 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). The Court also

constitutional right to a decision from those particular jurors[425]—they are unique. The defendant in the criminal case chose them. A decision from them is her right. The legal malpractice plaintiff has lost that jury. It can never be recreated. Its decision, without the influence of malpractice, can never be known.

Similarly, the personality and legal viewpoint of the judge have a decisive impact on the course of litigation. The judge controls decisions to admit or exclude evidence. The judge rules on motions to amend or dismiss pleadings. These rulings can vastly alter the course of a trial.[426] The judge, however, can also affect the result through more intangible actions. The judge's tone of voice, rulings on form of question objections, and general attitude toward the parties can send a message to the jury. These latter factors are practically unreviewable and usually are not contained in the printed record.

A case-within-a-case retrial of the issue can never restore these critical factors. The impact of unique jurors and a specific judge on the outcome of a case is so substantial that trying the issue in a different forum cannot recreate the pattern of factors that would actually have caused the result but for the negligence. The illusion of knowledge about the original outcome is created. The reality is not.

The case-within-a-case concept suffers from a further defect. There is a core difference in the "jury issue"[427] in the two cases. In the two cases,

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declared that an essential component of that tribunal was the defendant's participation in the selection of its members. "The federal rule .... reflects and protects the defendant's interest in retaining a chosen jury." *Id.* at 37-38.

425. *See supra* note 424.

426. The criminal prosecution of television sports announcer Marv Albert is a prime example. *See* Michael Janofsky, *Marv Albert Pleads Guilty and Is Dismissed by NBC*, N.Y. TIMES, Sept. 26, 1997, at A1. The defense anticipated being able to undermine the credibility of the complainant by showing that she had engaged in a course of conduct involving retaliatory actions against others. This evidence was entirely excluded. *See id.* Further, the defendant did not believe that testimony about an alleged prior similar act would be admitted. The trial judge admitted the prior similar act evidence and excluded the retaliatory course of conduct evidence. *See id.* The result was a trial-ending guilty plea. *See id.* A different judge might well have decided these two issues differently. In light of the standard of review, either ruling would probably have been sustained on appeal. *See, e.g.*, Tyson v. State, 619 N.E.2d 276, 289-92 (Ind. Ct. App. 1993).

427. The "jury issue" is the term for the fundamental issue that the jury has to decide. This issue may not be the technical legal or factual issue presented in the charge. In some cases, for example, the jury issue might be, "Is this the type of person who would do this type of thing?" *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 7-8 (1994). A similar concept was applied to explain the importance of the first Reagan/Carter debate in the 1980 presidential election. Theoretically, the electorate was deciding on the policy initiatives of the two men. The jury issue, however, was whether Reagan could be trusted with the atom bomb. *See* Peter Goldman et al., *Campaign '80: The Winner Is . . .*, NEWSWEEK, Nov. 3, 1980, at 27, 27; *see also Washington Whispers*, U.S. NEWS & WORLD REP., Nov. 3, 1980, at 20, 20. It was reported:

the jurors are being asked to resolve different disputes. In the underlying action, the focus is on the conduct of the individuals who are before them. The defendant did something. The jury must decide whether it was proper and whether it injured the plaintiff. The plaintiff who was hit by a car, for example, stands before the jury seeking judgment against the driver of the car. The jury must evaluate who is more deserving of the verdict. That is not the setting in a malpractice action. The individuals before the jury are the attorney—a very different person from the car driver—and the client. These two people were involved in a different kind of relationship than were the defendant car driver and the pedestrian plaintiff. The act of judging the individuals inherently involves judging the relationship that led to the injury. Attorneys present very different personas to the jury than the defendants in the underlying actions. They acted improperly for different reasons and created different risks. The speeding driver could kill people. The lawyer who is not energetic and does not review all of the documents is just as negligent as the speeding driver, but that lawyer may be perceived as presenting far less danger to society.[428] This difference can be critical to outcomes on both liability and damages.

Whether the issue is liability or damages, the result that would have been achieved had the trial not been destroyed by malpractice cannot be duplicated. The result of that trial is the composite of those individuals who were on the bench and in the jury box. Those people, and thus their verdict, are as unavailable as is the person who died because of medical malpractice. In both cases the result of proper representation cannot be replicated.

B. Replicability Test

The conclusion that the case-within-a-case process cannot fairly replicate the chance of victory for a plaintiff with a weak case does not

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> One thing both sides agreed on in the Carter-Reagan TV debate: The President had to score a clear victory in order to come out ahead. If Reagan were to hold Carter to a draw, the Republican contender would torpedo the Democrats' argument that he was not of presidential caliber.

Id.

428. Some in the legal malpractice defense bar agree with this claim that jurors will view the different defendants, the one in the underlying case and the one in the malpractice case, differently. However, their view is that the jurors so dislike lawyers that it is the malpractice defendant who suffers from jury bias. *See* Interview with Peter Contino, Rivkin, Radler & Kremer, in Uniondale, N.Y. (Mar. 5, 1999).

rest on mere argument. The failure to replicate is demonstrated by applying a "replicability test." The exercise of comparing known results against predicted results will help reveal the degree to which the present system fails to protect negligently represented clients. Although weak cases occasionally win at trial, the apparent lack of merit in the case always prevents the plaintiff who had the underlying weak case from prevailing in the case-within-a-case segment of the later malpractice trial.

Thus, the cases selected for this analysis are ones in which a reasonable attorney would predict that the client would lose. This is critical because the inequity of the case-within-a-case element only exists in malpractice actions in which the client always had a losing case. In these cases, it is the salvation of the inept attorney. Therefore, the replicability test explores the capacity of the case-within-a-case segment to protect the client when the client's success is unpredictable.[429]

The replicability test is an objective measurement of the reliability of the case-within-a-case element. The test is simple. The first step is identifying a known result: the jury verdicts in actual cases. The next step is to hypothesize malpractice in that case and assume that the malpractice caused a different result. The final step is an analysis of the probability that the malpractice jury would come to the same result as the actual jury—the actual verdict. If the case-within-a-case process reasonably replicates the original result, the two juries should, within a margin of error, come to the same judgment. However, if the analysis demonstrates that there is virtually no probability of the second jury replicating the actual verdict, then the case-within-a-case mechanism is not a valid mechanism for protecting the client against the loss occasioned by legal malpractice.

This reverse prediction technique is commonly used in scientific analyses. For example, scientists who have developed models that show the impact of global warming are challenged to demonstrate that their models would predict the present environment, if run with data from previous decades.[430] In the legal context, this scientific method involves

429. Thus, it is the legal malpractice equivalent of the medical malpractice patient with a 35% chance of survival without malpractice. One-third of those patients will survive. All of them would lose a malpractice action, however, if they had to establish that it was more likely than not that they would have survived.

430. If greenhouse computers are set to the conditions of the past in order to see if they "predict" present climate, the result would be global temperatures that should have risen about five degrees Fahrenheit by now. This sentence is not a summary of current forecasts, as Mr. Oppenheimer of the Environmental Defense Fund suggests, but is confirmed by the upcoming report of the Intergovernmental Panel on Climate Change. *See* William K. Stevens, *Computers Model World's Climate, but How Well?*, N.Y. TIMES, Nov. 4, 1997, at F1. Andrew R. Solow reported the following regarding

analyzing "stories" from the courtroom.[431] Applying the reverse prediction method to a real case will demonstrate the degree to which trial outcomes vary from the predictable.[432]

Any discussion of the ability of a second jury to replicate the result of a prior jury in a case in which the result is not predictable must consider the trials of O.J. Simpson. His overwhelmingly publicized prosecution and acquittal for the murder of his wife and Ronald Goldman, and the subsequent civil trial in which Mr. Simpson was found liable for wrongful death, provide a dramatic representation of the weakness of the replicability concept. These two trials reveal the gap between replicability and reality. The case is a perfect model to test replicability because there is no need to assume the result of a subsequent civil trial on the identical issues. Rather than having to speculate about what would have happened in a derivative trial with a different judge and jury, the Simpson case includes a subsequent civil action.

The test begins by positing the exact facts of the real case. Three assumptions are then added. The first is that Mr. Simpson was convicted of the criminal murder charges, and the second is that his attorneys were concededly negligent in his representation.[433] Based upon these two assumptions, the third assumption is that Simpson has brought a civil damage action against his attorneys for legal malpractice.

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computer models:

> The second way of making climate predictions is through computer models. These models are large systems of equations representing our understanding of climate processes. Because our understanding is limited, the models are of limited use. For example, these models have a hard time reproducing current climate from current data. They cannot be expected to predict future climate with any precision.

Andrew R. Solow, *Pseudo-Scientific Hot Air*, N.Y. TIMES, Dec. 28, 1988, at A27.

431. As in other settings in which the unique experiences of the individuals involved preclude total understanding by outsiders, only the trial attorney has experienced the vagaries of a jury trial. Nobody outside the world of the courtroom can really appreciate the degree to which the exact individuals who comprise the "trial"—the jurors, attorneys, and judge—affect the outcome.

432. The inherent uncertainty of trial outcomes does not, however, apply to settlement negotiations. The standard for settlement predictions is the custom and practice in the region. This is a standard created by attorney conduct, dominated by attorneys, and predictable by them.

433. For the purposes of this hypothetical, the exact nature of the assumed malpractice is not important. It could be the failure to make necessary motions, interview available witnesses, or comply with discovery rules. The critical concepts are: malpractice is conceded by the attorneys, and their defense against civil liability is that Mr. Simpson cannot prove it is more likely than not that he would have been found not guilty without the malpractice.

Because the attorneys in this hypothetical are forced to concede that they were negligent, their defense against civil liability would be that the negligence did not cause the conviction—the case-within-a-case segment of the malpractice trial. By imposing this defense, they would require Simpson to prove, by a preponderance of the evidence, that he would have been acquitted in the criminal case. The Simpson case fits the profile because evidence of his guilt appeared overwhelming. A brief summary of just some of the incriminating evidence includes: DNA matching blood was found at the scene of the crime; the victims' blood was discovered in his car and on his socks; Simpson had purchased a pair of expensive and rare gloves, and one was found at the crime scene; he had a cut on his hand that the prosecution argued explained how his blood came to be at the crime scene; and finally, he had no alibi.[434]

Virtually everyone in the United States knows that O.J. Simpson was acquitted of the criminal charges against him. However, to estimate the ability of a malpractice jury to replicate the result of the trial had it not been hypothetically corrupted by attorney malpractice, it is necessary to determine whether Simpson could prove that he would have been acquitted. Fortunately, the answer need not be derived from speculation as there was a civil trial. The issue in that trial was whether the plaintiff could prove that O.J. Simpson was responsible for the murders. Once again, the publicity surrounding the case has made the result common knowledge—Simpson was found liable. Thus, the results in the two trials of the same factual issues were different.

Commentators have argued about the factors causing the difference. One view is that the lower burden of proof combined with the absence of a Fifth Amendment right not to testify in the civil case caused the difference.[435] Another is that the civil attorneys learned from the mistakes of the prosecutors.[436] A third is that the rulings of the different judges were dispositive.[437] But the consensus is that the acquittal in the criminal case was the result of the exact jury that was empaneled in the criminal case.[438] That jury did not sit on the civil case. The exact jury,

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434. *See generally* JOSEPH BOSCO, A PROBLEM OF EVIDENCE: HOW THE PROSECUTION FREED O. J. SIMPSON (1996); JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON (1996).

435. *See* B. Drummond Ayres Jr., *Back on Stand, Simpson Again Denies Role in 2 Killings*, N.Y. TIMES, Jan. 14, 1997, at A10 (reporting Simpson's testimony during the civil trial).

436. *See generally* Elaine Lafferty, *The Inside Story of How O.J. Simpson Lost*, TIME, Feb. 17, 1997, at 28 (analyzing the usefullness of evidence in the civil trial).

437. *See* William Booth, *Legal Experts Cite Many Factors as Making a Difference in Simpson Verdicts*, WASH. POST, Feb. 6, 1997, at A6.

438. *See* Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, AM. LAW., June

and therefore the verdict of that jury, was not duplicated in the civil case and certainly would not have been duplicated in a hypothetical malpractice action.

The result of this analysis is clear. In the real world without malpractice, O.J. Simpson was acquitted. In a retrial of the same issues he was found liable. The result of the first trial was not replicated because it was not replicable; its lack of replicability is a feature shared by all cases in which the predictable result is that the client will lose.

The legal system produces unexpected results. The jury considers the fates of the human beings that are parties in a particular case. The legal system focuses an enormous amount of energy on the task of arriving at a result that juries perceive as fair *for those parties.*[439] A jury's verdict is a composite of the technical law that it is required to apply and its communal sense of justice. A jury verdict arrived at during a secret deliberation is inherently an equitable resolution. Change one of the parties and the equities change. Change one of the jurors and the perceptions change. These intangibles have a great impact on the jury.

The case-within-a-case concept is a sham. The legal significance of the inability to replicate the underlying case should be that plaintiffs with weak cases are not being adequately compensated for their lost chance with the initial jury. They lost their jury.[440] The result of that proceeding will never be known, but the loss that the plaintiff suffered can be compensated. Long shots sometimes win. They are in the race and they have a chance. Therefore, negligent attorneys should be liable for the chance that they took from their clients.

1997, at 5, 5; Tim Hanes, *American Justice Is the Loser*, TIMES (London), Feb. 6, 1997, at 16; Isabel Wilkerson, *Whose Side to Take: Women, Outrage and the Verdict on O.J. Simpson*, N.Y. TIMES, Oct. 8, 1995, § 4, at 1. *See generally* NATHAN AASENG, THE O.J. SIMPSON TRIAL: WHAT IT SHOWS US ABOUT OUR LEGAL SYSTEM (1995); JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O. J. SIMPSON IN A HOUSE DIVIDED (1996).

439. The desire of the jury to reach a verdict it perceives as fair is so strong that there is little doubt juries can, and do, nullify the law when such drastic conduct is perceived as appropriate to achieve the verdict they believe is fair. The chance of obtaining a nullification verdict is certainly one of the benefits of having a right to select and retain your jury. For a discussion of the degree to which the system should encourage jury nullification, see generaally *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239 (1993).

440. Even if the case did not get to trial because of malpractice in motion practice, client counseling, or case management, there still should have been a jury, and that jury will not be the malpractice jury.

There is no logical basis to conclude that the case-within-a-case trial can recreate the result that, absent negligence, would have been reached in the malpractice-tainted proceeding. Therefore, the only remaining justification for relying on it for the resolution of legal malpractice controversies is that, whatever its weaknesses, it has the appearance of fairness. According to this hypothetical justification, justice correlates more to the appearance of fairness than its reality. Thus, the "illusion of replicability" may be a sufficient basis to justify imposing the burden of proof on the client, because the appearance of justice is justice.[441] This theory would justify distinguishing legal from medical malpractice actions, as the legal malpractice action appears to be fair under traditional proof standards.

It is not necessary to explore subtle philosophical theories of justice to destroy the notion that special protections for attorneys can be justified under this type of logic. Attorneys are part of the nation's elite, and they have predominant control of information and decisions in litigation.[442] The client is often not a member of the elite, and when she is not, she is always less educated in the law. Even in an academic world in which the relativity of all events has become an accepted reality[443] and virtually nothing can be neutrally justified as superior or inferior, the protection of the elite against the economically and educationally weaker segment of society is not urged.[444] The attorney's domination of the relationship between lawyer and client precludes the special protection that the case-within-a-case process represents. In such a context, any suggestion that an unfair doctrine should remain the law because it appears to be fair is nothing more than a rationalization for privilege.

The most important principle in developing the criteria for tort review of client representation should be reinforcement of the legal community's responsibility to the client community. Any system that

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441. *See* Phillip J. Closius, *Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action*, 74 NEB. L. REV. 569, 575 (1995); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 42 (1987); Philippe Nonet, *In Praise of Callicles*, 74 IOWA L. REV. 807, 807-13 (1989); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 560 n.128 (1984).

442. *See supra* notes 378-92 and accompanying text.

443. *See, e.g.*, Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 327-28 (1996); Jay Tidmarsh, *Whitehead's Metaphysics and the Law: A Dialogue*, 62 ALB. L. REV. 1, 41 (1998); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 475 (1990).

444. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 63-64 (1984); A.E. Keir Nash, In Re *Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274, 327 (1983).

minimizes the possibility of deterring negligent representation unduly protects the bar. Because lawyers predominantly create the rules, continuing to provide the bar with this protection creates the appearance of impropriety.

It is essential that the litigation bar accept, and not attempt to avoid through litigation, its responsibilities to the client. To achieve this result, a legal structure must be adopted that extends the special lawyer-client relationship that exists in the representational stage through any adversarial proceedings. Once attorneys have accepted the responsibilities and the rights of representing a client in litigation, a special continuing duty exists. Indeed, the least compelling situation in which to terminate the attorney's special duty to her client is when the client claims that she was incompetently represented. The integrity[445] of the profession depends upon creating and reinforcing rules which demonstrate that lawyers deserve the trust of society. Alternative proof doctrines are the mechanisms through which this special duty can be implemented.

VI. ALTERNATIVE PROOF DOCTRINES IN LEGAL MALPRACTICE ACTIONS

Clients should be able to trust their attorneys, and all attorneys, in exchange for this trust, should have greater responsibilities to their clients where representation was negligent. Applying alternative causation doctrines will begin the task of synthesizing the malpractice tort with the ethical obligations of client representation. Alternative proof doctrines should be incorporated into the cause in fact element of the legal malpractice tort.[446] The doctrines that underscore and protect the dependent status inherent in the lawyer-client relationship also illuminate the applicability of alternative proof doctrines to the legal malpractice tort.

The Supreme Court's holdings on the Sixth Amendment right to counsel justify the incorporation of the substantial factor doctrine. Additionally, the various doctrines that establish the attorney's control

445. *See generally* STEPHEN L. CARTER, INTEGRITY (1996) (providing an analysis of the critical role of integrity in social institutions).

446. Alternative causation doctrines are well developed. *See generally* Porat & Stein, *supra* note 302, at 1891 (discussing the alternative causation doctrine). Legal malpractice victims, however, have generally been denied such assistance. *See supra* Part III.

over strategic litigation decisions, when considered in the context of the settlement rate in litigation, support the adoption of the alternative proof doctrines of burden switching and loss of chance.

A. Substantial Factor Doctrine

The substantial factor doctrine is particularly applicable to litigation malpractice. The courts in structuring duty and proof burdens in malpractice actions have ignored the fact that the attorney is in a dominant position to create the record of the representation. The fact that all of the information about the case is in the attorney's files, and that any lack of information may be the result of her incompetence, is legally irrelevant. The obligation to protect the client's interest ends whenever there is a claim that the attorney committed malpractice; the lawyer's defenses in a malpractice action are unaffected by the fact that there was a lawyer-client relationship. The attorney is given all of the rights of a stranger being sued by another stranger. When the client-attorney relationship fails and the client seeks recourse against the attorney for incompetent representation, the fact that the attorney was the party in the relationship who gathered all information and most, if not all, of the critical decisions is ignored. The ignorance of the client caused by this reliance has never been considered. In a malpractice action, the attorney has the right to abandon every vestige of her duty to the client, and the right to exploit every piece of information collected at the expense of the client pursuant to the privileges of the lawyer-client relationship.

The substantial factor doctrine permits the plaintiff to establish the relationship between the injury and the proven negligence of the defendant through a presumption. The presumption is that the type of negligence has, as its natural and probable consequence, enhanced the probability of injury. In *Reynolds*,[447] the inference of causation was based on the absence of illumination on a stairway that the defendant encouraged the plaintiff to descend quickly. The substantial factor concept was substituted for traditional proof of causation. Mrs. Reynolds might have fallen because of her neglect or the intervention of fate, or the fall may have been a pure accident. However, the facts that she was induced to hurry down the stairway and that the defendant had failed to keep it properly illuminated were held sufficient evidence to permit the jury to infer causation. The reason for the application of this alternative proof concept was that Mrs. Reynolds had been rendered dependent by the defendant's act of encouraging her to descend the

447. For a detailed discussion of Reynolds, see *supra* Part IV.C.4.b.

unlighted stairs quickly.

Litigation malpractice has the same relationship to the loss, or poor result, in a case as the lack of illumination on a stairway has to falling. First, the attorney, by controlling the decisions in litigation and dominating the accumulation of information, renders the client just as dependent as was Mrs. Reynolds. Second, malpractice naturally and probably increases the chances of losing a lawsuit. The Supreme Court's Sixth Amendment doctrines mandating appointment of counsel strongly corroborate the relationship between competent litigation representation and success.[448]

The existing causation doctrine requiring proof that the client would have won the underlying case can only be justified by an assumption that incompetence does not matter. Our legal system has the dexterity to simultaneously adhere to the inconsistent principles that counsel is central to a fair trial but that incompetent counsel is most likely meaningless. The former is the central tenant of the right to counsel cases; the latter is inherent in the notion that plaintiffs must prove that malpractice affected the result. However, both principles cannot be maintained. Because the courts clearly view counsel as central to a fair trial, the incompetence of counsel has, by definition, a high probability of affecting the fairness of the trial. The assumption that incompetence is not more likely than not to make a difference is simply wrong. It is inconsistent with Supreme Court doctrines of both right to counsel and lawyer-client confidentiality. It is hypocritical to permit lawyers to hide incompetent representation behind an assumption that competence does not make a difference, or that incompetence, by itself, does not naturally lead to a detrimental result.

If the substantial factor standard were applied in legal malpractice litigation, the client would be able to establish a prima facie case by proving malpractice and the loss of the litigation. Proof of malpractice would establish the prima facie case because such proof would simultaneously be direct proof of fault and circumstantial proof of causation. The attorney would, of course, be able to introduce evidence to rebut the circumstantial inference. The burden, however, would appropriately be allocated to the party with the greatest access to information—the lawyer.

448. *See supra* notes 378-92 and accompanying text.

B. *Combined Forces and Burden Switching*

Litigation representation has the essential characteristics of the combined forces scenarios.[449] Litigation is perilous. In a trial only one party can emerge victorious. A loss could be the result of natural forces, such as a weak case, or human intervention, such as legal malpractice. Because the two causes combine, the plaintiff is left without the resources to establish which of the causes was dispositive. The attorney is able to dominate access to information because of her representation of the plaintiff. The client is dependent upon the attorney. If the attorney was negligent in discovery, motion practice, strategic planning, or witness preparation, an examination of the record would fail to uncover information sufficient to establish that the case should have been won. The very negligence that lost the case simultaneously reduces the information about the case.

This power over information creates a dependency status. Status-based proof doctrines have been developed to protect similarly dependent plaintiffs, and must be applied to protect the client who receives negligent representation in a lawsuit. The dilemma of the plaintiff in litigation malpractice actions is identical to that confronted by the plaintiff in *Kingston*.[450] The combined forces dilemma confronting the plaintiff was proving the source of a second fire. The defendant's fire had burned the home, but it had done so in combination with the other fire. The act of negligently starting a fire that burned down the plaintiff's house both rendered the plaintiff dependent and deprived the plaintiff of information. The resolution was to switch the burden of proving the source of the other fire to the defendants.

In litigation malpractice, the combined forces problem is only slightly different. The plaintiff must prove which of the two causes was responsible for the loss. The dependency is the same; the lawyer has dominated access to information. More important to the application of this alternative proof doctrine is the fact that the attorney's negligence, by its very nature, reduces the chances of proving that the case would have been won.

In this aspect it is similar to *Summers*.[451] There the dependent plaintiff

449. For a detailed discussion of the combined forces scenarios, see *supra* Part IV.C.4.c.

450. For a detailed discussion of *Kingston*, see *supra* Part IV.C.4.c. The plaintiff's dilemma is also found in situations in which the legal system must rely on baseline or data compilations. *See generally* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991); V.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1083-91 (1968).

451. For a detailed discussion of Summers, see *supra* Part IV.C.4.d.

was deprived of information needed to prove which of two causes was responsible for the loss. The resolution, again, was alternative proof and switching the burden to the dominant defendant. As in litigation malpractice, the defendants' negligence was proven; the only issue was causation of injury.

The application of this doctrine to surgical malpractice suggests the doctrine's relevance to litigation malpractice. One of the medical malpractice fact sets in which it is applied involves an anesthetized patient.[452] In this fact set, the patient is unable to witness the events taking place around him. The litigation client is virtually as removed from the events of legal malpractice as that patient. The malpractice occurs in the attorney's office: in motion papers, interrogatories, and the like. None are likely to be viewed or fully understood by the client. She is as oblivious to the facts of legal malpractice as the surgical patient is to the facts of surgical malpractice. The mechanism that can rectify the imbalance in access to information is to switch the burden of proof to the defendant.

Of course, in switching the burden, courts must recognize, as they should in applying the substantial factor test, that malpractice is a likely cause of litigation loss. In surgical malpractice, the burden is switched on two issues. On proof of negligence, res ipsa is applied; on causation, *Summers*-style burden switching is applied.[453] The entwined doctrines are jointly applied. Therefore, they can only be relevant when the injury is to a part of the body that was not threatened by the surgery.[454] This fact element is necessary to establish the probability that there was negligence in the surgery, which is a predicate for the res ipsa aspect of the doctrine. In litigation malpractice, there is no role for res ipsa. The plaintiff must prove the malpractice. It should not be inferred. Once proven, however, the attorney's conduct is so important that it is more likely than not that malfeasance affected the result.[455] After malpractice has been proven, the surgical and litigation malpractice cases should be

452. *See supra* notes 282-302 and accompanying text.
453. *See supra* Part IV.D.
454. *See supra* note 284 and accompanying text.
455. There is little doubt that the bar generally accepts the proposition that representation by an attorney is a critical asset and that the attorney virtually always makes a difference. *See* Berger, *supra* note 376, at 96 ("When society can say *with confidence* that entirely adequate representation would not have changed the result of the case, and only then, I believe . . . judgments [should be salvaged] despite [the ineffective assistance of counsel].").

resolved similarly. The attorney should bear the burden of proving that the inept representation did not have an effect.[456]

Specifically, cause in fact should be assumed. The jury should be instructed that, if they find that the defendant was negligent, they must find that this negligence caused harm, unless the defendant establishes as an affirmative defense that the negligence did not cause any harm. The causation element would not be eliminated. Rather, the burden of proof concerning causation would be allocated to the defendant. Once proven negligent, the attorney should be required to prove that the conduct did not cause injury.

C. Combined Forces and Loss of Chance

Burden switching will lead to fairer results in many legal malpractice situations. Its adoption, however, would not guarantee just results in a vast number of them. The remaining inequities derive from the fact that trials are competitions in which one party will lose, and many of those "losers" appear to be identifiable prior to their trials. Under individualistic proof rules, none of these individuals can successfully sue her attorney for malpractice. Each person in this group of apparently predictable losers will be unable to prove that they would have won the underlying case. Even if the burden is switched to the attorney, many in this "loser class" will find that their attorney is able to prove they would have lost in the underlying case.

These clients are in a combined forces dependency relationship akin to that of the patient in *Herskovits*.[457] Herskovits had a thirty-nine percent chance of surviving cancer *before* the negligent failure to diagnose his cancer. The odds were that his death was the result of the natural cause of cancer. However, the court applied the loss of chance doctrine; it held that Herskovits had a chance of survival and that the negligence

456. Whether this change is effected under the *Summers* type doctrine or by creating a veritable rebuttable presumption akin to that in *Reynolds* (the "substantial factor" standard) is unimportant. In light of the reluctance of the courts to apply novel concepts to the legal malpractice tort, it is possible that this doctrine could be adopted by legislation. It is a presumption that is based on reason and reflects the appropriate balance between the institutional defendant and the individual. For a more comprehensive discussion of rebuttable presumptions, see *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 725-31 (Me. 1959); *Life & Cas. Ins. Co. v. Daniel*, 163 S.E.2d 577, 580-84 (Va. 1968); 1 MCCORMICK ON EVIDENCE 820-22 (John W. Strong ed., 5th ed. 1999) (discussing presumptions in paternity actions); Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U. L. REV. 527 (1978); Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82-83 (1933).

457. For a detailed discussion of *Herskovits*, see *supra* notes 354-63 and accompanying text.

took that away from him. The defendant might have saved him with an earlier diagnosis, but her negligence left the plaintiff both without a cure and without proof to establish that it was the negligence that caused Herskovits's death.

The litigation malpractice plaintiff is in the same position. Many clients have weak or predictably losing cases. They are thus more likely than not to have lost the case without regard to legal malpractice. The malpractice, however, deprives them of the chance of winning. As with Mr. Herskovits, the litigation client who had only a thirty-nine percent chance of winning the case would win approximately two out of every five times. The malpractice deprives these clients of both the chance of winning and the proof to establish that the negligence caused the loss.

The underlying policy that persuaded the courts to adopt loss of chance in diagnostic malpractice cases applies equally to litigation malpractice. That policy is based on the belief that potential tort liability induces careful conduct in the potential defendants. If doctors were never liable for negligent treatment of dying patients with losing odds for recovery, there would be no legal enforcement of the duty of care. These patients could never win a malpractice action, because the doctor could always prove that death was more likely than not the result of the disease. Attorneys have an identical obligation to represent their clients competently; no matter how inept the representation, these losing clients will never have a remedy at law. The attorney will always be able to avoid liability by claiming that the negligence caused no damage. And, of course, because the group of losers never had a sufficient chance of winning without malpractice, in these cases the attorney will always win. Fortunately, this inequitable benefit has been removed from the medical malpractice tort by the adoption of loss of chance compensation. Unfortunately, the legal malpractice defendant still reaps its benefits.

The inequity created by the individualistic proof standard is particularly severe in litigation malpractice cases. In these cases, the "win or lose" paradigm of malpractice litigation does not reflect the actual world of litigation.[458] While half of all litigants necessarily lose at

458. A similar problem has been extensively analyzed in the analogous area of permitting verdicts to rest exclusively on statistical data. *See* L. JONATHAN COHEN, THE PROBABLE AND THE PROVABLE 75 (1977) (discussing the gatecrasher hypothetical); David Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101, 101 (1979) (citing Dr. Cohen's book and exploring the inequities caused in a similar situation). In the gatecrasher hypothetical, 1000 people are killed in a fire in a circus tent. The problem is created by assuming that 501 of them did not pay. Since it is more

trial, perhaps ninety-five percent or more of lawsuits are settled without trial.[459] The significance of this settlement statistic is that a large percentage of clients who file cases and who would theoretically be losers, receiving nothing from a trial, actually wind up "winning" in a settlement.[460] In the real world, the litigation clients who would lose at trial do not lose. This is because they do not go to trial; instead, they settle. But in legal malpractice litigation, reality is ignored, as the fact of settlement is ignored. In the abstracted world of causation, legal malpractice plaintiffs cannot win unless they prove that they would have won at the trial that would never have occurred.[461]

A different articulation of this problem is that, in reality, virtually every case has value. Representational negligence has different impacts on different groups of clients. It deprives the potentially victorious client of her verdict and the potentially losing client of her settlement. For the winner, the loss caused by negligence is the lost verdict. For the loser, the damage caused by negligence is the lost settlement. In both cases, negligence deprives the client of the case's value.

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likely than not that each person in the crowd of 1000 had not paid, all 1000 would lose in a wrongful death action. This absurd result is replicated in legal malpractice actions. Among the 50% of clients who are *predicted* to lose, some would have won. But because of the burden of proof requirements, every single client in that 50% will lose. *See* Keith, *supra* note 347, at 770-80. Regarding causation requirements, Professor King wrote:

> Causation has for the most part been treated as an all-or-nothing proposition. Either a loss was caused by the defendant or it was not.... A plaintiff ordinarily should be required to prove by the applicable standard of proof that the defendant caused the loss in question. *What* caused a loss, however, should be a separate question from what the *nature and extent* of the loss are. This distinction seems to have eluded the courts, with the result that lost chances in many respects are compensated either as certainties or not at all.

Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1363 (1981).

459. *See* Joseph Kelner & Robert S. Kelner, *The Settling of Personal Injury Cases*, N.Y. L.J., Jan. 25, 1994, at 3; *see also* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 & n.2 (1996); Frances A. McMorris, *10 Firms Win $52 Million from City: Vast Majority of Year's Personal Injury Claims Result in Settlement*, N.Y. L.J., May 31, 1994, at 1.

460. Settlement benefits defendants in litigation as much as plaintiffs. While plaintiffs who might get nothing at a trial settle for a lower amount, defendants who might pay vast sums after a trial settle and pay smaller amounts. For both sides, settlement permits a guaranteed success compared to the uncertainty of a trial. Indeed, trials have been called "failures" in the system. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 321 (1991).

461. *See* Jensen, *supra* note 13, at 669.

The logical coherence of the malpractice system thus suffers from two defects. First, it does nothing to protect a large segment of litigation clients. This alone should be of paramount concern in light of the dismal record of attorney self-regulation.[462] Second, malpractice litigation does not reflect the results of actual litigation.[463] The high settlement rate, when considered in combination with the overwhelming probability that malpractice affects results in litigation, is a factor that must be considered in the development of rational rules to control legal malpractice litigation while appropriately compensating its victims. The significance of these facts is that the alternative proof doctrine of loss of chance must be adopted. The attorney for the suing ex-client should be given the right to sue for the lost chance—the settlement value of the case.

Application of loss of chance in legal malpractice actions would mean that the plaintiff would be given an *option.* She could sue for the full loss. If she made this choice, she would have to prove malpractice and the jury would have to decide that the malpractice caused her to lose the case.[464] Alternatively, she could establish a prima facie case by proving that a breach of duty caused a loss of the chance of winning. She would then have to prove the value of the lost chance through expert testimony establishing the settlement value of the case. This value of the opportunity to settle the case, as will be shown, is a far more precise valuation than any available in medical malpractice actions. Plaintiffs who choose to sue for the lost chance would not need to establish that the underlying case would have been won. There would be no trial of the case-within-a-case. The injury would become the loss of settlement value, and the proof would be of that loss. Under this doctrine there is no shifting of the burden of proof; instead, the injury is redefined.[465] The

462. *See supra* note 26.

463. Increasing litigation based on malpractice in settlement does not eliminate this concern because the elements have been strictly confined. Plaintiffs must establish either that settlement was proximate or that the attorney was negligent in failing to advise about likely settlement options. *See* 3 MALLEN & SMITH, *supra* note 10, § 28.23 (discussing the role of insurance counsel in settlements).

464. Her prima facie case should, as discussed *supra* Parts VI.A-B, be evaluated pursuant to the substantial factor or burden switching doctrines.

465. The attorney must have an affirmative defense to this action, however. Settlement negotiations may have proven to be fruitless in the specific case. The defendant should be liable for injuries that she caused, but should not be a guarantor of compensation. The settlement value of the case is an expert assessment of its value. That value is a composite of the results in similar cases. However accurate this valuation may be, the realities of life are such that, in a particular case, this figure may not have

dependent status of the plaintiff who lacks proof of causation because of the combined forces situation is partially rectified by permitting partial compensation. This is the only legal doctrine developed that would achieve the goal of imposing an enforceable duty on attorneys to make reasonable efforts to competently represent all of their clients.

Application of the loss of chance doctrine would harmonize the relationship between the reality of the practice of law and the tort of malpractice. In both situations, the real value—the settlement value—of the case would be the matter at issue.[466]

1. The Calculation of Loss of Chance

A predicate to the adoption of loss of chance compensation in legal malpractice cases is certainty that there is a rational basis upon which damages can be determined. The lack of such basis is the primary reason for the rejection of loss of chance in medical malpractice cases by a significant minority of the states that have considered the issue.[467] Whether compensation should be given for the full loss of life, for the discounted value of life to the percentage of chance lost by the malpractice, or some other standard, has been much bruited about in both the cases and the literature.[468] This is a serious concern in medical

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been attainable through negotiation. The underlying defendant may have refused to settle for this amount. Of course, since malpractice has a natural and probable influence on outcomes, the refusal to settle may have been caused by the *proven* malpractice. Nonetheless, providing compensation when settlement at the "settlement value" was rejected is not appropriate. Thus, the malpractice defendant should have an affirmative defense. Recognition of the loss of settlement value effectively creates a presumption that malpractice influenced the outcome. If the malpractice defendant can prove that competent settlement efforts, uninfluenced by the malpractice, were rejected at the loss of chance value of the case, she should prevail.

466. *See* Bauman, *supra* note 85, at 1131 ("The issue is always whether or not an element of damages was properly recoverable in the underlying action. The problem for the plaintiff . . . is how to put satisfactory evidence of the amount of damage before the trier of fact."); *see also* Boggs, *supra* note 365, at 446-47.

467. *See* Fennel v. Southern Md. Hosp. Ctr., Inc., 580 A.2d 206, 209 n.3 (Md. 1990); *see also* Dionne R. Carney, Note, Smith v. State of Louisiana, Department of Health and Hospitals*: Loss Chance of Survival: The Valuation Debate*, 58 LA. L. REV. 339, 349 (1997) (criticizing the valuation of loss of chance); Ellis, *supra* note 16, at 384 (discussing over and undercompensation).

468. *See, e.g.*, Ellis, *supra* note 18, at 378. The author states:

> The two seminal cases from which loss of chance was derived—*Hicks v. United States* and *Hamil v. Bashline*—involved patients who were able to prove that the defendants more likely than not caused their injury. . . . Both decisions indicate that if the plaintiff can show a better-than-even chance of survival at the time of the defendant's negligence, the court should allow the jury to infer that the doctor was a cause in fact of the ultimate injury suffered by the patient and thus award full damages.

Id. (emphasis omitted) (footnotes omitted).

malpractice actions, because the loss of chance concept does not comfortably fit the available data. The nature of the financial injury to a person who lost a chance of living is entirely speculative. If the person would have died anyway, the value of the lost chance is zero. If the person would have lived, the value is the full loss of life. The speculativeness derives from the fact that it is impossible to tell whether a particular person would have lived or died.[469] Doctors evaluate the chance a patient has of living, not the economic value of her life at various stages of a disease.

This practical limitation does not exist when the doctrine is applied to litigation malpractice. Lawyers are in the business of turning disputes into dollars. The entire litigation industry exists to achieve such a result. The settlement value of a case is a clear and generally accepted standard of evaluating cases. This is a standard that can be determined by the testimony of experts who practice and are familiar with both trial and settlement results in similar litigations. It is a fair and ascertainable standard.[470] It is a far more precise and well-developed measure of value than the type of loss of chance calculations relied on in those jurisdictions that permit recovery for such losses in medical malpractice cases.

The existence of this settlement value is ironic, because many courts

469. This speculativeness has forced courts to deal with the virtually imponderable issue of how to evaluate the economic consequences caused by the loss of chance theory in a medical malpractice case. It has split those jurisdictions recognizing the tort in the medical malpractice area. *See Fennel*, 580 A.2d at 209 & n.1-3. The problem derives from the very nature of the theory of liability. Liability exists without proof that the ultimate injury was caused by the defendant. Thus, the propriety of awarding full damages for that injury is questionable. All that is truly known is a chance of avoiding damage was lost by the defendant's conduct. Using the settlement value as the standard to judge the value of the chance lost avoids this issue by replacing a conceptual solution with a pure issue of fact. However, the use of settlement value as the definition of loss of chance in a legal malpractice case prevents any plaintiff from being overcompensated. This is becaause the nature of the underlying transaction in legal cases is different than that in medical cases. In medical cases the injuries are the result of disease and the deterioration of the body; it is a biological process and may not fully be understood. Litigation, however, is a human interaction. In medicine, with or without malpractice, some will die, some will not. Those who would have died without regard to the negligence of their doctor deserve no compensation. Those who lose in litigation, even those whose lawsuits would have been lost, are in a different position. In litigation, even losers can win. Disease cannot be "paid off," but litigants can be; even losers can settle for something.

470. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 117 (1987) (proposing that without loss of chance injurers will have "inadequate incentives to reduce risk")

permit loss of chance recovery in medical malpractice cases while precluding it in legal malpractice cases under the rationale that settlement is speculative.[471] In fact, one of the least speculative facts in the American legal system is that cases will settle. The litigation system is almost entirely dependent upon the settlement of cases. In both the criminal and civil trial worlds the vast majority—over ninety-five percent—of lawsuits are resolved by a settlement.[472] The numbers of judges and courtrooms are insufficient for resolving a greater number of cases through trial. The present caseload has created burdensome delays which, in many cases, come perilously close to depriving the parties of a just hearing of their controversy. Virtually everything has to be settled.

Because of the enormous pressure to settle cases, the litigation system is dependent upon the ability to predict the value of a case. Predictability of value enables settlement. In personal injury cases, attorneys provided through the defendants' insurance companies represent most defendants. These lawyers negotiate and settle a vast majority of cases.[473] As soon as a case is filed, the insurance company

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471. However, suits for negligence in settlement are growing. *See* Joyce K. Baker-Selesky, Commentary, *Negligence in Failing to Settle Lawsuits: Malpractice Actions and Their Defenses*, 20 J. LEGAL PROF. 191, 191-92 (1995-1996). However salutary, the viability of these actions is limited by technical proof requirements. *See* Steve France, *Giving Up the Fight*, A.B.A. J., Feb. 1999, at 28, 28. The reform herein proposed would operate differently than the tort of negligence in settlement. It would expand the definition of compensable injury to all victims of legal malpractice. The advantages of this approach are obvious:

> Plaintiffs and commentators alike have argued that plaintiffs should be allowed to prove causation through expert testimony regarding the value of the mishandled claim—that is, either the settlement value of the lost claim or the value of the lost chance to prevail. Underlying the idea of settlement value is the realization that most cases are settled prior to trial. The injury to the plaintiff, then, is not the loss of a valid claim, but the loss of a reasonably calculable settlement amount. Proof of causation would thus involve the presentation of expert testimony on the likely settlement amount of the underlying claim based on prior cases in the jurisdiction. The loss-of-chance doctrine, developed in medical malpractice cases, rests on a probabilistic view of value. Losing a claim that had a 20% chance of winning a $1 million award would thus be worth $200,000. Under this theory, proof of causation would entail testimony about the chance of victory and potential value of the claim. At least two courts have explicitly rejected testimony regarding loss of chance or settlement value as insufficient to prove causation in the legal malpractice context.

Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses, 107 HARV. L. REV. 1547, 1569-70 (1994) (footnotes omitted).

472. *See supra* note 459 and accompanying text.

473. In New York, there is a weekly publication, *The New York Jury Verdict Reporter*, published by Moran Publishing Company. The publication is sub-titled, *Civil Jury Verdicts and Settlements Throughout New York State.* The publication is not a gossip column for civil litigators; it is a source of information to be used to evaluate cases for settlement. The information is so important that lawyers pay for this information on a weekly basis. The system provides information not only on verdicts

analyzes it to predict its value. Insurance companies make these predictions and then create financial reserves for every personal injury case. The reserve is based upon their professional analysis of the maximum risk in the matter.[474] This risk analysis is a professional assessment of the value of the case, the risk to which the company believes it is exposed. Of course, this sum is greater than the amount for which they hope to settle the case, but that is not the issue. The ability of a vast enterprise such as the insurance industry to rely upon assessments of case outcomes for their economic viability demonstrates that the determination of settlement value is not speculative. It is a task that is routinely done by experts in an industry that has an enormous financial commitment to the accuracy of the predictions.

Because of this pattern of settlement, attorneys who practice in the various subspecialties of the law have substantial experience in evaluating a case. In many cases, what is known as a "number" can be put on the case well before the end of discovery. It is certain that substantial agreement can be achieved as to the likely settlement figure for most cases by the end of discovery.[475]

Of course, the ability of lawyers to agree upon the value of a case is often dependent upon how they are involved. An attorney's evaluation of someone else's case is likely to be far more reasonable than that same attorney's evaluation of her own case. But it cannot be doubted that the profession has, with experience, developed the ability to predict with a reasonable degree of accuracy the amount for which a case will be

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but also on the amount of verdicts that are sustained on appeal. In the June 21, 1999 issue alone, 43 jury verdicts and 5 settlements are summarized. The issue also reports the case name, date, type of injury, county, and verdict (in exact dollars) for 164 cases on appeal. *See* N.Y. JURY VERDICT REP., June 21, 1999, at 1-33. Similar publications exist in other jurisdictions. *See* Gross & Syverud, *supra* note 459, at 5 ("*Jury Verdicts Weekly* [is] a state-wide California jury verdict reporter that is widely used by lawyers in evaluating their cases."); Joseph Kelner & Robert S. Kelner, *The Setting Aside of Jury Verdicts—II,* N.Y. L.J., Oct. 28, 1997, at 3.

474. *See* N.R. Kleinfield, *The Malpractice Crunch at St. Paul,* N.Y. TIMES, Feb. 24, 1985, § 3, at 4; Interview with Victor A. Rotolo, Personal Injury Defense Specialist, Law Offices of Victor A. Rotolo, P.A., in Lebanon, N.J. (Jan. 5, 1999).

475. The predictability of this "number" is the reason that such a vast majority of cases are settled. *See* Gross & Syverud, *supra* note 459, at 4 ("But for practitioners, trials are important primarily because they influence the terms of settlement for the mass of cases that are not tried; trials cast a major part of the legal shadow within which private bargaining takes place."); *see also* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior,* 11 J. LEGAL STUD. 225, 228 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 997 (1979).

settled.

Settlement value is an extremely regional concept. The value of a case can be predicted only by reference to the history of jury verdicts and settlements in that particular jurisdiction. The same case has a very different value depending upon the jurisdiction in which it is pending. Within each jurisdiction there will be a high degree of agreement about the value of a case, but there is not going to be any consistent value of a case across regional lines. In fact, the value of a case can vary dramatically from one segment of a community to another, depending upon the nature of the residential community from which the juries are drawn.[476] For example, a knee injury in a case with clear negligence may be worth $125,000 in Brooklyn, New York, but only $20,000 in Bucks County, Pennsylvania.[477] In both jurisdictions the local attorneys will substantially agree upon the number.[478]

The settlement value of any litigated matter is thus a predictable quantity. Both strong and weak cases have a settlement value. The value is a composite of the damages and the prospects of winning. That knee injury worth $125,000 with clear negligence would be worth considerably less if there were a comparative negligence problem. It would be worth even less if the plaintiff had marginal proof that the defendant was negligent. Damages for legal malpractice in a litigation matter would be the difference between the actual recovery and the case's settlement value.[479]

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476. *See* Edward A. Adams, *Venue Crucial to Tort Awards, Study: City Verdicts Depend on Counties*, N.Y. L.J., Apr. 4, 1994, at 1. The author states:

> Over the past decade, juries in Manhattan have awarded an average of $1.9 million in cases where people have died because of someone else's negligence. But in Brooklyn, juries put a lower price tag on the value of a life, awarding an average of only $1.2 million—37 percent less than for lives lost across the East River.
>
> A study of almost 4,600 personal injury verdicts by juries in New York City over the past decade, conducted for the *Law Journal* by the *New York Jury Verdict Reporter*, found that the value of a limb or a human life varies dramatically depending on where a case is brought.

Id.

477. *Compare Adams*, *supra* note 476, at 1 (stating that the average knee injury case in Bronx, New York produces a jury verdict of $552,000), *with* Interview with Rea Boylan Thomas, Esq., Boylan & Serpico, in Doylestown, Pa. (Sept. 22, 1998) (stating the average knee injury case in Bucks County, Pennsylvania produces a jury verdict of $45,000).

478. The predictability of settlement value is so common that the litigation bar refers to the recovery in a case as "the number." This refers to the amount that a case is worth.

479. This might not seem fair to the client who can often "hit" for a much larger sum in a jury verdict. But, in light of the common practice of granting remittiturs, settlement value often represents a close approximation of the amount of a jury verdict that would actually be collected. *See* Kelner & Kelner, *supra* note 473, at 3.

Despite the dependence of the profession on settlements and the vast data accumulated for their rational negotiation, based on proximate cause analyses, no jurisdiction presently permits recovery for the settlement value of a legal malpractice action that the plaintiff cannot prove would have been won at trial.[480] Judicial decisions rejecting claims for the settlement value of cases are common. The central justification for the prohibition is that such damages are speculative.[481] Even when clients sue for negligence in the settlement process itself, they must establish that the opposing party would in fact have settled and that the settlement would have been for a specific amount.[482] Thus, the malpractice plaintiff in a case in which no serious settlement discussions took place, or in which settlement was not provably prevented by the malpractice, is prohibited from seeking the settlement value of that case.[483] The case, or the aspect of the case seeking damages for the lost settlement, is dismissed as a matter of law.[484]

It is a disgrace that the victim of legal malpractice cannot gain compensation for the lost settlement value of a case.[485] Although it may seem that loss of chance liability will make attorneys guarantors of their clients' success, such a result is not unfair because every case has settlement value. No attorney would be liable unless the client first proved the attorney's negligence. If shown to be negligent, the attorney should not be protected from the obligation of compensation.[486]

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480. The only exception to this generally accepted rule is that a lawsuit is permitted for specific negligence in settlement negotiations. If such negligence is proven, then the plaintiff may recover the negligently lost settlement. For a compendium of cases involving settlement malpractice, see 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 29.38 (4th ed. 1996 & Supp. 1999).

481. *See* Muhammed v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1352 (Pa. 1991); *see also* Schlomer v. Perina, 485 N.W.2d 399, 402 (Wis. 1992) ("[W]e conclude that recovery must be denied under public policy grounds because the injury in this case is simply 'too removed from the negligence,' and furthermore, the injury is 'too wholly out of proportion to the culpability of the negligent tortfeasor.'" (quoting Coffey v. Milwaukee, 247 N.W. 2d 132, 140 (Wis. 1976))).

482. *See, e.g.*, McConwell v. FMG of Kansas City, Inc., 861 P.2d 830, 839-40 (Kan. Ct. App. 1993); Ziegelheim v. Apollo, 607 A.2d 1298, 1305 (N.J. 1992).

483. *See* Campbell v. Magana, 8 Cal. Rptr. 32, 36 (Cal. Dist. Ct. App. 1960).

484. *See* 3 MALLEN & SMITH, *supra* note 10, § 28.23, at 609 (discussing insurance settlements).

485. This is especially true in light of the escalating complaints of attorney misconduct. *See* Mark Hamblett, *1998 Marked by Battles and Bonuses*, N.Y. L.J., Jan. 4, 1999, at 1 ("Misconduct complaints against [New York] Appellate Division, First and Second Department lawyers rose about 50 percent from 1990 through 1996, according to the New York State Bar's Committee on Professional Discipline.").

486. Compensation for "tortious risk" as distinguished from the physical injury is

2. *The Percentage of Chance Lost Is Provable*

In legal malpractice lost chance cases, litigation experts would testify as experience-based experts. Although the method by which they obtain their expertise is different than that of medical experts, lawyers are equally competent expert witnesses.[487]

In a medical malpractice case, the methods by which the medical profession analyzes and treats disease have created a paper trail of data concerning causation. Doctors analyze most diseases as progressive events. Each stage has distinctive presenting criteria. Additionally, each stage has treatments that have been established as reliable through time or patient studies.[488] Reference to such data to prove that a patient has lost a chance of survival through negligence provides direct proof of a loss. A stage II cancer is far more likely to be stopped than a stage IV cancer. Negligence that delays diagnosis and treatment automatically means a loss of a statistically provable chance of success. The same cannot be said in the law. No data are kept; no case analyses compare different legal strategies to determine their impact on client survival. Thus, there seems to be no ready source of data to prove that negligence had any result upon the outcome of a case. Even failure to file within the applicable statute of limitations may not have affected the client negatively! After all, the case may have been a loser. Of course, this ignores that in the medical world, the client may have died anyway—a loser in legal case terms. But the data make proof of the degree of "loserness" clear.

Although a medical patient might be a likely loser—her chances of survival might be as low as ten percent—the exact chance is derivable

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the essence of loss of chance liability. *See* Glen O. Robinson, *Probabalistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 782-83 (1985). The difference between "settlement value" and the actual recovery in a case is the tortious risk created by litigation malpractice. *See* King, *supra* note 458, at 1381-87 (discussing the process of valuing chance).

487. *See* Kumho Tire Co., Ltd. v. Carmichael, 119 S. Ct. 1167, 1174-75 (1999) (broadening the application of the *Daubert* expert testimony gatekeeping factors).

488. *Compare* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 1-28 (1989) (providing a representative example of the very generalized practice standards developed for the legal profession), *with* Julius G. Mendel, Letter to the Editor, *Judging Managed Care*, N.Y. TIMES, May 31, 1997, at 18 ("The [managed care] external review process is now performed by recognized peers in the same medical specialty and uses criteria of accepted standards of practice without cost-benefit calculations."). *See* Lawrence K. Altman, *Drug Used in Emergencies Despite Warnings*, N.Y. TIMES, Oct. 23, 1996, at C1; Koch R. Guttler et al., *Mild Hyperphenylalaninemia and Heterozygosity of the Phenylalanine Hydroxylase Gene*, *available at* National Lib. Med., *PubMed* (revised Jan. 10, 2000) <http://www.ncbi.nlm.nih.gov/PubMed>; K. Geier, *Perioperative Blood Management*, *available at* National Lib. Med., *PubMed* (revised Jan. 10, 2000) <http://www.ncbi.nlm.nih.gov/PubMed>.

from treatment data compiled over a large number of cases. Because one out of ten with a ninety-percent chance of dying do survive, even those with small chances have a perceptible chance of living. In the legal practice world, however, there are no such data. The chances of winning are the same; the legal profession simply lacks the data to articulate precisely the difference between a one in ten and a two in ten chance of winning. Nonetheless, clients who have a one in ten chance of winning win ten percent of the time, in exactly the same proportion as patients with a one in ten chance of survival. Interviews with trial counsel indicate that attorneys have substantial experience with turning statistical losers into winners.[489] Their experience gives them a basis to estimate the chances of success.

The fact that the sources of proof of probabilities are different in legal malpractice loss of chance situations should not prevent them from being used to vindicate the interests of injured clients. In both the medical and legal malpractice cases, reliable proof exists to evaluate the loss of chance caused by malpractice. In a trial on legal malpractice the settlement value of the case would be a matter for testimony by litigation experts. Undoubtedly, there would be disputes about valuation. As with other fact issues involving experts, both parties could call witnesses. These experts would be attorneys or insurance company appraisers who have acquired a provable expertise. The experience basis for the expertise would not be an impediment to having these experts qualified. There is admittedly no science of predicting case value; however, scientific verifiability is not an essential basis for the qualification of an expert.[490] The litigation experts who would testify about the value of a case would not be experts relying on science. Litigation experts rely on skill and experience based on observations for their expertise.[491]

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489. *See* Interview with Victor A. Rotolo, *supra* note 474; Interview with Evan Torgan, Evan Torgan, P.C., in New York, N.Y. (Feb. 17, 1999).

490. *See Kumho Tire*, 119 S. Ct. at 1174-75.

491. The four-part *Daubert* standard, by which the scientific validity of expert testimony must be assessed pursuant to Federal Rule of Evidence 702, would apply to legal experts. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-94 (1992). Trial lawyers and insurance company appraisers would clearly fall into the non-scientific category considered in *Kumho Tire*. In *Kumho Tire*, the expert had acquired his specialized knowledge as to whether a tire failed because of a defect or abuse by years of looking at the mangled carcasses of tires. *See Kuhmo Tire*, 119 S. Ct. at 1176. It was held insufficient to meet the *Daubert* standard. *See id.* at 1178-79. However, the vast industry of "settlement value" predictors creates a basis for expertise far more substantial than that of the expert in *Kumho Tire*.

Thus, the legal profession has developed an expertise in predicting the settlement value of cases, and there are experts who could provide juries with information about this value.[492] This represents the best method for evaluating the worth of a lost chance. Nonetheless, courts refuse to permit plaintiffs to sue for the settlement value of the case. To prevail, plaintiffs must still establish that they would have won but for the malpractice of the attorney.

VII. CONCLUSION

Recently, decisions in criminal cases have permitted appeals to be filed despite counsel's negligent failure to file a timely notice of appeal and without regard to the improbability of the defendant prevailing.[493] In limited areas, some courts have even been willing to modify the malfeasing lawyer's most successful defense: the causation defense. For example, in California, causation burdens are relaxed in spoliation cases,[494] and several states have even denied dismissals of complaints alleging a loss of chance.[495] But the greatest sign of progress in imposing

492. Although the standards of care in the medical community are more precisely defined, expert testimony concerning their violation and its significance is obtainable. *See supra* note 488.

493. Some United States Courts of Appeals have held in ineffective assistance of counsel claims that counsel's failure to timely file a notice of appeal violated the defendant's rights without consideration of the merits of the appeal. *See, e.g.*, Romero v. Tansy, 46 F.3d 1024, 1030-31 (10th Cir. 1995); United States v. Peak, 992 F.2d 39, 41-42 (4th Cir. 1993); Bonneau v. United States, 961 F.2d 17, 23 (1st Cir. 1992). The result was reached despite the very slim chance of a criminal defendant prevailing on appeal. In New York, for example, the prosecution won 81% of criminal appeals in the 1997-1998 court year. *See* Gary Spencer, *Prosecutors Win Big at Court of Appeals*, N.Y. L.J., July 13, 1998, at 1; *see also* Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y. L.J., May 6, 1996, at 1 ("The results are striking: of the thousands of defendants each year who seek access to the [c]ourt after losing in the [a]ppellate [d]ivision or the [a]ppellate [t]erm only [one] percent will ultimately prevail on the merits in the [New York] Court of Appeals."). In the U.S. Court of Appeals for the Second Circuit, the government wins at a higher rate—91%. *See* Deborah Pines, *Appeal in Bomb Case Seen a Long Shot*, N.Y. L.J., Mar. 8, 1994, at 1.

494. *See* Pati Jo Pofahl, Note, Smith v. Superior Court: *A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 969-70 (1985); *see also* Paul Gary Kerkorian, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions*, 41 HASTINGS L.J. 1077, 1084-87 (1990) (citing cases that recognize the spoliation tort, including the following: Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277 (E.D. Pa. 1973); Williams v. State, 664 P.2d 137 (Cal. 1983); Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504 (Ct. App. 1985)); Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 389 (1995) (discussing Murray v. Farmers Ins. Co., 796 P.2d 101 (Idaho 1990), and spoliation as a way of avoiding the cause in fact element in malpractice tort).

495. *See, e.g.*, Weiss v. Pegalis & Wachsman, No. 95-CV-2901, 1995 U.S. Dist. LEXIS 15175, at *3 (E.D. Pa. 1995); *see also* Hendry v. Pelland, 73 F.3d 397, 402-03 (D.C. Cir. 1996) (holding that once the client had a valid claim for breach of fiduciary

a reasonable standard of care on attorneys has come from quasi-ethics rules. In New York, for example, a litany of complaints about matrimonial attorneys led to the adoption of special court rules that imposed new duties on attorneys.[496] Perhaps for the first time, a body assigned to regulate the conduct of attorneys recognized that the bar has excessive power over clients. Matrimonial attorneys were prohibited from engaging in conduct that would exploit their domination of information and power in the relationship. Actions such as requiring nonrefundable retainers and taking liens on the matrimonial residence were prohibited.[497]

These rules by New York and other states[498] represent the breach in the dike of protection for the malfeasing attorney. They represent the possibility that the judicial and attorney regulators of the bar will begin to energetically develop mechanisms to control the bar. These rules begin the process of reevaluation that has been the hallmark of post-World War II torts jurisprudence. They begin the dialogue about the appropriate rules of conduct and how those rules can best be enforced. In this regard, the participation of the judiciary in the enactment of these ethics rules suggests a new willingness to reconsider the propriety of protecting malfeasing attorneys. Decisional law reform does not, however, begin with the courts. Judges can only rule on cases and issues

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duty, there was no need to prove proximate causation); Davis v. Parker, 58 F.3d 183, 190 (5th Cir. 1995) (discussing the difference between legal malpractice and breach of fiduciary duty).

496. *See* N.Y. EDUC. LAW § 6509 (McKinney 1985) (defining professional misconduct); 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1 (1998) (providing courts the power to impose sanctions for frivolous conduct).

497. *See* 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 202.16 (1998). The section provides, in part, as follows:

> (c) Retainer agreements and closing statements.
>
> ....
>
> (2) An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and to his or her adversary. The application may be granted only after the court reviews the finances of the parties and an application for attorney's fees.

Id. § 202.16(c)(2). This section eliminates the possibility of the attorney putting a lien on the client's home or other personal property without the matrimonial court's knowledge.

498. *See generally* PA. CONTINUING LEGAL EDUC. BD. REGS. § 8 (1999) (describing "Compliance Procedures Applicable to Active Lawyers" and defining standards of professional conduct); *Practice Book Revisions Being Considered by the Rules Committee of the Superior Court*, 60 CONN. L.J. 46 (1999) (discussing proposed rules for professional conduct under consideration).

presented to them. Judicially created law reform starts with attorneys who propose legal theories to the courts. But the new court-imposed ethics rules are a signal of changing judicial perceptions. Once the signal has been given, the magical power of contingent fee litigation should create the same drive for legal change that has been so effective in curbing industrial and medical depredations. There is now an opportunity for the malpractice bar, the attorneys who represent those who have been victimized by malpractice, to seek changes in doctrines that unduly protect the malfeasing attorney.[499] The causation defense and the case-within-a-case anachronism should be the first areas tested. In seeking the adoption of alternative liability standards, the malpractice bar could significantly benefit the victims of legal malpractice and simultaneously improve the protection afforded clients.[500]

Like the police officers who routinely violated the Fourth Amendment before the Supreme Court created an effective remedy in *Mapp*,[501] attorneys have been able to violate the standard of representational care with impunity. The standard of care has existed and the tort remedy has been available, but causation defenses have protected these attorneys from liability. Thus, the panoply of causation defenses has rendered the tort remedy ineffective. Without an effective tort remedy, the rules have had little real meaning. The legal rule changes proposed in this Article, if adopted, will create an effective tort remedy for litigation malpractice.

499. The instant increase in malpractice litigation was already motivated, in part, by the money that can be made by the plaintiff's bar. *See* Stephen Gillers, *Ethics that Bite: Lawyers' Liability to Third Parties*, LITIG., Winter 1987, at 8, 9 ("First, lawyers are insured, and insurance companies can pay judgments. Lawyers are discovering that other lawyers can be attractive targets . . . ."); Ramos, *supra* note 76, at 1683 ("Greed is the most common reason for legal malpractice cited by academic and lay writers").

500. Of course, since the *Herskovits* decision, there has been a precedent that could have been exploited in an effort to expand lawyer's liability. Remarkably few suits tested the courts' willingness to apply this doctrine. The uncharacteristically placid reaction of the plaintiff's malpractice bar should change with encouragement from increased verdict sizes and doctrinal support from the academy.

501. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that individuals may move to exclude illegally seized evidence in state criminal court proceedings).