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# Rescuing Avoidable Consequences from the Clutches of Remedies and Placing it in Apportionment of Liability, Where it Belongs

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# RESCUING AVOIDABLE CONSEQUENCES FROM THE CLUTCHES OF REMEDIES AND PLACING IT IN APPORTIONMENT OF LIABILITY, WHERE IT BELONGS

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## PART I: INTRODUCTION

Comparative fault spread like contemporary wildfires beginning late in the 1960s.[1] Although there are a few stragglers, it is now the law in forty-six states.[2] Ultimately, this reform was fueled by a pent-up sense that contributory negligence was unfair.[3] Why, advocates for comparative fault asked, should a loss be borne by one person when two parties acted unreasonably to cause that harm? Properly understood, we believe the same sense of fairness should be applied in the case of avoidable consequences, a remedial doctrine that imposes a loss entirely on one of two parties who unreasonably caused that loss.[4]

1. Alvis v. Ribar, 421 N.E.2d 886, 891 (Ill. 1981) (documenting the rapid adoption of comparative fault through the late 1960s and early 1980s).

2. Judge Harrel, dissenting from the Maryland Court of Appeals' refusal to adopt comparative fault, wrote that "forty-six states now employ comparative fault" and explained that the doctrine is "no longer a trend . . . of recent vintage, but rather is an established and integral doctrine to the negligence systems of nearly every state in the country." Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 714, 69 A.3d 1149, 1169–70 (Md. 2013) (Harrel J., dissenting). In his dissent, Judge Harrel described contributory negligence as a "fossilized doctrine" that will one day be relegated to Maryland's "judicial tar pit." *Id.* at 696, 69 A.3d at 1158–59.

3. When replacing contributory negligence with comparative fault, the California Supreme Court wrote:

> It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.

Li v. Yellow Cab Co., 532 P.2d 1226, 1230–31 (Cal. 1975). *See also* Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (replacing contributory negligence with comparative negligence and observing that the "latter is simply a more equitable system of determining liability" while the former is a "harsh" rule); Sun Oil Co. v. Seamon, 84 N.W.2d 840, 845 (Mich. 1957) (explaining that comparative fault is superior to contributory negligence "[n]ot for reasons of abstract symmetry, but because of human experience: fault is rarely the monopoly of one party to an accident. . . . Yet the doctrine of contributory negligence so treats it in our court today, denying the fundamental principle of right and justice that juries weigh the merits and demerits of each of the parties to a controversy."); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 882 (W. Va. 1979) ("There is an almost universal dissatisfaction among leading scholars of tort law with the harshness of the doctrine of contributory negligence . . . . A plaintiff can, if the jury is faithful to the contributory negligence instruction it receives, be barred from recovery if his negligence 'contributed in the slightest degree' to the accident . . . . Thus, our system of jurisprudence, while based on concepts of justice and fair play, contains an anomaly in which the slightest negligence of a plaintiff precludes any recovery and thereby excuses the defendant from the consequences of all of his negligence, however great it may be.") (internal citations omitted).

4. As Gary Schwartz compellingly demonstrated, the question of whether contributory or comparative negligence provides better deterrence incentives is endlessly problematic and cannot

One must appreciate that comparative fault's widespread adoption revolutionized contemporary tort law in three ways. First, it replaced contributory negligence—the all-or-nothing imposition of party liability—with a fine-grained method of apportionment among the responsible parties. Second, it created a ripple effect that transformed many doctrines developed with contributory negligence as their foundation. Third, and less appreciated by courts and commentators, comparative fault caused tension with existing, unrelated doctrines that nevertheless depended on contributory negligence, which assured that plaintiffs recovered only when they had not acted culpably (i.e., only innocent plaintiffs could successfully recover from a defendant).[5] In 1985, Justice Ryan of the Illinois Supreme Court wrote:

> [C]omparative negligence . . . has given us a wonderful opportunity to break from the artificial concepts and doctrines of the past. This is difficult to do because . . . we have become so accustomed to thinking in terms of contributory negligence and the many doctrines that evolved to avoid its harshness that it is difficult to view a case solely on the basis of pure comparative fault. However, we must remember that we are writing on a clean slate. We should therefore strive to apply to all actions arising under the common law the fairness doctrine of . . . comparative fault so that each person stands responsible for the share of the injuries attributable to him. We no longer have to think in the nebulous terms of contributory negligence, assumption of risk,

be answered on a categorical basis. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 704 (1978). Given the powerful case for fairness and the uncertain matter of deterrence, we focus on fairness in this article and put aside efficiency.

5. Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103, 1103 (2002) ("[L]ike a stone thrown into a pond, the ripple effects of comparative negligence are far broader than merely removing the bar to recovery by a negligent plaintiff. We might think of the first ring of effects as the abolition of doctrines developed to ameliorate the harshness of contributory negligence, including last clear chance and stricter rules of proximate cause for plaintiff contributory negligence. But there are several more and larger rings of ripples that cut a wide swath across tort law. Indeed, the breadth and depth of the impact of comparative negligence on tort law belies the conception that comparative fault merely changes the rule about apportioning liability between a negligent plaintiff and defendant."); *see also* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996) ("[The widespread adoption of comparative fault] we believe, is as important for tort law as was the coming of insurance seventy years ago. Like that earlier change, it is slowly making its way through the whole of tort law and redirecting the development of different doctrines, one after another."); Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks in Twentieth Century Injury Law*, *in* EXPLORING TORT LAW (M. Stuart Madden ed. 2005) (identifying the adoption of comparative fault and its replacing the all-or-nothing approach of contributory negligence as one of the five most significant developments in tort law in the twentieth century).

misuse of the product, failure to discover, mitigation of damages, avoidable consequences, and the like.[6]

For the most part, the doctrines Justice Ryan identified as requiring modification in the wake of comparative fault are quite obvious and have evolved with post-comparative-fault jurisprudence. As such, nearly every state has recognized that comparative fault implicitly abrogated rules such as last clear chance and assumption of risk.[7] Even the doctrine of joint and several liability—which places the risk of insolvency on one or more culpable defendants rather than on an innocent plaintiff—transformed fairly quickly as plaintiffs were no longer required to be entirely innocent under comparative fault.[8] However, court appreciation regarding the full impact of comparative fault—which, again, means that defendants need not be the only culpable party in tort—on doctrines peripheral to apportionment of liability has been slow and stuttering. For instance, most courts took a number of years, often with the aid of scholarship, to recognize comparative fault's impact on doctrines such as intervening cause,[9] wrongful acts,[10] and defenses to intentional torts.[11] Comparative fault's ripple effects, however, continue

6. Simpson v. Gen. Motors Corp., 483 N.E.2d 1, 7 (Ill. 1985) (Ryan J., dissenting); *see also* Green, *supra* note 5, at 1103.

7. *See, e.g.*, CONN. GEN. STAT. § 52-572h (2020) ("The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished."); OR. REV. STAT. § 31.620 (2020) ("The doctrine of last clear chance is abolished . . . The doctrine of implied assumption of the risk is abolished."); MINN. STAT. § 604.01 (2020) ("The doctrine of last clear chance is abolished."); Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975) ("[L]ast clear chance and assumption of risk . . . are to be subsumed under the general process of assessing liability in proportion to fault").

8. MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 452 (10th ed. 2016) ("Joint and several liability came under fire after the adoption of comparative fault, which meant that even culpable plaintiffs could recover damages, and because of the perceived unfairness to some 'peripheral' defendants who nevertheless were solvent when other 'primary' defendants were far more culpable and insolvent."). Notably, the five jurisdictions that retain contributory negligence all continue to impose joint and several liability. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a , Reporters' Note (AM. LAW INST. 2000).

9. Green, *supra* note 5, at 1135.

10. RESTATEMENT OF THE LAW OF TORTS: CONCLUDING PROVISIONS pp. § 4A (P.D. No. 1 Mar. 13, 2020) (providing that plaintiffs are not barred from recovery merely because they were engaged in illegal or wrongful conduct when suffering harm).

11. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 50 (P.D. No. 7 Aug. 7, 2020); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c, Reporters' Note (AM. LAW INST. 2000). England, Canada, and New Zealand have interpreted their comparative fault statutes to permit apportionment of fault to plaintiffs in intentional tort cases. *See* W.V.H. ROGERS, ET. AL., WINFIELD & JOLOWICZ ON TORT 234 n.65 (15th ed. 1998); ALLEN M. LINDEN, CANADIAN TORT LAW 94–95 (6th ed. 1997); Hoebergen v. Koppens, [1974] 2 N.Z.L.R. 597, 603. For a provocative claim that criminal law reflects aspects of comparative responsibility analyses, especially when the victim has provoked the attack, see Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1211–26 (1994).

radiating outward, touching doctrines that are even less obvious to courts; indeed, many such doctrines remain largely unrecognized today.[12] The subject of this Article, then, is another tort provision that requires reconsideration in the wake of comparative fault's radiating implications: avoidable consequences.[13] The same fundamental fairness concern that animated comparative fault applies when employing avoidable consequences to bar a plaintiff's recovery for harm for which both the plaintiff and defendant are responsible.[14]

Avoidable consequences—distinguished from mitigation of damages[15]—is nominally a remedial doctrine that bars plaintiffs from recovering for enhanced or aggravated harms that the plaintiff could reasonably have avoided.[16] A quintessential illustration of this doctrine involves a plaintiff who suffers a leg injury due to the defendant's negligent

12. For example, the doctrine of alternative causation recognized in Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948), the landmark case involving two hunters who fired negligently but only one of whom caused the plaintiff's harm, is another rule that may be affected by comparative fault. The burden-shifting rule adopted by the California Supreme Court, as is the case with other doctrines ameliorating the plaintiff's obligation to prove causation, was justified on the basis that culpable defendants should bear the consequences of a lack of evidence rather than an innocent plaintiff. After comparative fault, however, plaintiffs may no longer be entirely innocent with respect to their injuries. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c, Reporters' Note (AM. LAW INST. 2000). For other doctrines requiring re-examination, see Green, *supra* note 5, at 1106–07.

13. Notwithstanding Justice Ryan's identification of it in the quotation above. *See supra* note 6 and accompanying text.

14. One problematic aspect of avoidable consequences involves determining whether the plaintiff's post-injury conduct was unreasonable and therefore subject to the rule's recovery bar. We put aside this aspect of avoidable consequences because it is not implicated in the question of how to apportion damages once the plaintiff's failure to avoid *is* determined to be unreasonable. Whether a plaintiff has acted unreasonably in failing to undergo a risky procedure, such as surgery, is a difficult matter with which courts struggle. Particularly challenging are cases in which plaintiffs decline medical treatment because of their religious belief—which could require juries to determine that following one's religious beliefs was unreasonable. *See, e.g.*, Rozewicz v. N.Y.C. Health & Hosps. Corp., 656 N.Y.S.2d 593, 594 (Sup. Ct. 1997) (noting that such claim about a Jehovah's Witness "raised some of the most difficult legal issues I have been faced with during my years on the Bench"); *see generally* Jeremy Pomeroy, Note, *Reason, Religion, and Avoidable Consequences: When Faith and the Duty to Mitigate Collide*, 67 N.Y.U. L. REV. 1111 (1992).

15. Avoidable consequences applies to injury-enhancing plaintiff misconduct that occurs *after* the defendant's initial tort. Mitigation of damages refers to injury-enhancing plaintiff misconduct that *precedes* or *coincides* with the defendant's tort. We discuss this distinction further, *infra* at notes 34–36 and accompanying text. We note an important terminological matter: Courts frequently use "avoidable consequences" and "mitigation of damages" interchangeably. To avoid confusion and clarify analysis, we maintain their technical definitions and nomenclature.

16. *See, e.g.*, Weston v. Dun Transp., 695 S.E.2d 279, 282 (Ga. Ct. App. 2010) ("Under the doctrine of avoidable consequences . . . '[i]f the plaintiff by ordinary care could have avoided the consequences to himself [or herself] caused by the defendant's negligence, [the plaintiff] is not entitled to recover.'") (internal citation omitted).

operation of an automobile.[17] Notwithstanding this injury, the plaintiff goes skiing a few days after the accident despite doctors' orders to keep weight off the leg. In so doing, the plaintiff acts unreasonably and aggravates the leg injury. Avoidable consequences bars the plaintiff from recovering damages for this enhanced harm from the defendant.[18] To be sure, the plaintiff will still recover damages for the initial injury, but must bear the entire loss for the enhanced harm despite the defendant's role in causing it.[19]

In this manner, avoidable consequences is a complete bar for enhanced injuries caused[20] by both a defendant's and the plaintiff's unreasonable conduct. If the preceding sentence sounds eerily familiar, it might be because avoidable consequences mirrors contributory negligence.[21] Of course, unlike the complete bar of avoidable consequences, plaintiff negligence no longer operates as a bar to recovery in comparative fault jurisdictions. Instead, under comparative fault, a plaintiff's unreasonable conduct *reduces* recovery based on the plaintiff's comparative share of responsibility for the harm.[22] Theoretically, then, "any negligence by a plaintiff that . . . aggravates [his or her] injuries should reduce (not bar) the plaintiff's recovery . . . of that portion of the damages."[23]

17. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b, illus. 4 & 5 (AM. LAW INST. 2000).

18. *See, e.g.*, Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005) (explaining that "[a] plaintiff 'may not recover for any [post-accident] item of damage that [the plaintiff] could have avoided through the use of reasonable care.'") (internal citation omitted); Gross v. Knuth, 471 P.2d 648, 650 (Colo. App. 1970) ("The doctrine of avoidable consequences . . . applies after a legal wrong has occurred, but while damages may still be averted, and bars recovery only for such damages.").

19. After all, if the defendant never injured the plaintiff in the first place, then the plaintiff would not have an injury to enhance.

20. We use "cause" to mean factual causation and rely on the Third Restatement's adoption of a but-for standard for factual causation. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM. LAW INST. 2010). By contrast, and also consistent with the Third Restatement, we use "scope of liability," often denominated "proximate cause," to refer to limits on the liability of a defendant who has tortiously caused harm. *See id.* Chapter 6 Special Note on Proximate Cause at 492. A comparable concept is applicable to a plaintiff's unreasonable conduct, which, when applicable, would remove that negligent conduct from consideration for apportioning liability. "Scope of liability" is an awkward term to use with regard to plaintiff negligence, as liability is not imposed on plaintiffs. Instead, we use the term "scope of responsibility" when addressing the same matter as scope of liability with regard to plaintiff negligent conduct.

21. *See, e.g.*, FRANKLIN, *supra* note 8, at 435 (explaining contributory negligence). For a more extensive discussion on the similarities between avoidable consequences and contributory negligence, see Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 799 (2013), and Part III.A, *infra*.

22. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 (AM. LAW INST. 2000). Once comparative fault replaced the all-or-nothing method of apportioning liability between plaintiffs and defendants, comparative contribution logically followed, displacing the prior pro rata method of apportionment.

23. *Id.* at § 3 cmt. b, Reporters' Note.

Today, almost half a century after the adoption of comparative fault, only a minority of courts—roughly eleven—has addressed the tension between comparative fault and the complete bar of avoidable consequences.[24] Of those that have dealt with avoidable consequences in a post-contributory-negligence world, eight courts revised avoidable consequences to align with comparative fault,[25] and three courts ruled that comparative fault had no effect on avoidable consequences.[26] The vast majority of courts, however, has failed to recognize this tension.[27] As we explain below, this short-

24. *See infra* notes 176 & 189.

25. *See infra* note 176. Eight courts have modified their approach to avoidable consequences in response to comparative fault, replacing its operation as a per se bar, in some cases because a statute modeled on the Uniform Comparative fault Act, see below, had been enacted in the state. A ninth court, the Supreme Court of Vermont, expressed strong support for comparative fault subsuming avoidable consequences in dicta, but chose not to decide the issue since neither party had briefed the issue. Langlois v. Town of Proctor, 113 A.3d 44, 55–56 (Vt. 2014). We note here that Professor Adar, addressing the modification of avoidable consequences after the widespread adoption of comparative fault, wrote:

> Under the Restatement's approach, [avoidable consequences] should merely reduce the . . . tortfeasor's liability . . . rather than eliminate it altogether. Surprisingly enough, this revolutionary proposition has escaped the attention of the Anglo-American legal community. It has barely been mentioned by American courts and has not yet been discussed in the academic literature.

Adar, *supra* note 21, at 785. This "barely mentioned" claim is inaccurate. As stated in the text, twelve courts (including the Vermont Supreme Court, which did not decide the issue) have confronted and discussed this issue. Of those courts, the majority agree with the Restatement approach, although many of them did so without reference to the Restatement. In addition, four of those opinions predate the Restatement's position published in 2000. *See infra* note 176. Moreover, the idea that the Restatement approach to avoidable consequences is revolutionary and not mentioned in legal literature is belied by the work of the National Conference of Commissioners on Uniform State Laws, which twice has promulgated model state statutes that would do the same. *See* UNIF. COMPARATIVE FAULT ACT § 1 (NAT'L CONF. COMM'RS 1977); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3 (NAT'L CONF. COMM'RS 2002). Both of the major contemporary torts treatises address the matter as do a number of torts casebooks. *See infra* note 33; DAN B. DOBB ET AL., TORTS AND COMPENSATION 310 (8th ed. 2017) (addressing avoidable consequences in the comparative fault chapter and criticizing the all-or-nothing approach to the doctrine as wrong because "defendant is clearly a but-for cause of the [enhanced] harm and [it] also seems to be withing the scope of risk defendant created"); FRANKLIN, *supra* note 8, at 461–64 (covering avoidable consequences in the section of text on comparative fault); DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 414–19 (5th ed. 2017) (addressing avoidable consequences and mitigation of harm in the section of text on contributory and comparative negligence); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 676–77 (14th ed. 2020) (discussing avoidable consequences as an aspect of comparative fault).

26. *See infra* notes 189–194 and accompanying text.

27. The remaining courts have failed to consider the interplay between avoidable consequences and comparative fault. These courts simply cite to, and apply, avoidable consequences precedent without mentioning comparative fault. *See, e.g.*, Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC, 867 N.W.2d 265, 271–73 (Neb. 2015) (employing avoidable consequences without reference to comparative fault); Flemings v. State, 19 So.3d 1220, 1228–30 (La. Ct. App. 2009) (employing an avoidable consequences analysis, but discussing it separately from—and without referencing—comparative fault); Tabieros v. Clark Equip. Co., 944 P.2d 1279, 1314–17 (Haw. 1997) (same, but

sightedness appears to stem from the longstanding conception that avoidable consequences is a remedial matter and therefore unrelated to substantive doctrines that constitute an affirmative defense.[28] Regardless of the reason, this application of avoidable consequences resurrects contributory negligence in a postcomparative-fault world and is fundamentally inconsistent with contemporary apportionment principles.[29] Moreover, of the three courts that have refused to modify avoidable consequences after the adoption of comparative fault, only one has meaningfully confronted the tension between avoidable consequences and comparative fault—and, unfortunately, that court's opinion reveals basic misunderstandings about tort law and how apportionment of liability works.[30]

Professor Oscar S. Gray—to whom we dedicate this Article—worked tirelessly to reform and clarify tort law,[31] advocating for coherence and fairness.[32] Indeed, Professor Gray championed comparative fault and was one of the many torts scholars who recognized the incompatibility of avoidable consequences with modern apportionment schemes.[33] This Article, then, seeks to honor Professor Gray's memory by resolving an incoherency in tort law and upholding comparative fault's apportionment

using "mitigation of damages" to mean "avoidable consequences"); Automatic Merchandisers, Inc. v. Ward, 646 P.2d 553, 554 (Nev. 1982) (same). In addition, see RESTATEMENT (THIRD) OF TORTS: REMEDIES § 7 cmt. h Reporters' Note (P.D. 1 Oct. 14, 2020) ("Most avoidable-consequences opinions proceed without reference to comparative responsibility.").

28. A common refrain in avoidable consequences cases is that avoidable consequences only affects "damages" rather than liability. Thus, according to this argument, the doctrine is distinct from liability-determinative doctrines, such as contributory negligence or comparative fault. *See infra* note 96. Part III.A takes issue with this distinction.

29. *See infra* Part III.A.

30. *See infra* Part III.B. As explained in that subpart, only Kocher v. Getz, 824 N.E.2d 671 (Ind. 2005) provides meaningful discussion regarding the tension between avoidable consequences and comparative fault. The other two cases that reach the same conclusion provide no substantive rationale.

31. *In Memoriam: Oscar S. Gray*, AM. LAW INST. (Oct. 9, 2019), https://www.ali.org/news/articles/memoriam-oscar-s-gray/.

32. *A Celebration of the Life for Oscar Gray*, UNIV. MD. (Dec. 10, 2019), https://mediasite.umaryland.edu/Mediasite/Play/130a00107c5a453dbefa8e0074e0bf641d.

33. Professor Gray and his coauthors explained that "[i]n principle, the plaintiff's failure to take reasonable steps to avoid certain damages caused by the defendant's negligence should serve merely to reduce the plaintiff's recovery for those damages in a comparative negligence jurisdiction, rather than to bar such recovery." FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 25.4, at 604 (3d ed. 2007). Another treatise explains "[w]ith the adoption of comparative fault regimes in most states, the remaining role of the avoidable consequences or mitigation of damages approach has been called into question." DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 16.10, at 404 (2d ed. 2016). The American Law Institute, *see* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (AM. LAW INST. 2000), and the National Conference of Commissioners on Uniform State Laws agree that avoidable consequences should not operate to per se bar plaintiff recovery for enhanced harms. *See* Unif. Comp. Fault Act § 1 (1977); UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 3 (2002).

precepts because of the fundamental fairness that led to its adoption. To that end, the thesis of this Article is simple: avoidable consequences should not bar recovery for enhanced harm caused also by the plaintiff's unreasonable failure to mitigate; instead, the damages for the enhanced injury should be apportioned among all of those whose tortious conduct caused that harm.

Before proceeding further, clarity requires that we distinguish avoidable consequences from a similar rule known as mitigation of damages. Although courts frequently use these terms interchangeably,[34] we maintain their technical distinction for the sake of clarity and to highlight the incoherency in treating them differently for apportionment purposes. As explained above, avoidable consequences refers to unreasonable, post-injury plaintiff conduct that enhances the plaintiff's harm. Mitigation of damages, on the other hand, refers to injury-enhancing plaintiff misconduct that *precedes* or *coincides* with the initial tort.[35] The distinction between avoidable consequences and mitigation of damages rests on the temporal relationship between the plaintiff's injury-enhancing negligence and the initial injury. Today, virtually all courts recognize that comparative responsibility governs apportionment for mitigation of damages; that is, injury-enhancing plaintiff fault that predates or coincides with the plaintiff's injury is, universally, a factor in comparative fault apportionment rather than a recovery bar for the enhanced harm.[36]

34. *E.g.*, Cobb v. Snohomish County, 935 P.2d 1384, 1389 (Wash. 1997) ("The doctrine of avoidable consequences, also known as mitigation of damages, prevents recovery for damages the injured party could have avoided through reasonable efforts."); Munn v. Algee, 924 F.2d 568, 573 n.9 (5th Cir. 1991) ("Courts frequently use the phrases 'avoidable consequences' and 'mitigation of damages' interchangeably."); Gottsch Feeding Corp. v. Red Cloud Cattle Co., 429 N.W.2d 328, 333 (Neb. 1988) ("[T]he 'doctrine of avoidable consequences' is but another name for that which is more commonly referred to as the failure to mitigate damages.").

35. *See, e.g.*, Law v. Superior Court In & For Maricopa Cty., 755 P.2d 1135, 1138 (Ariz. 1988) (relating to the plaintiff's pre-injury failure to wear a seatbelt); Waterson v. Gen. Motors Corp., 544 A.2d 357, 359 (N.J. 1988) (same); Melesko v. Riley, 339 A.2d 479, 479 (Conn. Super. Ct. 1975) (same).

36. The vast majority of courts apply comparative fault to plaintiff misconduct that precedes or coincides with the initial harm. *See, e.g.*, *Law*, 755 P.2d at 1145; Kimbrough v. Anderson, 55 N.E.3d 325, 337 (Ind. Ct. App. 2016) (explaining that comparative fault applies to plaintiff's pre-injury conduct); Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 969 (Me. 2000); Burrell ex rel. Schatz v. O'Reilly Auto., Inc., 175 S.W.3d 642, 651 n.10 (Mo. Ct. App. 2005) ("[P]re-accident fault is properly submitted by a comparative fault instruction."); Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 546 (Nev. 2005) (in the course of addressing class certification, explaining that comparative fault governs pre-injury plaintiff conduct); Ostrowski v. Azzara, 545 A.2d 148, 152 (N.J. 1988) ("Avoidable consequences, then, normally comes into action when the injured party's carelessness occurs *after* the defendant's legal wrong has been committed. Contributory negligence, however, comes into action when the injured party's carelessness occurs *before* defendant's wrong has been committed or concurrently with it.); Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 563 (Tex. 2015) ("[W]e conclude that . . . the [comparative fault statute] . . . requires fact-finders to consider relevant evidence of a plaintiff's pre-occurrence, injury-

Part II of this Article outlines fundamental tort principles that are central to the apportionment enterprise.[37] Understanding these principles is essential to understanding how avoidable consequences contravenes them. Importantly, and unfortunately, the avoidable consequences (and mitigation of harm) case law is rife with courts that do not understand these principles. Part III, then, details how avoidable consequences violates these fundamentals, both in court application and justification.[38] By way of preview, avoidable consequences operates like the outdated and abandoned doctrine of contributory negligence.[39] Moreover, justifications for this application of avoidable consequences in a number of jurisdictions fails to appreciate the apportionment principles laid out in Part II. First, some courts fail to understand the appropriate causal inquiry in tort law by addressing the causes of the injury-causing accident (or initial harm) rather than the causes of the plaintiff's multiple harms.[40] In addition, another justification for avoidable consequences—that the plaintiff's post-injury conduct is a superseding cause of the enhanced harm[41]—is untenable in a comparative fault world. This is also true of the efforts to distinguish avoidable consequences from mitigation of damages based on the differing temporal relationship between the plaintiff's initial injury and enhanced harm.[42] Finally, some courts and commentators reveal a fundamental misunderstanding of apportionment principles by claiming that subsuming avoidable consequences into comparative fault would cause greater unfairness in modified comparative fault jurisdictions.[43] Part IV provides a solution consistent with the apportionment principles explained in Part II, which would apportion the enhanced harm due to avoidable consequences among the parties responsible for that harm, rather than barring all recovery for it.[44] Part V concludes.[45]

causing conduct."). *See also* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 7 cmt. b (P.D. 1 Oct. 14, 2020) ("[C]omparative responsibility applies to the plaintiff's conduct before or simultaneously with the tort, and avoidable consequences applies to plaintiff's conduct after the tort."). *But see* Weston v. Dun Transp., 695 S.E.2d 279, 282 (Ga. Ct. App. 2010) (barring plaintiff's claim due to pre-accident negligence notwithstanding the jurisdiction's adoption of comparative fault).

37. *See infra* Part II.
38. *See infra* Part III.
39. *See infra* Part III.A.
40. *See infra* Part III.B.
41. *See infra* Part III.C.
42. *See infra* Part III.D. The "other doctrine" mentioned here is mitigation of damages.
43. *See infra* Part III.E.
44. *See infra* Part IV.
45. *See infra* Part V.

## PART II. APPORTIONMENT OF LIABILITY PRINCIPLES: THE TWO-STEP PROCESS, CAUSATION BEFORE FAULT

To understand how avoidable consequences conflicts with comparative fault principles, we set forth fundamental tort principles for apportioning liability, which require attention to both causation and comparative fault when the plaintiff contributed to some portion of his or her harm. Subpart A briefly covers these principles. Subpart B explains how these principles relate to cases involving enhanced harms.

### *A. First, Apportionment is on the Basis of Causation; Second, Liability is Apportioned Based on Comparative Responsibility for Indivisible Harms*

There are two distinct concepts involved in apportioning liability: cause[46] and fault.[47] Courts and legislatures, however, sometimes fail to appreciate that these are discrete tools for apportionment.[48] Thus, apportionment is a two-step process, first requiring identification of the indivisible harms suffered by the plaintiff (if there is more than one harm) and the parties responsible for each of those harms.[49] In an ordinary case in which the plaintiff suffers a single injury, this step is unnecessary because all liable parties were a cause of the sole indivisible harm. However, causal apportionment is essential when the plaintiff has suffered more than one

46. *See* Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co., 15 S.W.3d 425, 433 (Tenn. Ct. App. 1997) ("Causation in fact is an all-or-nothing proposition . . . . While there may be different degrees of liability or fault, specific conduct is either a cause in fact, or it is not.") (internal citation omitted). Thus, there is no such thing as comparative causation.

47. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26(a) (AM. LAW INST. 2000) ("When damages for an injury can be divided by causation, the factfinder first divides them into their indivisible component parts and separately apportions liability for each indivisible component").

48. *See, e.g.*, Webb v. Navistar, 692 A.2d 343, 351 (Vt. 1996) (using "comparative causation" to mean "comparative fault"); Sparks v. Owens-Illinois, Inc., 32 Cal App. 4th 461, 471 (1995) (conflating causal apportionment with comparative fault); Protectus Alpha Navigation Co. v. North Pac. Grain Growers, Inc., 767 F.2d 1379, 1383–84 (9th Cir. 1985) (apportioning on the basis of causation without any consideration of comparative fault); Kalland v. North Am. Van Lines, 716 F.2d 570, 573 (9th Cir. 1983) (same).

49. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. c (AM. LAW INST. 2000) (explaining that the two-step apportionment process apportions first on causation and then on relative party fault for indivisible harms). We note that the causal inquiry in tort law addresses the causes of the plaintiff's *harm*. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010) ("Tortious conduct must be a factual cause of *harm* for liability to be imposed**").** Some courts employing avoidable consequences fail to appreciate this basic tenet, instead looking to the causes of the initial accident. *See, e.g.*, Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005) (refusing to consider the plaintiff's enhanced harms under comparative fault because the plaintiff's post-accident conduct did not cause the initial accident); *see also infra* Part III.B.

harm. Fundamentally, only those who tortiously cause harm are liable for it.[50] The corollary of this principle, putting aside difficulties of proof,[51] is that parties do not pay for what they do not cause.[52] We cannot emphasize enough the importance of this first step. A recurrent theme throughout avoidable consequences cases (and the critique of them in Part III) is the failure of courts to appreciate that frequently there are two harms: the initial one suffered by the plaintiff and another enhanced harm to which the plaintiff contributed by failing to take reasonable steps to mitigate it.[53]

Thus, the first step in apportioning liability is to determine who caused each of the plaintiff's multiple harms.[54] If multiple parties contribute to multiple, discrete plaintiff harms (each an "indivisible injury"), each party can only be liable for the harm or harms that party caused.[55] Consider two drivers, Avery and Brielle, who negligently run over the plaintiff at the same time. Avery runs over the plaintiff's right arm and Brielle runs over the plaintiff's left leg. Avery would be liable only for the injury to the plaintiff's arm, and Brielle would be liable only for the injury to the plaintiff's leg, because neither one caused the other injury.

Fault apportionment, the second step in the apportionment process, arises only *after* the plaintiff's harms have been divided by causation into indivisible harms[56]—i.e., discrete harms that are each caused by a different

50. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. a (AM. LAW INST. 2000) ("No party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility.").

51. When evidence is insufficient to determine which parties caused what harm, allocation of the burden of proof may result in a party paying for more or less of the harm than it caused. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (AM. LAW INST. 2000). That misallocation is by necessity, not design.

52. *See supra* note 50; *see also* Robert N. Strassfeld, *Causal Comparisons*, 60 FORDHAM L. REV. 913, 918–20 n.21 (1992) (collecting authorities).

53. There may be cases in which, had the plaintiff taken reasonable steps to mitigate, he or she would have suffered no harm, in which case this first step is unnecessary. Our reading of the cases is that, because courts fail to appreciate the necessity of this first step, they do not attend to whether the case involves a single harm, as described above, or an initial harm and enhanced harm due to the failure to mitigate. The latter is the more frequent case by a wide margin.

54. *See Waste Mgmt., Inc.*, 15 S.W.3d at 433; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. c (AM. L. INST. 2000). *See also* Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267 (1996) (explaining the history of courts failing to apportion causally by laxly determining what constituted an indivisible injury and advocating for more rigorous attention to identifying discrete injuries suffered by plaintiffs and apportioning first on the causes of each discrete injury).

55. This is equally true whether the jurisdiction employs joint and several liability, several liability, or some hybrid of the two. Those doctrines address only how liability will be apportioned among defendants who have caused it when there is insolvency of one or more of them.

56. We note that it can be difficult to determine whether a harm is indivisible. Roy D. Jackson, Jr., *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 420 (1939) ("This article has attempted

set of parties.[57] If, for instance, Avery and Brielle *both* ran over the plaintiff's torso in addition to Avery running over the plaintiff's arm and Brielle running over the plaintiff's leg, Avery and Brielle would both be liable for the harm to the plaintiff's torso in addition to their liability for the discrete harms to the plaintiff's extremities.[58] At this point, since both Avery and Brielle caused harm to the plaintiff's torso, apportionment between them would be based on comparative fault.[59]

Let us extend the simple illustration of Avery and Brielle to a case that implicates plaintiff fault and enhanced harm, a circumstance closer (though

to distinguish between divisible and indivisible torts. Such a distinction is a difficult one to make, and, at best, frequently controversial."); Michael D. Green, *A Future for Asbestos Apportionment?*, 12 CONN. INS. L.J. 315 (2006) (surveying apportionment issues faced by courts in asbestos cases). While exploring the complications of divisibility is beyond the scope of this article, we observe one quintessential example of an injury that many consider to be indivisible but arguably is not: death. Death might seem like an indivisible injury because, after all, someone is either dead or not, and—unlike causally apportioning the arm damage to Avery and the leg damage to Brielle in the above example—it is not obvious how death might be causally apportioned. That said, when we examine the measure of damages for wrongful death, we discover that it is not death per se for which damages are awarded but for losses reflecting the amount of earnings the decedent would have made through employment. FRANKLIN, *supra* note 8, at 744–45. Thus, consider a wrongful death action for a decedent exposed to two different toxic agents, one that accelerated his death by five years and the other that accelerated his death by ten years. In addition, assume that the exposure to each toxic agent was caused by a different defendant. Damages would be causally apportioned between the defendants based on their contribution to diminishing the decedent's survival for each of the two periods. *Cf.* Dillon v. Twin State Gas & Electric Co., 163 A. 111, 115 (N.H. 1932) (addressing a child who fell off of a bridge but who was electrocuted during his fall and concluding that, if the fall would have resulted in his death a few seconds later, damages against the electric company should be drastically reduced). Indeed, all cases of death are about depriving the decedent of some number of years (or less, as in *Dillon*) of life, as even in the absence of the "wrongful death," the decedent would have eventually died at some later time. *See* FRANKLIN, *supra* note 8, at 744–45. To generalize, time may be a basis for making death or other harms divisible by accelerating their occurrence and thereby enable causal apportionment.

57. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. g (AM. LAW INST. 2000) ("Damages are indivisible, and thus the injury is indivisible, when all legally culpable conduct of the plaintiff and every tortious act of the defendants and other relevant persons caused all the damages."). Importantly, if there is insufficient evidence regarding the divisibility of a harm, the harm is treated as an indivisible harm. *Id.*

58. Provided, of course, that there was no further way to divide the torso's harms into discrete items.

59. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. c (AM. LAW INST. 2000) (explaining that the "two-step" process for causal and fault apportionment only authorizes fault-based apportionment for indivisible harms). We note here that we use the term "comparative fault" to refer to "comparative negligence," since comparative negligence—that is, unreasonable plaintiff conduct—is the type of plaintiff conduct that implicates liability apportionment between the plaintiff and defendants for the purposes of § 26. Note that some courts, many of which are quoted throughout this article, use "comparative responsibility" to mean comparative fault and comparative negligence. Typically, "comparative responsibility" refers to all tortious conduct, including strict liability, rather than just negligence. *See id.* at § 1.

not identical) to the cases employing avoidable consequences.[60] In this hypothetical, a cook aboard a boat negligently starts an uncontrollable grease fire while cooking at sea. Attempting to save the boat, the cook races to the cockpit and steers the boat toward the dock to enable firefighters to put out the fire and save the ship. The cook succeeds in reaching the dock, and firefighters begin to douse the flames. Unfortunately, the dock owner believes the burning boat will destroy her dock and unreasonably casts the boat off by releasing the line tethering it to the dock. Due to having smoke-choked engines, the boat is adrift and unable to maneuver. The boat's crew evacuates, and the boat burns to a cinder. Before being cast adrift, the boat had severe cosmetic and engine damage (amounting to, say, $100,000), but the boat would have been saved if the dock owner had not unreasonably cast the boat adrift. In a suit against the dock owner for damages to the boat, how should damages be apportioned?

First, each indivisible harm suffered by the ship owner, as well as the parties responsible for each of those harms, must be identified.[61] Why must the court begin by identifying the discrete harms that occurred? As stated above, tortfeasors pay only for harm that they caused. If there is a discrete harm—and there are two in this hypothetical—then we must distinguish them and apportion liability for each harm separately unless all parties caused each discrete harm.[62] That is not the case here, as only one party—the cook—is responsible for the cosmetic and engine damage. The cook's negligence is the only relevant cause of the fire, and the fire alone caused the $100,000 of cosmetic and engine damage regardless of the dock owner's subsequent conduct. Thus, the cook—for whom the boat's owner is vicariously liable—is solely responsible for the $100,000 of cosmetic and engine damage.

60. We draw on Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1381 (9th Cir. 1985), for the hypothetical in the text. We have slightly modified the facts to better serve our illustrative purpose.

61. We suspect that a number of judges fail to appreciate this step, as did the trial judge in Greenwood v. Mitchell, 621 N.W.2d 200, 204 (Iowa 2001). In this case, the defendant drove into the plaintiff, a pedestrian, and injured his shoulder. *Id.* at 201. The defendant argued that the plaintiff failed to mitigate his damages by not attending physical rehabilitation, thereby enhancing the initial injury. *Id.* at 202. The trial judge did not instruct the jury to causally apportion the initial and enhanced harm, so, when the jury found the plaintiff 60% at fault, the judge entered judgment for the defendant based on the state's modified comparative fault scheme. *Id.* at 204. It is important to note that some courts and commentators justify the traditional application of avoidable consequences based on concerns that the trial court's approach in *Greenwood* would result in barring recovery routinely in modified comparative fault jurisdictions. As explained in this Part and in Part III.E, such a justification misunderstands causal apportionment.

62. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. c Reporters' Notes (AM. LAW INST. 2000) (explaining that, if all the parties contributed to the harm and it is impossible to divide the harm into indivisible components due to lack of evidence, then the "two-step" process becomes a "one-step" process," and the factfinder can apportion fault between all those responsible).

The second harm—the boat's value less the $100,000 of cosmetic and engine damage; that is, the enhanced harm that occurred after the initial damage—resulted from *both* the cook's negligence *and* the dock owner's unreasonable conduct.[63] Moreover, this second harm is indivisible because it cannot be further factually apportioned—both the cook and the dock owner caused the entirety of this harm.[64] Thus, proceeding to the second step of the apportionment process, the factfinder will have to apportion damages for this second, enhanced harm between the cook and the dock owner by assigning comparative percentages of fault.[65]

In sum, factfinders assign shares of comparative responsibility among parties for each indivisible harm suffered by a plaintiff.[66] Such comparative responsibility is assigned based on the tortious conduct that caused that indivisible harm. As such, the comparative responsibility assigned to one party (say, to the plaintiff) may be different for each indivisible harm suffered by the plaintiff because (1) the negligent conduct that caused each indivisible harm may be different or (2) a different set of parties may be responsible for different indivisible harms.[67] Thus, factfinders assign different responsibility shares for each indivisible harm if the facts warrant such treatment.[68]

### *B. Enhanced Harms Are Common in Tort Law and Are Routinely Apportioned Under the Principles Set Forth Above*

Enhanced injury cases—cases in which a subsequent event enhances the plaintiff's initial injury—occur with some frequency in tort law. In such

63. *See id.* § 26 cmt. f Reporters' Notes ("Divisible damages may occur when a part of the damages was caused by one set of persons in an initial accident and was then later enhanced by a different set of persons.").

64. *Id.* § 26 cmt. g.

65. The factors involved in apportioning responsibility for indivisible harms is beyond the scope of this article, although factfinders often apportion by considering the culpability of the risk-creating conduct of each party and the strength of the proximate causal connection between that conduct and the resulting harm. *Id.* § 26 cmt. c Reporters' Note.

66. *Id.* § 26.

67. To illustrate, consider the following hypothetical: *A* negligently parks his automobile in a dangerous location. *B* negligently crashes his automobile into *A*'s automobile, damaging it. When *B* is standing in the road inspecting the damage, *B* is hit by *C*, causing personal injury to *B*. *B* sues *A* and *C* for personal injury and property damage. *B*'s negligent driving and *A*'s negligent parking caused damage to *B*'s automobile. *A*'s negligent parking, *B*'s negligent driving, *B*'s negligent standing in the road, and *C*'s negligent driving caused *B*'s personal injuries. The factfinder determines damages separately for *B*'s automobile and *B*'s person. The factfinder assigns separate percentages of responsibility to *A* and *B* for damage to *B*'s automobile, considering *A*'s parking and *B*'s driving. *A*'s and *B*'s percentages add to 100 percent. The factfinder assigns a separate percentage of responsibility to *A*, *B*, and *C* for *B*'s personal injury, considering *A*'s parking, *B*'s driving, *B*'s standing in the road, and *C*'s driving. *A*'s, *B*'s, and *C*'s percentages add to 100 percent. *Id.* cmt. c, illus. 1.

68. *Id.*

cases, courts routinely recognize that the plaintiff's enhanced harm is an indivisible injury and instruct factfinders to apportion that harm separately and based on party fault, rather than apportioning the enhanced harm entirely to one party.[69]

Consider the products liability crashworthiness doctrine, employed in so-called "second impact" cases.[70] For convenience, let us assume the plaintiff is the only cause of his or her initial automobile accident,[71] due to, say, intoxicated driving or otherwise negligent conduct.[72] As such, the plaintiff is wholly responsible for his or her initial harm.[73] However, due to a defect in the plaintiff's vehicle, the plaintiff suffers a "second collision" that enhances the initial injury.[74] Seeking remedy, a crashworthiness plaintiff sues the vehicle manufacturer for the damages associated with the enhanced harm—i.e., those harms that occur as a result of the "second collision."[75] In these cases, the enhanced harm is indivisible because, again, it was a discrete

69. *E.g.*, Miyamoto v. Lum, 84 P.3d 509, 521 (Haw. 2004) (plaintiff suffered enhanced harm due to the treating chiropractor's malpractice); Daly v. Gen. Motors Corp., 575 P.2d 1162, 1164 (Cal. 1978) (plaintiff suffered an enhanced injury due to defendant manufacturer's design defect). Serial automobile accidents in which the plaintiff suffers aggravation of a harm that occurred in a prior collision is another example. *See* Loui v. Oakley, 438 P.2d 393, 395 (Haw. 1968) (plaintiff was involved in a series of four automobile accidents, each resulting in injury to the same area of her body, for which the court required causal apportionment in a suit against the defendant responsible for the first accident). Another instance of enhanced harm occurs when the plaintiff suffers from an adverse physical condition and the defendant causes an aggravation of the harm. Again, courts appreciate that the defendant is liable only for the enhanced harm because the defendant did not cause the original condition. *See* Montalvo v. Lapez, 884 P.2d 345, 362 (Haw. 1994) (plaintiff with prior back and neck injuries suffered enhanced injury in a multi-vehicle accident).

70. *E.g.*, *Daly*, 575 P.2d 1162, 1164 (Cal. 1978) ("[T]he case involves a so-called 'second collision' in which the 'defect' did not contribute to the original impact, but only to the 'enhancement' of injury.").

71. This assumption is not necessary. The same principles of apportionment would apply if another driver negligently caused the accident or the negligence of the other driver and the plaintiff concurred to cause the accident. Those changes in the facts would change the fault apportionment but not the critical causal apportionment explained below.

72. *See Daly*, 575 P.2d at 1164 (intoxicated motorist drove at 50–70 miles per hour into a metal divider fence); Dannenfelser v. DaimlerChrysler Corp., 370 F. Supp. 2d 1091, 1093 (D. Haw. 2005) (plaintiff negligently crossed the median and crashed into a lamp post after drinking four alcoholic beverages and consuming marijuana before driving); Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 685 (Tenn. 1995) (plaintiff negligently crossed the center line and collided head-on with incoming traffic).

73. Typically, these second collisions result from ejection. For instance, in *Daly v. General Motors Corp.*, the plaintiff negligently drove into a metal fence and suffered injuries from the impact. After hitting the fence, the plaintiff's vehicle began spinning, the "driver's door was thrown open, and [the plaintiff] was forcibly ejected from the car and sustained fatal head injuries." *Id.* at 1164. The court found that "the 'defect' did not contribute to the original impact and injury, but only to the 'enhancement' of injury."). *Id.*

74. *Id.*

75. *See, e.g.*, *id.*

harm caused by both by the plaintiff and the defendant manufacturer (and/or a third party whose negligence caused the initial accident).[76] Accordingly, the factfinder apportions comparative responsibility for the enhanced harm between the plaintiff and the automobile manufacturer.[77] This apportionment method reflects the fundamental apportionment principles explained in Part II.A.

"Secondary-harm" cases are another example of cases involving enhanced harms. These cases involve a plaintiff injured by the tortious conduct of another whose harm is enhanced by physician malpractice.[78] The secondary harm is indivisible because it is a discrete harm caused by the conduct of multiple parties.[79] Under these circumstances, courts require the factfinder to apportion the secondary harm among its tortious causes—i.e., the initial tortfeasor and the physician third party.[80] To be sure, the enhanced harms in these cases were not caused by negligent plaintiff conduct. But, whether plaintiff or defendant, special rules that applied to plaintiff conduct were among the casualties of comparative fault's widespread adoption.[81] As such, in avoidable consequences cases, courts should allow factfinders to apportion enhanced harm based on the comparative fault of the parties—as courts do in the enhanced-harm cases just discussed—rather than bar plaintiffs from recovering for their enhanced harms.

76. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. g (AM. LAW INST. 2000).

77. *See Daly*, 575 P.2d at 1171–72 (holding that comparative fault applies to the enhanced harm in crashworthiness cases); *Dannenfelser*, 370 F. Supp. 2d at 1095 (same); *Whitehead*, 897 S.W.2d at 693 (same); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 (AM. LAW INST. 1998).

78. *See, e.g.*, Miyamoto v. Lum, 84 P.3d 509, 521–22 (Haw. 2004) (addressing liability of chiropractor whose negligence aggravated plaintiff's initial injury caused by a negligent driver).

79. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. g (AM. LAW INST. 2000).

80. *See Miyamoto*, 84 P.3d at 522 ("[A] defendant can be held liable for injuries resulting from both negligent and non-negligent medical treatment [that enhances the plaintiff's harm]."); Pridham v. Cash & Carry Building Ctr., Inc., 359 A.2d 193, 197–98 (N.H. 1976) ("If the [medical] services are rendered negligently . . . the negligence of the original tortfeasor [is] a proximate cause of the subsequent injuries suffered by the victim."); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 35 (AM. LAW INST. 2010) ("An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other's injury, so long as the enhanced harm arises from a risk that inheres in the effort to render aid.").

81. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. a (AM. LAW INST. 2000) ("[S]pecial provisions in the Restatement Second of Torts for evaluating a plaintiff's conduct are now superfluous and no longer effective [given the advent of comparative fault].").

Drivers who are in multiple car accidents may suffer enhanced harm to a previously suffered harm due to a subsequent accident.[82] This is another common form of enhanced harm that requires the two-step apportionment described above.

## PART III: RECOGNIZING AVOIDABLE CONSEQUENCES AS A FORM OF CONTRIBUTORY NEGLIGENCE AND RESCUING THE DOCTRINE FROM THE CLUTCHES OF REMEDIES

When one appreciates that there are two harms to apportion in the enhanced-harm cases discussed above, the case for apportioning the entirety of the enhanced harm on only the most proximate negligent party is weak.[83] Yet, that is precisely what avoidable consequences does.[84] In that respect, avoidable consequences violates the apportionment principles set forth in Part II and the fundamental fairness that comparative fault provided. Why does this happen? There are several reasons, we believe.

First, courts do not appreciate that avoidable consequences is merely a stylized version of enhanced harm and are instead captive to the idea that avoidable consequences is a remedial doctrine.[85] Second, and relatedly, courts do not understand that barring recovery for avoidable consequences

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[82] In Loui v. Oakley, 438 P.2d 393, 395 (Haw. 1968), the plaintiff was in four separate accidents and suffered harm to the same area of her body in each one, requiring the court to address how to apportion her harm based on causation.

83. This statement is subject to a fact-specific qualification based on scope of liability that we explain *infra*. *See infra* notes 130–132 and accompanying text.

84. As an example, the Arkansas Supreme Court approved the following jury instruction regarding avoidable consequences:

> You are instructed, that it was incumbent upon the plaintiff to use reasonable care to avoid unnecessary aggravation of his injuries; and if you believe from the evidence, that the plaintiff did not use reasonable care in following the advice of his physician, and if you further believe from the evidence that because of his failure to observe such reasonable care, his collar-bone was deformed, then the court tells you that the plaintiff cannot recover in this action for such deformity.

Burnett v. Seventh St. Produce Co., 47 S.W.2d 38, 39 (Ark. 1932). This instruction is quite typical. *See, e.g.*, *Judicial Council of California Civil Jury Instructions*, CACI No. 3930 (Nov. 2019), https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf; *Connecticut Judicial Branch Civil Jury Instructions*, ST. CONN. JUD. BRANCH § 4.5-14 (Mar. 25, 2011), https://jud.ct.gov/JI/Civil/Civil.pdf; *66.015 Tort Damages; Duty to Lessen*, GA. SUGGESTED PATTERN JURY INSTRUCTIONS (2020), https://1.next.westlaw.com/Document/I3c169813950d11dd93e7a76b30106ace/View/FullText.html?originationContext=document&contextData=(sc.Category)&transitionType=StatuteNavigator&needToInjectTerms=False**;** *Hawai'i Civil Jury Instructions*, HAW. ST. JUDICIARY, Instruction No. 18 (Mar. 7, 2016), https://www.courts.state.hi.us/docs/legal_references/jury_instructions_civil.pdf.

85. *See infra* notes 96–102 and accompanying text.

mirrors contributory negligence[86] and thereby contravenes post comparative-fault apportionment principles.[87]

Third, some courts employing avoidable consequences fail to appreciate the appropriate causal inquiry in tort law, which asks who caused the plaintiff's *harm*, rather than who caused the *accident*.[88] Tort law compensates for harm, not for accidents;[89] an accident that results in no legally compensable harm is not one in which tort law has an interest. Fourth, some courts' doctrinal analysis of avoidable consequences reveals confusion regarding fundamental apportionment principles in the comparative fault era: a plaintiff's post-injury negligence is not a superseding cause of the enhanced harm because, save for highly unusual situations, the subsequent tortious conduct of a party does not absolve earlier tortfeasors of liability, especially when the plaintiff is the subsequent negligent party.[90] Fifth, courts that apportion liability in mitigation of damages cases but bar recovery in avoidable consequences cases typically fail to recognize that the temporal distinction between avoidable consequences and mitigation of damages cannot justify treating the two doctrines differently.[91] Finally, courts that maintain avoidable consequences because they are concerned that employing comparative fault could bar all recovery in modified comparative fault schemes misunderstand the apportionment principles set forth in Part II.[92]

### *A. Avoidable Consequences Mirrors Contributory Negligence in Contravention of Comparative Fault Precepts*

Avoidable consequences employs the same apportionment method as contributory negligence, which bars plaintiffs from recovery if they unreasonably contributed to their harm. Although avoidable consequences only bars a plaintiff from recovering for his or her enhanced harm rather than

86. Adar, *supra* note 21, at 799 ("[B]oth contributory negligence and mitigation of damages apply the same basic rule: Defendant is not liable for any damage caused by his wrongful conduct, if the plaintiff could and should have avoided suffering that damage.") (emphasis omitted). For further explanation, see *infra* Part III.A.

87. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 7 (AM. LAW INST. 2000) (explaining that a plaintiff's contributory negligence should not bar the plaintiff from recovery but instead reduce the plaintiff's damages in proportion to the plaintiff's comparative fault).

88. *See infra* note 106.

89. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010) (**"**Tortious conduct must be a . . . cause of *harm* for liability to be imposed.") (emphasis added). To be sure, in routine cases without enhanced harm, the harm and the accident may concur.

90. *See infra* Part III.C.

91. *See infra* Part III.D.

92. *See infra* Part III.E.

barring the entire suit, the test for contributory negligence and avoidable consequences is the same: if the plaintiff deviates from the conduct of a reasonably prudent person and that deviation causally contributed to the plaintiff's enhanced harm, the plaintiff bears the entirety of his or her enhanced-harm damages, even though the tortfeasor also caused the plaintiff's enhanced harm. Thus, both of these doctrines bar plaintiff recovery if the plaintiff's negligence also caused the enhanced harm.

That avoidable consequences duplicated contributory negligence's rule and barred recovery for enhanced harms did not matter during the contributory negligence era—both would bar recovery for the enhanced harm, albeit under different doctrinal labels.[93] But carrying avoidable consequences forward in a day when comparative fault has displaced contributory negligence is at odds with the apportionment framework required by comparative fault[94] and retains the same unfairness that comparative fault was meant to displace. Unreasonable plaintiff conduct no longer operates as a bar to recovery.[95] As with the numerous tort doctrines identified in Part I that required reconsideration and modification after the adoption of comparative fault, so too does avoidable consequences. Thus, courts should structure apportionment—for enhanced harms or otherwise—in accordance with causation and party fault rather than leaving all enhanced-harm damages to be borne by the plaintiff in avoidable consequences cases,

93. MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES TEACHER'S MANUAL 461–64 (10th ed. 2016) ("Historically, courts barred any recovery for the enhanced harm that could have been avoided if the plaintiff had acted reasonably to mitigate the harm. In a day of contributory negligence, that result made sense. Today, if courts employ comparative fault principles, then the enhanced harm will be apportioned between the plaintiff and defendant in accordance with the comparative fault assigned to each.").

94. *See, e.g.*, *id.*; ARIZ. REV. STAT. ANN. § 12-2506 (no longer barring plaintiff recovery if the plaintiff's unreasonable conduct contributed to his or her harm); ARK. CODE ANN. § 16-64-122 (same); COLO. REV. STAT. § 13-21-111 (same); CONN. GEN. STAT. § 52-572H (same); FLA. STAT. § 768.81 (same); IOWA CODE § 668.1 (defining "unreasonable failure to avoid an injury or to mitigate damages" as fault); N.Y. C.P.L.R. § 1411 (same); *see also, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1243–44 (Cal. 1975) (holding that a plaintiff's contributory negligence "shall not bar recovery, but the damages award shall be diminished in proportion to the amount of [the plaintiff's] negligence").

95. The statement in the text is subject to qualification in modified comparative fault jurisdictions, which retain the complete bar of contributory negligence when the plaintiff's fault exceeds a specified threshold, typically 50%. *E.g.*, IND. CODE § 34-51-2-7 ("If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's . . . damage, the jury shall return a verdict for the defendant and no further deliberation of the jury is required."). Where the plaintiff's fault would bar recovery for an enhanced harm, it would do so only because the factfinder apportioned comparative fault to the plaintiff and defendant(s) for the enhanced harm, and the factfinder apportioned fault to the plaintiff that exceeded the jurisdiction's threshold.

especially because the defendant and the plaintiff *both* negligently caused the enhanced harm.

Historically, remedies scholars—and other avoidable consequences apologists—have argued that avoidable consequences and contributory negligence/comparative responsibility are unrelated doctrines because the former merely adjusts plaintiff recovery while the latter determines party liability.[96] Indeed, it is this very reasoning that has likely prevented courts from appreciating the impact of comparative fault on avoidable consequences and exploring their interplay.[97] This reasoning falls flat, however, because it fails to appreciate that avoidable consequences operates identically to contributory negligence for plaintiffs' enhanced harms. With this appreciation, one can readily see that avoidable consequences is no more a remedial matter than is contributory or comparative negligence.[98] Clearing this unfortunate taxonomic underbrush would greatly contribute to clearer and more coherent analyses regarding the interactions between comparative fault and avoidable consequences.

96. *E.g.*, Ostrowski v. Azzara, 545 A.2d 148, 154–55 & n.5 (N.J. 1988) (explaining that "[c]omparative negligence is generally 'viewed as a liability doctrine, rather than a damage doctrine'" and that avoidable consequences "should more properly be addressed to the question of diminution of damages; it does not go to the existence of a cause of action."); Pennzoil Producing Co. v. Offshore Exp., Inc., 943 F.2d 1465, 1474 (5th Cir. 1991) (explaining that "the doctrine of avoidable consequences is really a rule of damages, and that as such it stands wholly apart from the rules that determine who is at fault for the initial injury."); Adar, *supra* note 21, at 798 ("[W]hereas contributory negligence is treated as a complete defense to liability in tort, mitigation is considered a remedial rule, which affects merely the scope of the plaintiff's recovery."). The Restatement (Second) of Torts promoted this distinction, explaining that "contributory negligence either precludes recovery or is no defense at all to a claim for compensatory damages. On the other hand, the rule [of avoidable consequences] stated in this Section applies only to the diminution of damages and not to the existence of a cause of action." RESTATEMENT (SECOND) OF TORTS § 918 cmt. a (AM. LAW INST. 1979). As Professor Adar explains, "[t]his is an entrenched distinction." Adar, *supra* note 21, at 798 n.54.

97. HARPER ET AL., *supra* note 33, at 604 (explaining that courts continue to employ avoidable consequences as a recovery bar due to "unthinking treatment of [avoidable consequences] as a rule entirely separate from the principle of contributory negligence"); Adar, *supra* note 21, at 795–96 (explaining that the division between comparative fault and avoidable consequences, a remedies doctrine, is "so entrenched that it sometimes leads remedies experts to exclude any treatment of comparative negligence from their textbooks, presumably on the basis of the assumption that the doctrine [of comparative fault] involves issues of liability rather than remedial questions.").

98. This is a matter that seems to escape remedies scholars. *See* DOUGLAS LAYCOCK & RICHARD L. HAZEN, MODERN AMERICAN REMEDIES: CASES & MATERIALS 86–93 (5th ed. 2018) (addressing avoidable consequences as a matter limiting damages but containing no coverage of contributory or comparative negligence); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES & MATERIALS 139–53 (8th ed. 2010) (same); RUSSELL L. WEAVER ET AL., REMEDIES: A CONTEMPORARY APPROACH 736–57 (5th ed. 2019) (explaining, in the course of discussing avoidable consequences, why comparative fault is different).

One commenter previously made precisely this point, i.e., that the remedy/liability distinction between avoidable consequences and contributory negligence is artificial, explaining:

> [C]ontrary to its widespread image as a rule that merely *reduces* recovery for avoidable losses, [avoidable consequences] in fact *eliminates* altogether the right of a plaintiff to recover for any such losses, even when they are factually linked to the defendant's wrongful conduct. In this very important respect, the [avoidable consequences] doctrine is identical to the doctrine of contributory negligence: both have the effect of completely barring the plaintiff from recovering any damages whatsoever, if those damages could have been avoided by the exercise of due care. Put differently, contributory negligence and [avoidable consequences] are two parallel but identical doctrines of tort law: they lay down the same substantive principle . . . .[99]

To be blunt, the remedy/liability distinction between avoidable consequences and comparative fault is untenable. Indeed, Dean Prosser wrote that "the doctrines of contributory negligence and avoidable consequences are in reality the same,"[100] and Professor McCormick suggested that any distinction between the two doctrines is "using different labels for two sides of the same bottle."[101] As explained above in Part II.A, comparative fault employs a more granular and equitable distribution of damages in relation to causation and party fault, as should avoidable consequences.[102] The all-or-nothing allocation of damages to the plaintiff under avoidable consequences thus violates the fairness concerns that animated the adoption of comparative fault principles.

### *B. Confusion About What Must Be Apportioned: The Harm or the Accident?*

Some courts that employ avoidable consequences as a bar to recovery for enhanced harm fumble the causal inquiry, focusing on the causes of the accident instead of the causes of the plaintiff's harms.[103] Other courts make

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99. Adar, *supra* note 21, at 801; *see also* Jerry J. Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C. L. REV. 295, 311 (1980) ("Under any analysis, contributory negligence and avoidable consequences cannot be distinguished in logic or in policy.").

100. WILLIAM PROSSER, HANDBOOK OF THE LAW ON TORTS § 65, at 423 (4th ed. 1971).

101. *Id.* (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW ON DAMAGES § 33, at 129 (1935)).

102. *See supra* Part II.A.

103. *See, e.g.*, Kocher v. Getz, 824 N.E.2d 671, 674 (Ind. 2005) (explaining that enhanced harms should not be apportioned under comparative fault because the plaintiff's subsequent conduct did not cause the initial accident). *But see* Cox v. Lesko, 953 P.2d 1033, 1039 (Kan. 1998) (observing that although defendant-doctors may have committed malpractice in the treatment of the plaintiff's

a related but different error in failing to appreciate that avoidable consequences implicates a second harm that requires its own apportionment.[104] As explained in Part II, tort law concerns itself with determining the causes of the plaintiff's *harm*.[105] This is an important distinction that courts miss, incorrectly reasoning that comparative fault principles cannot apply in avoidable consequences cases because the plaintiff's after-injury conduct did not causally contribute to the initial accident.[106]

To recognize the importance of this distinction, consider a helmetless motorcyclist who suffers body bruises and a severe concussion in a collision negligently caused by the defendant.[107] Assume that the concussion would not have occurred if the motorcyclist had been wearing a helmet. The plaintiff's failure to wear a helmet did not cause the collision itself; the

shoulder "these acts may not have resulted in any injury or damages if [the patient's] shoulder had proceeded to heal.").

104. *See, e.g.*, Preston v. Keith, 584 A.2d 439, 445 (Conn. 1991) (permitting comparative fault apportionment of the initial injury but not the enhanced harm because the court failed to appreciate that comparative fault requires *each* indivisible harm to be apportioned in accordance with party fault, not just the initial injury); Tedd Bish Farm, Inc. v. Sw. Fencing Servs., LLC, 867 N.W.2d 265, 271–72 (Neb. 2015) (same).

105. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010) **("**Tortious conduct must be a . . . cause of *harm* for liability to be imposed.") (emphasis added); *see also supra* Part II.

106. *E.g.*, Law v. Superior Ct. In & For Maricopa Cty., 755 P.2d 1135, 1138 (Ariz. 1988) (explaining that "[b]ecause [plaintiff negligence in enhancing harm] seldom contributes to the occurrence of the accident," it does not easily allow for liability apportionment, focusing on the causes of the accident rather than the causes of the harm); Waterson v. Gen. Motors Corp., 544 A.2d 357, 359 (N.J. 1988) ("Thus the principle we announce does not concern a plaintiff's fault in causing an automobile accident and, accordingly, does not rest on this state's comparative negligence law."); Melesko v. Riley, 339 A.2d 479, 479 (Conn. Super. Ct. 1975) ("The [negligence] of the plaintiff . . . could not, as a matter of law, have caused the accident . . . ."); Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005) ("[A] plaintiff's post-accident conduct that constitutes an unreasonable failure to mitigate damages is not to be considered in the assessment of fault . . . ."); Komlodi v. Picciano, 89 A.3d 1234, 1248 (N.J. 2014) (reflecting the belief that comparative fault can be used only to apportion for injuries caused in the initial accident); DOBBS ET AL., *supra* note 33, at § 16.10 ("Under this rule [avoidable consequences], the plaintiff who fails to [act reasonably in mitigating the injury] is not chargeable with comparative negligence, because failure to use a seatbelt did not cause the accident."). *See also Nonuse of Seatbelt as Reducing Amount of Damages Recoverable*, 62 A.L.R.5th 537 (1998 & Supp.); *Motorcyclist's Failure to Wear Helmet or Other Protective Equipment as Affecting Recovery for Personal Injury or Death*, 85 A.L.R.4th 365 (1991 & Supp.). Although most of the citations in this footnote discuss mitigation of damages, i.e., the use of seatbelts or motorcycle helmets, the focus on the plaintiff's conduct not causing the accident or initial harm exists in avoidable consequences as well. *See Kocher*, 824 N.E.2d at 675 (refusing to consider aggravated lost wages under comparative fault because the plaintiff's post-accident conduct did not cause the initial injuries).

107. The facts of this illustration are borrowed from Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 555–58 (Tex. 2015). *See also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b, illus. 3 (AM. LAW INST. 2000).

accident would have occurred regardless of whether the plaintiff was wearing a helmet. That said, the plaintiff's failure to wear a helmet certainly contributed to the plaintiff's concussion, i.e., the plaintiff's enhanced *harm* due to not wearing a helmet. Examining the causes of accidents rather than the causes of each harm misses the fundamental principle requiring apportionment first on *the causes of the plaintiff's harm or harms*.[108]

In *Kocher v. Getz*,[109] the Indiana Supreme Court confronted comparative fault's impact on avoidable consequences. In that case, the defendant was the only cause of an automobile collision with the plaintiff.[110] Among the damages the plaintiff sought to recover were her lost wages. In response, the defendant argued that the plaintiff was negligent in failing to secure alternative employment and therefore failed to mitigate her lost wage damages.[111] The trial court submitted the defendant's avoidable consequences defense, and the jury found for the defendant on the matter, thus barring the plaintiff from recovering for her lost wages.[112] On appeal, the Indiana Supreme Court limited the application of comparative fault only to the causes of the initial accident.[113] This limitation removed any comparative fault apportionment for the plaintiff's enhanced harm, namely her lost wages.[114] In doing so, the court fumbled in its interpretation of Indiana's comparative fault statute, whose plain language included "unreasonable failure to avoid an injury or to mitigate damages" as an element of fault to be apportioned, along with other parties' fault, among "all persons who caused or contributed to cause the *alleged injury*. . . ."[115]

We emphasize that the comparative fault statute requires assessing each contributor's comparative fault for the plaintiff's injury; that is, the plaintiff's *harm*. After all, the definition for "physical harm" is "the physical impairment of the human body."[116] As the discussion about enhanced harm in Part II reveals, a case may include more than one harm to the plaintiff, a matter the *Kocher* court failed to appreciate as it focused only on apportionment for the causes of the accident.[117] In so doing, the court effectively interpreted "the fault of all persons who caused . . . the alleged

108. *See supra* Part II.A.

109. 824 N.E.2d 671 (Ind. 2005).

110. *Id.* at 673.

111. *Id.*

112. *Id.*

113. *Id.* at 673–74.

114. *Id.* at 675.

115. IND. CODE § 34-6-2-45(b) (2020) (emphasis added).

116. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 4 (AM. LAW INST. 2010)

117. *See Kocher*, 824 N.E.2d at 673–75.

injury"[118] to mean "the fault of all persons who caused . . . *the accident*." Since conduct must precede the accident to cause it, the court was left with a quandary, namely how to account for the plaintiff's failure to mitigate. Without analysis, the court concluded that the plaintiff was barred from recovering those lost wages. Indeed, later in the opinion, the court explained that enhanced harms should not be apportioned by comparative fault "if the act of the injured party does not operate in causing the injury from which all damages ensued, but merely adds to the resulting damages. . . ."[119]

In this manner, the Indiana Supreme Court failed to recognize the principle that apportionment must proceed first based on identifying *each* indivisible harm suffered by the plaintiff. Failing to do that, the court was left with the remedies mindset that a plaintiff's failure to mitigate harm bars recovery for those damages that could have been avoided. If the court had instead focused on the causes of each of the plaintiff's harms, it would have been natural to apportion each of the plaintiff's harms in accordance with party fault—as mandated by Indiana's comparative fault statute[120]—rather than barring recovery for the enhanced harm in contravention of apportionment principles.

*Kocher* illustrates that the failure to distinguish between the causes of the plaintiff's harm and those of the accident can lead courts astray from an equitable apportionment of liability. In addition, *Kocher* reveals the flaws that result from failing to appreciate that causal apportionment precedes comparative fault apportionment. These flaws can be found in myriad avoidable consequences and mitigation of damages cases.[121] Most of these courts are quite unaware of the deficiencies of this reasoning, however, and rule cursorily, simply citing precedent without conducting any analysis.[122]

That said, other courts across the United States have recognized that apportionment must address the causes of a plaintiff's harms rather than accidents.[123] By attending to this distinction, it is clear that the plaintiff's

118. *Id.* at 673 (citing IND. CODE §§ 34-51-2-7 to -8).

119. *Id.* at 674.

120. IND. CODE § 34-51-2-7(b)(1) (2020) ("In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury . . . .").

121. *See supra* notes 104 & 106.

122. *See, e.g.*, Anglin v. Kleeman, 665 A.2d 747, 752 (N.H. 1995) (routinely applying avoidable consequences without critical examination); Lublin v. Weber, 833 P.2d 1139, 1140 (Nev. 1992) (same); *Walter*, 748 A. 2d at 970 (same). For additional cases that employ avoidable consequences precedent without examination, see *supra* note 27.

123. *E.g.*, Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 562 (Tex. 2015) ("Furthermore, [apportionment statutes] focus the fact-finder on assigning responsibility for the 'harm for which recovery of damages is sought'—two examples of which are 'personal injury' and 'death'—and not strictly for the underlying occurrence, such as a car accident."); Campbell v. La. Dep't of Transp. & Dev., 648 So. 2d 898, 903 (La. 1995) (distinguishing between the causes of the

injury-enhancing conduct in *Kocher* (1) contributed to the plaintiff's harm, if not the initial injury, and (2) should thus be considered when apportioning liability for that enhanced harm under comparative fault rather than barring recovery.

### *C. Superseding[124] Cause Justifications for Avoidable Consequences Fail to Account for Comparative Fault's Impact on Superseding Cause*

Some courts justify avoidable consequences barring all recovery for plaintiff enhanced harm because "under the avoidable consequences rule for minimizing damages, the plaintiff is regarded as the sole proximate cause of damages suffered because she failed to mitigate damages once injury occurred."[125] This rationale is problematic for two reasons. First, "sole proximate cause" is not an explanation, it is a conclusion that obscures whatever analysis (or intuition) lies behind that conclusion.[126] Second, a rule that an initial tortfeasor's liability can be "cutoff," as a matter of law, by the subsequent conduct of another ignores the impact of comparative fault on the superseding cause doctrine.[127]

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accident and the harm by noting that while the first defendant's negligence "set the course for an accident to happen," the second defendant's negligence nevertheless contributed to the plaintiffs' decedents' harms despite not causing the accident); Union Pac. R.R. Co. v. Ameron Pole Prods. LLC, 257 Cal. Rptr. 3d 131, 138 (Cal. Ct. App. 2019) (explaining that the causal inquiry in tort "focuses on the nexus between the defendant's conduct and the plaintiff's harm" and that "[t]he causation analysis does not require a nexus between the defendant's conduct and the [initial] accident"); Geibel v. PennDOT, 8 Pa. D. & C.4th 302, 307 (Com. Pl. 1990) ("Therefore, our concern is not whether the plaintiff's decedent's conduct caused the initial accident, but whether it . . . caused the plaintiff's decedent's harm.").

124. Courts use "superseding cause," "supervening cause," "intervening cause," "sole proximate cause," "intervening force," and "intervening negligence" to mean approximately the same thing. *See* Terry Christlieb, Note, *Why Superseding Cause Analysis Should be Abandoned*, 72 TEX. L. REV. 161, 167–68 (1993) (discussing the confusing usage and overlapping definitions of these terms); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. f (AM. LAW INST. 2010) (discussing variable terminology for superseding cause).

125. Williams v. Manchester, 864 N.E.2d 963, 986 (Ill. App. Ct. 2007) (quoting DAN B. DOBBS ET AL., TORTS § 196, at 489 (2001)), *vacated in part on other grounds*, 888 N.E.2d 1 (Ill. 2008). *See also, e.g.*, Weston v. Dun Transp., 695 S.E.2d 279, 282 (Ga. Ct. App. 2010) ("Under this doctrine, the plaintiff's negligence in failing to avoid the consequences of the defendant's negligence is deemed the sole proximate cause of the injuries sustained"); Hallas v. Boehmke & Dobosz, Inc., 686 A.2d 491, 497 (Conn. 1997) ("'[T]he theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to promote recovery and avoid aggravating the original injury.'").

126. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. a Reporters' Note (AM. LAW INST. 2010).

127. *E.g.*, Everly v. Columbia Gas of W. Va., Inc., 301 S.E.2d 165, 168 (W. Va. 1982) ("[I]t is only necessary for a defendant's negligence to be a contributing cause of the plaintiff's injury, not

Before continuing with this critique of the superseding cause justification, we pause briefly to discuss how scope of liability, or proximate cause, could properly operate in avoidable consequences cases.[128] Fundamentally, a defendant is not liable for a plaintiff's harm unless that harm was within the defendant's scope of liability.[129] As such, in some avoidable consequences cases, as in other enhanced harm cases, the factfinder could absolve the defendant of liability for the plaintiff's enhanced harm by determining that the plaintiff's after-injury conduct that enhanced the harm was outside the defendant's scope of liability.[130] This, however, first requires appreciation that the plaintiff's initial injury and enhanced injury are discrete harms, and then requires the jury[131] to determine, based on the facts of the case, that the enhanced harm was not within the defendant's scope of liability, a result that would be out of the ordinary based on how

the sole proximate cause."). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. a (AM. LAW INST. 2010); Green, *supra* note 5, at 1130 (explaining that "when a plaintiff's acts, however careless or unreasonable, are denominated a superseding cause, thereby barring recovery, the basic principle of comparative responsibility is substantially undetermined."); *Id.* at 1135 (arguing that the "evolution in the legal treatment of causation" and an awareness of "the dual aspects of legal cause and the appropriate role of proximate cause" create "persuasive reasons to consign superseding cause to the same receptacle in which [courts and commentators] have placed contributory negligence."); Paul T. Hayden, Butterfield *Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 917 (2000) (noting that "[t]he most pointed criticism of the use of superseding or sole proximate cause . . . is that it undercuts the idea of pure comparative responsibility"); John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. ILL. U. L.J. 1, 1–2 (1997) (explaining that "there may be more than one cause of an injury" and that "it is not a defense [in tort] that some other person or thing contributed to the injury."); Christlieb, *supra* note 124, at 161–62 (explaining why "causal analyses can and should be simplified by abandoning . . . 'superseding cause'—and the substitutes for it—in virtually all legal analysis."); Christopher Dove, Note, *Dumb As A Matter of Law: The "Superseding Cause" Modification of Comparative Negligence*, 79 TEX. L. REV. 493, 493–96 (2000) (explaining that comparative fault should control when the subsequent negligent conduct of the plaintiff or a third party contributes to the plaintiff's harm, rather than the superseding cause doctrine).

128. Recall that superseding cause was typically viewed as a doctrine related to scope of liability/proximate cause. FRANKLIN ET AL., *supra* note 8, at 409–10; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. a (AM. LAW INST. 2010).

129. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010).

130. *See Williams*, 864 N.E.2d at 990 ("Thus, there can be little question that under well-established proximate cause analysis the question of liability of the underlying tortfeasor for [enhanced harm caused by plaintiff's refusal to undertake alternative treatment], at the very least, would remain an issue for a jury to determine and would not be susceptible to summary determination as a matter of law.").

131. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. f. (AM. LAW INST. 2010) ("[S]cope of liability . . . is . . . a question of fact for the factfinder.").

other enhanced harm cases are treated.[132] Any such exoneration of a defendant for avoidable enhanced harm, however, should not be based on the notion that the plaintiff's unreasonable conduct was a superseding cause of harm for the reasons explained below.

When applied to a plaintiff's conduct, a superseding cause—like contributory negligence[133]—absolves the defendant from liability despite the defendant's role in causing the plaintiff's harm. Indeed, one commentator wrote that applying superseding cause to plaintiff conduct—an iteration of the superseding cause doctrine sometimes referred to as "sole proximate cause"[134]—amounts "to smuggling the abolished contributory negligence defense into . . . cases through the back door."[135] As a result, courts and commentators have long recognized that superseding cause and sole proximate cause applied to a plaintiff's negligent conduct are not compatible with comparative fault, which apportions liability for the plaintiff's harms among the responsible parties.[136] Like avoidable consequences, it did not matter in the day of contributory negligence whether a plaintiff's recovery was barred by contributory negligence, avoidable consequences, or superseding cause. But, with comparative fault reform, doctrines instituting per se recovery bars must be reworked for the same reasons that courts and legislators reworked contributory negligence.[137]

132. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 35 (AM. LAW INST. 2010) ("An actor whose tortious conduct is a factual cause of harm to another is subject to liability for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the other's injury, so long as the enhanced harm arises from a risk that inheres in the effort to render aid."); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 (AM. LAW INST. 1998) (addressing apportionment in crashworthiness cases).

133. One commentator argues that superseding cause, when applied to subsequent plaintiff conduct, is "another name for contributory negligence." Hayden, *supra* note 127, at 918.

134. *See supra* note 124.

135. Hayden, *supra* note 127, at 917–18.

136. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 cmt. a (AM. LAW INST. 2010). *See also supra* note 127.

137. For detailed discussions on the incompatibility of superseding cause and sole proximate cause with comparative fault, see Green, *supra* note 5; Hayden, *supra* note 127; Phillips, *supra* note 127; Christlieb, *supra* note 124. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 (AM. LAW INST. 2010) (containing an in-depth discussion in comments and reporters' notes regarding comparative fault's inconsistency with superseding cause and sole proximate cause); *see also* Adar, *supra* note 21, at 826 (addressing the incompatibility of employing superseding cause in avoidable consequences cases with comparative fault).

### *D. The Temporal Distinction Between Avoidable Consequences and Mitigation of Damages Fails to Justify Avoidable Consequences Operating as a Recovery Bar for Enhanced Harms*

We begin this Subpart with a stylized history of the incorporation of avoidable consequences and mitigation of harm into tort law. Avoidable consequences has a longer history in tort law than mitigation of harm, which did not develop until the mid-twentieth century, largely in response to the introduction of seat belts.[138] This history is in service of appreciating how mitigation of harm came to be recognized as plaintiff behavior that should be apportioned based on comparative fault, while avoidable consequences is treated differently by a large number of courts. Finally, this Subpart explains why there is no good basis, according to the apportionment tools laid out in Part II, to distinguish these two doctrines.

Avoidable consequences originated as a remedy for breach of contract.[139] Thus, avoidable consequences developed in the context of contract law's strict liability for breach and prevented parties injured by breach from recovering avoidable losses.[140] Contract law required a robust avoidable consequences doctrine because, for the most part, breach of contract results in only economic harm, and a plaintiff would have little or no incentive to mitigate that harm when damages are fully compensatory for that loss, a classic instance of moral hazard. That, of course, is not the case when the harm is physical injury, where damages are not fully compensable and plaintiffs have (often powerful) incentives to obtain appropriate medical and other services to minimize their harm.[141] In other words, there is more at stake in tort law than dollars and cents, and these stakes—such as avoiding physical discomfort, minimizing scarring, speeding recovery, and limiting long-term disability—provide significant motivation for plaintiffs to mitigate their injuries without avoidable consequences' recovery bar.[142] Moreover, it is important to appreciate a major difference between tort and contract law; the latter—historically and today—has no mechanism for apportioning losses

138. *See infra* note 153 and accompanying text.

139. John C. Everett, *Mitigation of Damages—Effect of Plaintiff Choosing Among Reasonable Alternatives*, 23 ARK. L. REV. 132, 133 (1969) ("[T]he doctrine of [avoidable consequences] developed in the law of contracts.").

140. Charles J. Goetz, *The Mitigation Principle: Toward A General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 n.1 (1983). Functionally, this rule disincentivized economic waste among the parties to a contract. *See* Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 246 (1996).

141. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 711–12 (1978) (explaining the variety of ways in which a physically injured plaintiff's damages fall short of being fully compensatory).

142. *See id.*

between or among the parties, unlike contemporary tort law with comparative principles.[143] Thus, in contrast to contract law, with comparative fault, a plaintiff still has the additional incentive to take reasonable mitigating steps because the plaintiff shares on the enhanced loss based on the jury's assignment of comparative fault.

In sum, tort law and contract law are different when it comes to, among other things, damages, incentives, and capacity. Given these points of divergence, it makes sense for the two to diverge when it comes to who should bear responsibility for a plaintiff's failure to mitigate.

Before the middle of the nineteenth century, tort law had not taken shape as a coherent body of law.[144] Although this history is contested, many cases under the English writ system[145] were decided based on strict liability, similar to breach of contract.[146] Given this history, the migration of avoidable consequences from contract into tort made sense, particularly since tort law, similar to contract law, had no apportionment mechanism.[147] With the abolition of the writ system and the injuries of the Industrial Revolution fueling its growth,[148] tort law largely moved away from strict liability and adopted fault as the basis for liability.[149] As negligence became a basis for liability, the doctrine of contributory negligence rose as a defense.[150] During the era of contributory negligence, any contributory plaintiff negligence would bar the plaintiff from recovery in tort.[151]

Mitigation of damages[152] evolved in the mid-twentieth century from avoidable consequences—when defendants began asserting the "seat belt

143. *See, e.g.*, Haysville U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 199 (Kan. 1983) ("The use of the comparative negligence theory is not proper in breach of contract actions.").

144. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 350 (3d ed. 2005) ("[T]he law of torts was totally insignificant before 1800, a twig on the great tree of law.").

145. *See* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1723 (1981).

146. *Id.*; *see also* FRANKLIN ET AL., *supra* note 8, at 35.

147. Emanuel G.D. van Dongen & Henriëtte P. Verdam, *The Development of the Concept of Contributory Negligence in English Common Law*, 12 UTRECHT L. REV. 61, 61–63 (2016) (tracking the early defenses in tort law before negligence became a basis for liability).

148. *See* FRANKLIN ET AL., *supra* note 8, at 35.

149. Brown v. Kendall, 60 Mass. 292, 296 (1850), is an early prominent case explaining that defendants must be "in fault," that is, "not using ordinary care" to be liable in tort.

150. Butterfield v. Forrester (1809) 103 Eng. Rep. 926; 11 East 60 is credited as the first case to adopt contributory negligence. Harrison v. Montgomery Cty. Bd. of Educ., 295 Md. 442, 449 n.4; 456 A.2d 894, 897 n.4 (1983) (explaining that "most modern courts and scholars agree with Dean Prosser in attributing the first recorded formulation of the [contributory negligence] doctrine to the *Butterfield* case.") (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416 (4th ed. 1971)).

151. RESTATEMENT (SECOND) OF TORTS § 463 (AM. LAW INST. 1965).

152. As a reminder, we define mitigation of damages in this article to mean injury-enhancing plaintiff conduct that precedes or coincides with the initial injury but does not causally contribute

defense"[153]—despite mitigation of damages applying to plaintiff conduct that occurred before, rather than after, the accident.[154] Failing to appreciate the necessity of causal apportionment, courts were concerned that employing contributory negligence in these seatbelt cases would bar all recovery.[155]

to the accident itself. Recall that courts and commenters often use avoidable consequences and mitigation of damages interchangeably. *See supra* note 34.

153. Both Ford and Chrysler were offering seat belts as an option in the mid-1950s. AMERICAN SAFETY BELT COUNCIL, THE AUTOMOTIVE SEAT BELT STORY (1970). For more information on the history and development of mitigation of harm and the impact of legislatures' mandatory seat-belt laws, see Robert M. Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 222-31 (1986). Mitigation of damages is not limited to seat-belt nonuse and would apply to any failure to use an available safety device.

154. For example, the New York Court of Appeals acknowledged that avoidable consequences typically applied to plaintiff conduct occurring after suffering an injury but nevertheless modified the doctrine to apply to pre-injury plaintiff conduct to avoid the application of contributory negligence:

> We concede that the opportunity to mitigate damages prior to the occurrence of an accident does not ordinarily arise, and that the chronological distinction, on which the concept of mitigation damages rests, is justified in most cases. However, in our opinion, the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages *prior* to the accident.

Spier v. Barker, 323 N.E.2d 164, 168 (N.Y. 1974) (determining that mitigation of damages applies to a plaintiff's failure to wear seatbelts after refusing to apply contributory negligence). To see the shifting narrative in seatbelt cases from contributory negligence to mitigation of damages, compare *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence***,** 92 A.L.R.3d 9 (Originally published in 1979) (documenting how early court opinions responded to automobile plaintiffs who were not wearing seatbelts by anchoring their analysis around contributory negligence), with *Nonuse of Seatbelt as Reducing Amount of Damages Recoverable*, 62 A.L.R.5th 537 (Originally published in 1998) (documenting how courts approached automobile plaintiffs who failed to wear seatbelts by anchoring their analyses largely around "principles of mitigation of damages").

155. *See, e.g.*, NCO Fin. Sys., Inc. v. Montgomery Park, LLC, 918 F.3d 388, 395 (4th Cir. 2019) (explaining that avoidable consequences "may *decrease* the amount of recoverable damages but does not *necessarily* preclude recovery of damages altogether."); Garrett v. NationsBank, N.A., 491 S.E.2d 158, 163 (Ga. Ct. App. 1997) (explaining that contributory negligence will "bar . . . the right of recovery" while avoidable consequences will reduce the amount of recovery); Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947, 949 n.2 (5th Cir. 1956) ("The harsh rule of . . . contributory negligence [which] wholly barred an injured person from recovery is completely incompatible with modern admiralty practice . . . admiralty has developed . . . its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires."). We would like to point out that this belief stems from courts failing to appreciate the necessity of causal apportionment. A plaintiff's contributory negligence should bar recovery only for the harm or harms to which that negligence contributed. RESTATEMENT (SECOND) OF TORTS § 467 (AM. LAW INST. 1965). It seems that some courts, however, did not causally separate such items of harm. This explains why some courts treated contributory negligence as generally barring the plaintiff's "right of recovery." Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 970 (Me. 2000) (explaining that, while avoidable consequences may affect the plaintiff's recoverable damages, it does not bar the plaintiff's "right of recovery") (citing Isenman v. Burnell, 130 A. 868, 870 (Me. 1925) (distinguishing mitigation of damages and contributory negligence)). This also explains why many courts insisted on keeping avoidable consequences and mitigation of damages distinct from contributory negligence.

Thus, some courts began to apply mitigation of damages to plaintiff misconduct that preceded or concurred with the accident but did not *cause* the accident, such as plaintiffs failing to wear seatbelts. In this way, unbelted plaintiffs would not be barred by contributory negligence and could still maintain suits against tortfeasors in automobile collision cases, even if their recovery was diminished. Other courts ruled that seatbelt nonuse could not sustain either contributory negligence or mitigation of damages, barring the introduction of such evidence.[156]

To justify applying mitigation of damages in these collision cases instead of contributory negligence, which many courts believed would bar plaintiffs' claims, some courts distinguished the two doctrines by explaining that contributory negligence only applied to plaintiff conduct that caused the initial *accident*, while mitigation of damages and avoidable consequences applied to injury-enhancing conduct that did not cause the initial accident.[157] Indeed, we believe that this reasoning may explain court confusion regarding the appropriate causal inquiry in avoidable consequences cases, discussed in Part III.B, since the doctrines of avoidable consequences and mitigation of damages are so incestuous.[158]

Today, nearly every court has recognized that comparative fault governs pre-injury plaintiff negligence that enhances the plaintiff's harm.[159] Thus, the artificial reasoning that distinguished mitigation of damages from contributory negligence is no longer warranted. Given that comparative fault has subsumed mitigation of damages, which is similarly classified as a remedies' doctrine, what explains avoidable consequences' different treatment?

The justification for distinguishing avoidable consequences' continued operation as a bar to recovery from mitigation of damages is that, after the defendant's negligence has caused harm, the plaintiff has sole control over

156. *See* Carnation Co. v. Wong, 516 S.W.2d 116 (Tex. 1974), *overruled* by Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 556 (Tex. 2015). On the different treatment by courts with regard to seat-belt nonuse, see Law v. Superior Court In & For Maricopa Cty., 755 P.2d 1135, 1137 (Ariz. 1988) ("The mitigation theory sharply split the courts.").

157. *See, Law*, 755 P.2d at 1138 ("Because seat belt nonuse seldom contributes to the occurrence of the accident, it does not easily fit into the theory of contributory negligence."); Waterson v. Gen. Motors Corp., 544 A.2d 357, 359 (N.J. 1988) ("Thus the principle we announce does not concern a plaintiff's fault in causing an automobile accident and, accordingly, does not rest on this state's comparative negligence law."); Melesko v. Riley, 339 A.2d 479, 479 (Conn. Super. Ct. 1975) (explaining that "[t]he failure of the plaintiff passenger to use a seat belt could not, as a matter of law, have caused the accident"); DOBBS ET AL., *supra* note 33, at § 16.10 ("Under this rule [mitigation of damages], the plaintiff who fails to use a safety device like a seatbelt is not chargeable with comparative negligence, because failure to use a seatbelt did not cause the *accident*.") (emphasis added).

158. *See supra* note 34.

159. *See supra* note 36.

whether steps will be taken to mitigate the extent of or avoid that harm.[160] Only the plaintiff can seek medical attention, engage in physical rehabilitation, follow doctors' orders, or take other appropriate steps to minimize the extent of the harm. Of course, that is not true for plaintiff negligence that precedes or concurs with the defendant's negligence. Thus, the plaintiff's sole agency over the magnitude of the loss after suffering the initial harm serves as the justification for placing responsibility solely on the plaintiff and distinguishing mitigation of harm, or so the claim goes.[161]

This argument fails, we think, because it echoes the same reasoning that animated the last clear chance doctrine. The last clear chance doctrine constituted an exception to contributory negligence when the plaintiff could show that the defendant had "the last clear chance"—after the plaintiff's negligent conduct contributed to the plaintiff's risk of harm—to avoid causing the plaintiff's injury.[162] After the plaintiff had negligently created risk to him- or herself, the defendant had the sole agency to avoid causing the harm, and so we see here complementary reasoning with avoidable consequences albeit with respect to the defendant's, rather than the plaintiff's, conduct.[163] Critically, especially when considering that this rationale underlies avoidable consequences, last clear chance was universally abrogated after comparative fault's adoption.[164] With a tool available for apportioning damages, last clear chance's all-or-nothing approach was rejected. A defendant's sole control over whether harm occurs is relevant to the extent of comparative responsibility assigned, but does not completely absolve the plaintiff for prior negligence that was also a cause of the harm. The same should be true for avoidable consequences: the jury can decide if

160. *E.g.*, Piche v. Nugent, 436 F. Supp. 2d 193, 204 (D. Me. 2006) (explaining that comparative fault and plaintiff pre-accident negligence is temporally distinct from avoidable consequences, which only applies to plaintiff misconduct *after* the accident); *see also* 1 COMPARATIVE NEGLIGENCE MANUAL § 1:26 (3d ed. 2020).

161. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 7 cmt. *c* (Preliminary Draft No. 1 Oct. 14, 2020) ("a salient fact is that [defendant] has absolutely no control over whether [plaintiff takes appropriate steps to minimize her harm]"). For a discussion of the interplay between avoidable consequences and instances when the plaintiff's subsequent conduct is not within the plaintiff's control, see Adar, *supra* note 21, at 828–39.

162. FRANKLIN, *supra* note 8, at 437.

163. Gary Schwartz explained the complementarity of last clear chance and avoidable consequences many decades ago. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 707 (1978).

164. *E.g.*, CONN. GEN. STAT. § 52-572h ("The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished."); OR. REV. STAT. § 31.600 ("The doctrine of last clear chance is abolished."); MINN. STAT. § 604.01 ("The doctrine of last clear chance is abolished."); Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (1975) ("[L]ast clear chance and assumption of risk . . . are to be subsumed under the general process of assessing liability in proportion to fault").

the plaintiff's sole agency over the enhanced harm justifies a larger assignment of comparative fault, but the defendant should still be held responsible for his or her contribution to that harm.

Moreover, this "last opportunity" reasoning is inconsistent with the treatment of enhanced harm in other contexts. Consider the tort doctrine of secondary harm, in which the enhanced harm caused by medical professionals occurs after the victim was injured and avoidance of further harm is solely in the hands of the medical professionals.[165] Despite this, courts employ comparative principles to apportion liability for the enhanced harm among all responsible parties.[166] There is no good reason why avoidable consequences should be treated differently.

Finally, as noted at the beginning of this Subpart, avoidable consequences initially developed in tort law that, at the time, lacked a device for apportioning liability, and was inherited from contract, which employed strict liability to an extent far greater than tort law.[167] Given that apportionment in modern tort law substantially differs from that period, it makes sense that avoidable consequences should be reworked to cohere with modern apportionment principles.

### *E. Explanations Relying on Avoidable Consequences Potentially Barring All Recovery if Subsumed by Comparative Fault in Modified Comparative Fault Jurisdictions Misunderstand Causal Apportionment*

Some courts and commentators have argued that subsuming avoidable consequences under comparative fault has the potential to cause greater injustice in modified comparative fault jurisdictions.[168] According to this

165. *See supra* notes 78 & 79 and accompanying text.

166. *See supra* notes 80 & 81 and accompanying text.

167. *See supra* note 140 and accompanying text.

168. *E.g.*, Williams v. Jader Fuel Co., 944 F.2d 1388, 1402 (7th Cir. 1991) ("Under the [modified comparative fault statute] . . . a plaintiff who suffers $100,000 in damages because of an automobile accident for which he was forty-five percent at fault would recover $55,000. If the jury were also to conclude that the plaintiff's failure promptly to seek medical attention following the accident—perhaps the prototypical example of avoidable consequences—was the cause of $15,000 of his injuries, it would reduce the award to $40,000. If, however, the jury was instructed that the failure to seek medical help was contributory negligence, it might find that the plaintiff was sixty percent culpable, leading it to deny the plaintiff *any* recovery."); Ostrowski v. Azzara, 111 N.J. 429, 441, 545 A.2d 148, 153–54 (1988) (explaining that "we must avoid the indiscriminate application of the doctrine of comparative negligence (with its fifty percent qualifier for recovery) when the doctrines of avoidable consequences . . . apply."); DOBBS ET AL., *supra* note 33, at 405; John R. Grier, *Rethinking the Treatment of Mitigation of Damages Under the Iowa Comparative Fault Act in Light of* Tanberg v. Ackerman Inv. Co., 77 IOWA L. REV. 1913, 1923–24 (1992) (mistakenly

argument, there is a risk that "by combining the plaintiff's fault in causing the accident with her fault in failing to [avoid consequences], the court may be required to bar the plaintiff's claim altogether under the modified system of comparative fault."[169] One commentator provides an example of this injustice:

> [C]onsider the hypothetical in which the defendant was solely responsible for creating a $30,000 injury . . . . Subsequent to the accident, however, the plaintiff was solely at fault for increasing damages by $70,000 . . . . The jury in a pure comparative fault system would determine that the plaintiff's damages totaled $100,000, but because the plaintiff caused $70,000 of the damage, the damage award must be reduced by $70,000. By assessing seventy percent of the total fault to the plaintiff and thirty percent of the total fault to the defendant, the plaintiff recovers $30,000, the same amount recovered under contributory negligence. In a modified comparative fault system, the same instruction given in a pure comparative fault system results in a complete bar to the hypothetical plaintiff's recovery since the plaintiff's total fault is greater than fifty percent.[170]

This hypothetical fails to appreciate, however, the first step in apportionment, causal apportionment, which requires disaggregating the plaintiff's harm based on each indivisible injury, as explained in Part II.A.[171] Recall that apportionment for one discrete item of harm is independent of apportionment for another.[172] The hypothetical then incorrectly specifies that the plaintiff is solely responsible for the enhanced harm. At a minimum, the jury would likely decide that, as a matter of fact on scope of liability grounds, both parties are responsible for the enhanced injury.[173] Obviously, liability for the initial harm would be assigned entirely to the defendant who is the sole tortious cause of it. Liability for the enhanced harm, however, would be

suggesting that the integration of avoidable consequences into comparative fault in a modified comparative fault system would completely bar plaintiffs from recovery if their enhanced harms amounted to more than fifty percent of their total damages).

169. DOBBS ET AL., *supra* note 33, at 405.

170. Grier, *supra* note 168, at 1923–24.

171. For a commentator who did appreciate the necessity of the two-step "causation then fault" apportionment, see Robert M. Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 232 (1986).

172. *See supra* notes 49 & 50.

173. As explained *supra* in Part III.C, a plaintiff is typically not solely responsible for his or her enhanced harms since the defendant is also a factual cause of the enhanced harm. On the other hand, if the author meant that the plaintiff engaged in some unrelated activity—say, drag racing on a city street—that resulted in new injuries rather than enhanced injuries, the sole attribution to the plaintiff would be correct. The latter interpretation seems implausible given that the article is about mitigation of damages.

apportioned between the plaintiff and defendant, but based on an assessment of comparative fault rather than, as specified in the hypothetical, on the ratio of the damages between the two harm items. As such, the correct approach to the hypothetical would apportion all of the damages for the initial harm to the defendant, since the plaintiff's fault in failing to mitigate had no role in that initial harm. The damages for the enhanced harm—which, despite the terms of the hypothetical, were caused by both the plaintiff and defendant—would then be divided among the parties in relation to their relative fault. Even if a modified comparative fault scheme were in operation and the plaintiff's comparative fault for the enhanced harm was greater than 50%, the plaintiff would still recover $30,000 because whatever comparative fault assigned to the plaintiff for unreasonably enhancing the harm has no application to the apportionment for the original injury, which was not caused by that unreasonable conduct.

## PART IV: THE SOLUTION

Avoidable consequences violates fundamental apportionment principles and reveals confused reasoning that fails to recognize the causal inquiry required by enhanced harms resulting from after-injury plaintiff negligence.[174] How, then, can courts remedy this doctrine? The answer is deceptively simple and has already been recognized by a number of

174. *See supra* Part III.B.

legislatures,[175] courts,[176] the American Law Institute,[177] and the National Conference of Commissioners on Uniform State Laws.[178] The answer:

175. *See infra* note 178

176. Jacobs v. Westgate, 766 So. 2d 1175, 1180 (Fla. Dist. Ct. App. 2000) ("[W]e agree . . . that the doctrine of comparative negligence subsumes the concept of mitigation of damages."); Williams v. Manchester, 864 N.E.2d 963, 986 (Ill. App. Ct. 2007), *vacated in part on other grounds*, 888 N.E.2d 1 (Ill. 2008) ("Whether based upon principles relating to mitigation of damages, comparative fault, or assumption of the risk, we do not believe that a patient's refusal to accept a reasonable medical treatment, suggested in an effort to alleviate the consequences of the physician's negligence, should serve to completely defeat the patient's recovery for those injuries proximately caused by the physician's negligent acts.") (internal citations omitted); Greenwood v. Mitchell, 621 N.W.2d 200, 208 (Iowa 2001) (instructing the court on remand to use a comparative fault analysis for the enhanced harm that resulted from the plaintiff's post-injury negligence); Maunz v. Perales, 76 P.3d 1027, 1034 (Kan. 2003) ("[I]n *Cox v. Lesko* . . . this court permitted a jury to consider as plaintiff's fault—not just as failure to mitigate damages—her failure to complete doctor-ordered physical therapy when evidence indicated her inaction exacerbated her damages.") (internal citation omitted); Christopherson v. Indep. Sch. Dist. No. 284, 354 N.W.2d 845, 848 (Minn. Ct. App. 1984) (employing comparative fault to the plaintiff's enhanced harm, which resulted from the plaintiff's decision to teach gymnastics weeks after suffering severe leg injuries in contravention of her doctor's orders); Love v. Park Lane Med. Ctr., 737 S.W.2d 720, 725 (Mo. 1987) ("The [Uniform Comparative Fault Act (which the court adopted)] therefore covers the concept of avoidable consequences and provides that for a particular injury that could have been avoided by the plaintiff . . . the amount will be diminished proportionately according to the comparative fault of the parties."); Lynch v. Scheininger, 744 A.2d 113, 129 (N.J. 2000) ("[W]e held that under the doctrine of avoidable consequences a plaintiff's post-negligence conduct that increased the risk of harm from defendant's negligence could be considered by the jury as fault-based conduct that would reduce plaintiff's damages but would not bar recovery . . . We cited with approval the Uniform Comparative Fault Act . . . , which includes in its definition of fault an "unreasonable failure to avoid an injury or to mitigate damages.") (internal citations omitted); Taylor v. Intuitive Surgical, Inc., 389 P.3d 517, 530 (Wash. 2017) ("Washington law states that the plaintiff's failure to mitigate can be considered under the comparative fault statute.").

177. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (AM. LAW INST. 2000) ("No rule about mitigation of damages or avoidable consequences categorically forgives a plaintiff of this type of conduct or categorically excludes recovery.").

178. Unif. Comp. Fault Act § 1 (1977) (defining "fault" in fault apportionment to include avoidable consequences, endorsing the idea that after-injury plaintiff conduct should be used when assigning relative party fault rather than barring plaintiff recovery); Unif. Apportionment of Tort Responsibility Act § 3 (2002). Alaska, Iowa, Minnesota, Missouri, Indiana, and Washington have adopted the Uniform Comparative Fault Act's definition for "fault," which includes avoidable consequences as a factor in comparative fault analyses. ALASKA STAT. ANN. § 09.17.900 (2020); IOWA CODE § 668.1 (2020); MINN. STAT. § 604.01 (2020); IND. CODE § 34-6-2-45 (2020); WASH. REV. CODE § 4.22.015 (2020); Gustafson v. Benda, 661 S.W.2d 11, 18 (Mo. 1983). Similarly, the Kentucky Supreme Court has endorsed the UCFA's definition of fault. Wemyss v. Coleman, 729 S.W.2d 174, 178 (Ky. 1987) ("We have already adopted § 2 of the Uniform Comparative Fault Act in *Hilen v. Hays*, *supra*, and it follows . . . we should adopt the definition of "fault" as utilized in § 1 of that Act, so that the fabric of our law shall be whole, rather than inconsistent and conflicting."). In addition, North Dakota adopted a definition of "fault" that includes avoidable consequences. N.D. CENT. CODE § 32-03.2-01 (2020) ("'[F]ault' includes . . . [the] failure to exercise reasonable care to avoid an injury or to mitigate damages."). Among these states, the Indiana Supreme Court has interpreted its comparative fault statute to include only plaintiff misconduct that precedes or coincides with the initial injury. Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005).

Enhanced harm due to the plaintiff's unreasonable after-injury conduct should be apportioned between the plaintiff and defendant based on comparative fault, rather than be apportioned solely to the plaintiff.

In *Langlois v. Town of Proctor*,[179] the Vermont Supreme Court explained the rationale behind this approach, writing that

> [t]he underlying premise of comparative responsibility is that a plaintiff's negligence should reduce, not bar, the plaintiff's recovery for any damages caused both by that conduct and by the defendant's conduct . . . [a] plaintiff's failure to [avoid consequences] should no longer constitute a bar to recovering those damages.[180]

Courts, then, should simply follow the blueprints set out in the Restatement (Third) of Torts: Apportionment of Liability,[181] the Uniform Comparative Fault Act,[182] and Part II of this Article, breaking down each plaintiff harm into its indivisible components and then apportioning fault among those responsible for each harm using comparative fault.[183]

The Iowa Supreme Court, in *Greenwood v. Mitchell*,[184] recommended providing the factfinder separate verdict sheets for each of the plaintiff's indivisible harms to aid in their apportionment task.[185] As such, the factfinder in an avoidable consequences case would have one verdict sheet for the plaintiff's initial injury and another for the enhanced harm.[186] This approach clearly communicates to the factfinder that the apportionment mix for each indivisible harm can differ depending on the parties responsible for each harm and the role their tortious conduct played in causing that harm.

As mentioned in Part I, the vast majority of courts continue to apply avoidable consequences without appreciating or confronting its inconsistency with comparative fault.[187] Nevertheless, a handful of courts

179. 113 A.3d 44 (Vt. 2014).

180. *Id.* at 55 (quoting the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. b (AM. LAW INST. 2000)) (dicta).

181. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1–9 (AM. LAW INST. 2000).

182. Unif. Comp. Fault Act § 1–3 (1977).

183. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (AM. LAW INST. 2000).

184. 621 N.W.2d 200 (Iowa 2001).

185. *Id.* at 208.

186. *Id.*

187. *See supra* Part I. Curiously, some Louisiana courts employ apportion loss due to avoidable consequences based on proportional principles. *E.g.*, Thomas v. Boyd, 245 So. 3d 308, 331–32 (La. Ct. App. 2017) (jury reduced the plaintiff's damages by 55% for failing to seek after-injury medical treatment); Ober v. Champagne, 166 So. 3d 254, 258 (La. Ct. App. 2014) (jury reduced the plaintiff's damages by 15% for failing to mitigate his after-injury damages). Nevertheless, while these courts have allowed juries to apportion plaintiffs' after-injury enhanced harms in accordance

have been confronted with the conflict between the two doctrines and resolved the relationship between comparative fault and avoidable consequences. Of those courts, eight modified their treatment of avoidable consequences to align with comparative fault's apportionment principles, and another expressed approval for doing so in dicta.[188] The remaining three courts,[189] however, decided to retain the traditional iteration of avoidable consequences notwithstanding comparative fault. Two of those courts provided no substantive rationale for their position. The Michigan Court of Appeals decided not to reform avoidable consequences because neither the state legislature nor the Michigan Supreme Court had expressed any intent to modify avoidable consequences in light of the adoption of comparative fault.[190] While this is an understandable rationale by an intermediate appellate court respecting existing Supreme Court precedent, it reflects only a commitment to the hierarchy of appellate courts and not to avoidable consequences. In addition, the Texas Supreme Court expressly endorsed the traditional avoidable consequences rule in dicta.[191] In doing so, however, the court provided no explanation for its position.[192]

The only court that has critically examined comparative fault's effects on avoidable consequences and upheld the traditional avoidable consequences rule is the Indiana Supreme Court in *Kocher v. Getz*, discussed

with comparative fault mechanisms, they have done so seemingly without awareness that avoidable consequences and comparative fault conflict. Indeed, these cases provide no discussion of the interaction between the two doctrines.

188. *See supra* note 176.

189. *See* Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005); Braverman v. Granger, 844 N.W.2d 485, 491 (Mich. Ct. App. 2014); Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553 (Tex. 2015).

190. Braverman v. Granger, 844 N.W.2d 485, 491 (Mich. Ct. App. 2014).

191. Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 564 (Tex. 2015) (rejecting, in dicta, that comparative fault analysis be applied to avoidable consequences).

192. The court wrote: "A plaintiff's post-occurrence failure to mitigate his damages [i.e., failure to avoid consequences] operates as a reduction of his damages award and is not considered in the responsibility apportionment. It is only the plaintiff's *pre*-occurrence, injury-causing conduct that should be considered in the fault apportionment." *Id.* Notably, the court provided no additional explanation. Curiously, prior case law in Texas provided that in strict products liability cases, avoidable consequences was to be included in the comparative assessment: "[T]he system we adopt will allow comparison of plaintiff's conduct, whether it is characterized as assumption of risk, misuse, or failure to mitigate or avoid damages, with the conduct or product of a defendant, whether the suit combines crashworthiness or other theories of strict products liability, breach of warranty, or negligence." Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984) (citing to the Uniform Comparative Fault Act § 1 (1977)). *Duncan*'s comparative scheme, however, was displaced by the Texas legislature's adoption of TEX. CIV. CODE ANN. § 33.002 in 1987. Sky View at Las Palmas, LLC v. Mendez, 555 S.W.3d 101, 107 n.7 (Tex. 2018), opinion corrected on reh'g, (Sept. 28, 2018). The statute makes no mention of avoidable consequences. *See* TEX. CIV. CODE ANN. § 33.002. We cannot fathom why the Texas Supreme court, in dicta, took a different stance regarding avoidable consequences in *Nabors* without providing an explanation.

above.[193] The *Kocher* court, however, confused the causal inquiry in tort law, as explained in Part III.B. Thus, the court upheld avoidable consequences by ignoring the causes of the plaintiff's *harm*, instead focusing on the causes of the initial accident.[194] As we write this Article, the remaining jurisdictions continue to apply avoidable consequences as they did before adopting comparative fault, likely due to the belief that the doctrines—one a tort doctrine and the other a remedial doctrine—are unrelated.[195] Given, however, that most courts that have confronted the interplay between avoidable consequences and comparative fault have shifted to accommodate comparative fault, it may only be a matter of time—although considerable time[196]—before more courts recognize the inherent tension between one doctrine that apportions responsibility according to relative fault and another that apportions responsibility entirely to one of two responsible parties.

## PART V: WHERE'S THE BEEF; ISN'T THIS ALL OBVIOUS?

We hope that readers who have reached this point are thinking that what we write is all so obvious: It is as unfair to bar a plaintiff from enhanced-harm recovery under avoidable consequences—when both the plaintiff and the defendant are responsible for that harm—as it is to bar a plaintiff from recovering for any injury caused both by the defendant's and plaintiff's conduct. Why, authors, have you spent so much effort beating a dead horse?

One answer is that the majority of courts adverted to in Part IV have not yet confronted nor appreciated the unfairness of allocating all avoidable consequences harm to the plaintiff. A second is to emphasize the importance of causal apportionment when apportioning liability, a principle that far too many courts do not appear to fully appreciate. The third answer, a stunning one, is that, as this Article goes to press, the Reporters for the *Restatement (Third) of Torts: Remedies* have circulated a Preliminary Draft that seeks to perpetuate avoidable consequences as a remedial doctrine that bars plaintiffs from enhanced-harm recovery.[197] These Reporters do so notwithstanding

193. 824 N.E.2d 671, 675 (Ind. 2005).

194. *See supra* Part III.B.

195. *See supra* note 96 and accompanying text. There are, of course, a small number of exceptions. *See supra* note 187 (explaining that Louisiana courts employ avoidable consequences as though it were comparative fault, but do so without discussing or resolving the conflicts between the doctrines).

196. We base this hypothesis on the fact that now, almost fifty years after comparative fault was adopted, only a dozen courts have addressed the tension between comparative fault and avoidable consequences. The same is true of other doctrines—such as alternative causation—where, arguably, comparative fault requires reconsideration but judicial appreciation of that need is almost nonexistent. *See supra* notes 9–11 and accompanying text.

197. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 7 (Preliminary Draft No. 1 Oct. 14, 2020).

and fully aware of the apportionment principles explained above. So, we respond. If the learned Remedies Reporters do not give credence to apportionment principles, perhaps our laying them out here will help courts rescue avoidable consequence from the remedies kidnappers.

Professor Oscar S. Gray was an advocate for progressive tort reform and understood that the widespread adoption of comparative fault would require courts and commenters alike to rethink doctrines that once seemed indisputable.[198] As both a teacher and scholar, Professor Gray had a shrewd mind and could not abide weak, flabby, and incoherent arguments.[199] Indeed, as discussed in Part I, Professor Gray and his coauthors noted the logical inconsistencies between avoidable consequences and comparative fault decades ago.[200]

Tort reform swept away contributory negligence, replacing it with comparative fault because of a consensus that contributory negligence was simply unfair.[211] That sense of injustice was based on the idea that, when two persons act unreasonably to cause harm, the cost of that harm should not be imposed on just one of them; rather it should be shared between them. Employing avoidable consequences to bar a plaintiff from recovering for the enhanced harm caused, in part, by the defendant echoes precisely the unfairness that finally sounded the death knell for contributory negligence. It is past time for avoidable consequences to face the same fate. Professor Gray, we know, would wholeheartedly approve.

198. *A Celebration of the Life for Oscar Gray*, UNIV. MD. (Dec. 10, 2019), https://mediasite.umaryland.edu/Mediasite/Play/130a00107c5a453dbefa8e0074e0bf641d.

199. *Id.*

200. "In principle, the plaintiff's failure to take reasonable steps to avoid certain damages caused by the defendant's negligence should serve merely to reduce the plaintiff's recovery for those damages in a comparative negligence jurisdiction, rather than to bar such recovery." FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 25.4, at 604 (3d ed. 2007).