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RETHINKING OIL SPILL COMPENSATION SCHEMES: THE CAUSATION INQUIRY

Amy D. Paul*

I. INTRODUCTION

With the 24-hour video surveillance dismantled¹ and most of the media refocusing their coverage on more timely issues, minimal attention has been given to the Deepwater Horizon as it “lies upside down at the bottom of the Gulf under one mile of seawater” since its explosion in April 2010.² However, what this oil-rig disaster represents is not an isolated catastrophe, but rather a growing and likely unstoppable risk that this surely will not be the last oil spill of its kind. And, if anything, the next spill may be greater, with even more disastrous consequences. As the United States contemplates ways to minimize its reliance on foreign oil sources, and oil reserves off both the East Coast³ and the coast of Brazil and Angola prepare to open, “the . . . explosion and fire aboard the Deepwater Horizon rig . . . is a reminder of how the task of supplying the world’s oil amid dwindling reserves is becoming ever-more complex—and dangerous—despite technological advances.”⁴ The plan for more domestic drilling has been a gradual expansion, with the Energy Department “predict[ing] that by 2035,

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1. See BP Live Feeds from the Gulf of Mexico ROVs, *available at* www.bp.com/livefeeds (“The MC 252 well has been shut in since July 15 and therefore activity among the remotely operated vehicles (ROVs) near the seabed is now limited.”).

2. Peter Coy & Stanley Reed, *Oil-Rig Disaster Threatens Future of Offshore Drilling*, BLOOMBERG, May 14, 2010, <http://www.bloomberg.com/news/2010-05-06/bp-s-deepwater-horizon-rig-disaster-threatens-future-of-offshore-drilling.html>.

3. Peter Coy & Stanley Reed, *Oil-Rig Disaster Threatens Future of Offshore Drilling*, BLOOMBERG, May 14, 2010, <http://www.bloomberg.com/news/2010-05-06/bp-s-deepwater-horizon-rig-disaster-threatens-future-of-offshore-drilling.html>. On March 31, President Obama “proposed opening areas off the East Coast and in the eastern Gulf and Alaskan waters beginning in 2010, part of a bargain that administration officials hoped would propel energy and climate legislation designed to lead the country beyond petroleum.”

4. Patrick Jonsson, *Transocean Deepwater Horizon Oil Rig Explosion Shows New Risk*, THE CHRISTIAN SCIENCE MONITOR, April 21, 2010, <http://www.csmonitor.com/USA/2010/0421/Transocean-Deepwater-Horizon-oil-rig-explosion-shows-new-risks>.

offshore oil production from the Lower 48 states would rise 80 percent to account for about 38 percent of U.S. output, up from 30 percent now.”⁵ Given the dangers and the size of the offshore industry, it is extraordinary that the last major U.S. oil spills were more than twenty years ago—the Exxon Valdez tanker accident in 1989—and twenty years before that, the Santa Barbara offshore oil well leak in 1969.⁶ Offshore drilling, being inherently risky like a “high-stakes casino,” forces the United States to confront the reality that oil and energy production will never be accident-free. With more tankers and rigs, such as the Deepwater Horizon, moving closer to American shorelines to promote domestic drilling, we must prepare ourselves for the next inevitable spill.

One way to prepare for future accidents is the creation of recovery funds. The BP compensation fund now serves as precedent in the event of another spill.⁷ It is likely that similar funds will be established and administered to compensate those affected by future oil spills. This precedent is not without fault, however. The narrow causation standard employed by the fund administrator caused many otherwise valid claims to go unaddressed and uncompensated. This Paper urges a reconsideration of this causation standard in analyzing economic loss claims. The complexities of each of the claims naturally evoke a desire for some kind of administrable standard by which claims can expeditiously be evaluated and compensated. To date, that standard has not been formulated. The one originally proposed and employed by the BP fund administrator—geography—proved unworkable and unreasonable, and was subsequently abandoned.⁸ The causation inquiry is a “big deal” because without establishing some kind of causal connection to the event, there can be no

5. Peter Coy & Stanley Reed, *Oil-Rig Disaster Threatens Future of Offshore Drilling*, BLOOMBERG, May 14, 2010, <http://www.bloomberg.com/news/2010-05-06/bp-s-deepwater-horizon-rig-disaster-threatens-future-of-offshore-drilling.html>.

6. See Opinion, *Drilling in Deep Water*, WALL STREET JOURNAL, May 14, 2010, <http://www.bloomberg.com/news/2010-05-06/bp-s-deepwater-horizon-rig-disaster-threatens-future-of-offshore-drilling.html>.

7. See Kenneth R. Feinberg, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005). Mr. Feinberg has been hesitant to call any of the funds he has administered “a precedent.” In fact, in the book he authored about the 9/11 Compensation Fund, he goes to great lengths to discourage Congress from using that fund as a precedent for future national tragedies. When asked whether he believed this kind of private compensation fund should have more precedential value, he reiterated his belief that no fund should ever serve as precedent. When asked why, he said that the first question that must be answered for any fund is, “Who is going to pay?” Here, oil companies would pay. Similar funds may be established because of the benefit the oil companies receive—limited liability and expeditious results. Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011). I conducted this interview myself in person for all future references.

8. See *infra* Part IV.A.

assessment of damages.⁹ To remedy the inadequacy of the original standard, this Paper closely examines the basic principles underlying causation analysis in the law of torts and contracts and proposes a “contort” principle of foreseeability as the causation standard to be employed by oil spill fund administrators.¹⁰ In applying this standard, this Paper suggests a general framework of considerations that can inform the causation inquiry.

Part II provides background information about the Deepwater Horizon oil spill in the Gulf of Mexico, which prompted the unprecedented establishment of the BP compensation fund. Specifically, it examines the events surrounding the explosion and oil spill, including initial attempts to stop the flow of oil and the resulting environmental damage.

Part III discusses BP’s admission of responsibility and the establishment of the compensation fund from which loss claims are paid. It particularly focuses on the protocol for claim assessment established by fund administrator Kenneth Feinberg and the Gulf Coast Claims Facility.

Part IV discusses the now-discarded geography causation standard and the criticism it received from claimants as well as practitioners and government officials. This Part also focuses on existing causation principles in tort and contract law as a frame of reference for formulating another standard for assessing oil-spill claims. It particularly concentrates on one main approach that courts have employed in both areas of law—foreseeability—and suggests that despite the weight of authority arguing otherwise, these two standards are indistinguishable and should be collapsed into one uniform test.

Part V discusses this proposed standard and what its purpose and goals would be in the administration of the fund. The proposed standard focuses on two main compensatory goals: (1) achieving social justice—righting a private wrong, and (2) limiting liability to a level that makes it economically rational to insure against. Importing these goals to the administration of the fund, this Part concludes by suggesting a three-possibly-four-part inquiry by which a fund administrator can analyze loss claims.

9. Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011).

10. Bryan A. Garner, *A DICTIONARY OF MODERN LEGAL USAGE* 214 (2d ed. 2001) “Contort” is a word invented by Professor Grant Gilmore in the 1970s to explain “the overlapping domain of contract law and tort law, [and] a specific wrong that falls within that domain.” (“I have occasionally suggested to my students that a desirable reform in legal education could be to merge the first-year courses in Contracts and Torts into a single course that we would call Contorts.” Grant Gilmore, *THE DEATH OF CONTRACT* 90 (1974)).

Part VI applies this general inquiry to two prototypical loss claims, displaying how the geographic standard and foreseeability standard can arrive at divergent results. This Part concludes that because the results yielded by the foreseeability standard are more beneficial to both claimants and oil companies, it should be adopted.

II. BACKGROUND

A. THE SPILL

At approximately ten o'clock central time on the evening of Tuesday, April 20, 2010, a large explosion occurred aboard the Deepwater Horizon ("Horizon") oil rig, positioned in the Gulf of Mexico about fifty miles southeast of Venice, Louisiana.¹¹ The rig was carrying a 126-person crew at the time of the explosion, and eleven crewmembers remained unaccounted for and were presumed dead.¹² At the time of the explosion, Horizon was being used solely for drilling and was not producing any oil. It was owned by Transocean,¹³ a Swiss-based company, and had been under contract to British Petroleum¹⁴ (hereinafter "BP") since September 2007.¹⁵

Despite estimates that 13,000 gallons of crude oil per hour were pouring out of the well into the Gulf, Coast Guard officials' initial reports were optimistic that the pollution was minimal "because most of the oil and gas was being burned up in the fire" caused by the explosion.¹⁶ This optimism faded quickly when robotic devices used to monitor the deepwater well from which the rig detached as a result of the explosion detected oil leaking from the well.¹⁷ This discovery was a "game changer" as officials realized that until the leak could be found and plugged, roughly 1,000 barrels¹⁸ of oil per day would flow from the well.¹⁹ Coast Guard

11. Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, April 21, 2010, <http://www.nytimes.com/2010/04/22/us/22rig.html>.

12. *Id.*

13. Transocean, Ltd. is the world's largest offshore drilling contractor. More information about the company can be found at its company website, <http://www.deepwater.com/fw/main/Home-1.html>.

14. Based in London, BP is "third largest oil company in the world, after ExxonMobil and Royal Dutch Shell, with 80,000 employees worldwide as of December 2009, sales of \$239 billion in 2009 and a market value . . . of more than \$100 billion." *BP Plc. News* (Sept. 8, 2010), http://topics.nytimes.com/top/news/business/companies/bp_plc/index.html.

15. Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, April 21, 2010, <http://www.nytimes.com/2010/04/22/us/22rig.html>.

16. *Id.*

17. Campbell Robertson, *Oil Leaking Underwater From Well in Rig Blast*, N.Y. TIMES, April 24, 2010, <http://www.nytimes.com/2010/04/25/us/25rig.html>.

18. The conversion of oil barrel to gallons is 1 barrel: 42 gallons. See EPA, *User's Guide to Tanks: Storage Tank Emissions Calculation Software*, v.4, <http://www.epa.gov/ttn/chief/software>

officials, however, continued to relay a message of confidence that the impact of the spill could be mitigated before reaching shore, touting its successful on-water skimming efforts.²⁰

Within forty-eight hours, news outlets began reporting that Coast Guard officials believed “that it could be months before they were able to stem the flow” of oil into the Gulf of Mexico,²¹ and the Gulf Coast States were alerted to the possibility of oil sightings on their shores. As a result, biologists and environmentalists warned animal fatalities should be expected if the leaks were not sealed, specifically alluding to “[sea] life that congregates at the surface and has no mobility of its own—like plankton and fish eggs—[as] the most vulnerable to the [oil] slick. A large scale destruction of eggs could affect fish populations in the future.”²²

Fast-forward almost three months to July 15, 2010 when BP officials announced that after several failed attempts, “for the first time in 86 days . . . oil was not gushing into the Gulf of Mexico” after they successfully capped the well.²³ The failed attempts²⁴ caused government officials and Gulf citizens to be skeptical of the cap’s projected success. Although capping the well marked a turn for the better, the aftermath of the BP oil spill remained far from over. Millions of barrels of oil remained in the Gulf for several months, causing fishermen and shrimpers to miss many months of work.²⁵ While the total economic and environmental harm remains,

/tanks/tank4man.pdf, at 4-3. The estimate of 1,000 barrels, or 42,000 gallons, of oil per day is a more favorable estimate than the initial 13,000 gallons per hour that officials released following the explosion.

19. Campbell Robertson, *Oil Leaking Underwater From Well in Rig Blast*, N.Y. TIMES, April 24, 2010, <http://www.nytimes.com/2010/04/25/us/25rig.html>.

20. *Id.* (“The rig itself was found on the sea floor about 1,500 feet from the well. The sheen of crude oil and water mix on the surface of the water was still more than forty miles from shore at its closest point on Saturday, [April 24, 2010]. ‘That gives us a lot of time to try to mitigate in response to the spill,’ [Rear Admiral Mary E. Landry, commander of the Coast Guard’s Eighth District] said.”).

21. Campbell Robertson, *Oil Leaks Could Take Months to Stop*, N.Y. TIMES, April 25, 2010, www.nytimes.com/2010/04/26/us/26rig.html.

22. *Id.* For more information about the specific effects on various wildlife, see Haeyoun Park, et al, *The Oil Spill’s Effects on Wildlife*, N.Y. TIMES, August 16, 2010, <http://www.nytimes.com/interactive/2010/04/28/us/20100428-spill-map.html>.

23. Campbell Robertson & Henry Fountain, *BP Says Oil Flow Has Stopped as Cap Is Tested*, N.Y. TIMES, July 15, 2010, <http://www.nytimes.com/2010/07/16/us/16spill.html>.

24. For more information on the various methods used by BP in its series of failed attempts, see Jonathan Corum, et al, *Methods That Have Been Tried to Stop the Leaking Oil*, N.Y. TIMES, August 17, 2010, <http://www.nytimes.com/interactive/2010/05/25/us/20100525-topkill-diagram.html>.

25. Campbell Robertson & Henry Fountain, *BP Says Oil Flow Has Stopped as Cap Is Tested*, N.Y. TIMES, July 15, 2010, <http://www.nytimes.com/2010/07/16/us/16spill.html>.

“anger still seethes along the Gulf coast.”²⁶

After holding for two months, the temporary cap that stopped the flow of oil into the Gulf was finally removed “as a prelude to raising the massive piece of equipment underneath that failed to prevent the . . . oil spill” by BP engineers in early September 2010.²⁷ Now that the oil leak has been contained and officials are able to move ahead with their complex engineering plan to remove the equipment, more searching investigations into both the immediate and long-term destruction caused by the leak can begin.

B. THE AFTERMATH

It was not until the National Oceanic and Atmospheric Administration (NOAA) began restricting fishing and swimming in federal waters did the general public begin to contemplate the economic and environmental effects of this oil spill. NOAA announced on May 2, 2010 that it was “restricting fishing for a minimum of ten days in federal waters most affected by the BP oil spill, largely between Louisiana state waters at the mouth of the Mississippi River to waters off Florida’s Pensacola Bay,”²⁸ constituting “slightly more than 31 percent of Gulf of Mexico federal waters,”²⁹ until it could be determined what kind of health and contamination risks the oil posed.³⁰ As of November 15, 2010, approximately 1,041 square miles of the Gulf Coast remained closed to fishing activities.³¹ The amount of commerce affected by these closures is startling. With more than “3.2 million recreational fishermen in the Gulf of

26. *Id.*

27. Harry R. Weber, *Temporary Cap That Stopped BP Spill Removed*, TIME MAGAZINE, September 2, 2010, <http://www.time.com/time/business/article/0,8599,2015891,00.html>.

28. Press Release, National Oceanic and Atmospheric Administration, NOAA Closes Commercial and Recreational Fishing in Oil-Affected Portion of Gulf of Mexico, http://www.noaanews.noaa.gov/stories2010/20100502_fisheries.html.

29. *Id.*

30. *Id.* These actions were not taken in response to water drifting closer to the shore, but rather to enable NOAA scientists to test the water and seafood samples “to ensure the safety of the seafood and fishing activities.” *Id.* Concerns about the economic impact of restricting fishing were immediately raised by local fishermen, but NOAA, “[b]alancing economic and health concerns,” still closed “those areas that [were] affected by oil.” *Id.* The federal government also acknowledged the economic impact of the NOAA decision. Secretary of Commerce Gary Locke said, “We stand with America’s fisherman, their families and businesses in impacted coastal communities during this very challenging time. Fishing is vital to our economy and our quality of life and we will work tirelessly to protect it.” *Id.*

31. Press Release, National Oceanic and Atmospheric Administration, NOAA Reopens More Than 8,000 Square Miles in the Gulf of Mexico to Fishing, http://www.noaa.news.noaa.gov/stories2010/20101115_reopening.html.

Mexico region who took 24 million fishing trips in 2008,³² and “1.27 billion pounds of finfish and shellfish” harvested by commercial fishermen in 2008,³³ the effected fishermen stood to lose a significant part of their livelihood for the 2010 harvesting season.³⁴ More significantly and to compound the potential losses, the oil spill occurred just weeks before harvesting season opened for commercial fisheries. Even more significant in terms of potential loss was the timing of the oil spill, just weeks before the opening of harvesting season for many commercial fishing enterprises.³⁵

But the oil spill’s impact has reached far beyond the coastal states³⁶ and the fishing industry. For example, Matthew Lepetich, an oyster fisherman in Louisiana who owns oyster beds in affected waters, illustrates the oil spill’s domino effect throughout the country. At the time of the spill, his oysters were not mature enough to harvest, and with NOAA’s fishing restrictions, he stood to lose \$4,500 per day.³⁷ Consequently, suppliers in seven States, including those in states as far away as Maryland, did not receive his oysters.³⁸ [In May, while] his customers anxiously await[ed] his harvest, one oyster house in Mississippi . . . laid off sixty workers because many Louisiana oyster beds [were] off limits.”³⁹ Also, Cliff Hal, who supplies seafood to hotels and restaurants across the country, immediately

32. *Id.*

33. Fact Sheet, National Oceanic and Atmospheric Administration, NOAA’s Oil Spill Response: Fishing Industry in the Gulf of Mexico, http://response.restoration.noaa.gov/book_shelf/1885_fishing_industry_gulf2.pdf.

34. Fact Sheet, National Oceanic and Atmospheric Administration, NOAA’s Oil Spill Response: Fishing Industry in the Gulf of Mexico, http://response.restoration.noaa.gov/book_shelf/1885_fishing_industry_gulf2.pdf. Just how much revenue was lost has yet to be determined, the potential is great, however. In terms of business and socio-economic impact, in 2008 alone, “[c]ommercial fishermen earned \$659 million in total landings revenue.” “The oil spill has the potential to impact 7.3 [million] active businesses throughout [Alabama, Louisiana, Florida, Mississippi, and Texas,] affecting 34.4 [million] employees and \$5.2 trillion in sales volume.” Report, Dun and Bradstreet, 2010 Deepwater Horizon Oil Spill: Preliminary Business Impact Analysis for Coastal Areas in the Gulf States, http://www.dnbgov.com/pdf/DNB_Gulf_Coast_Oil_Spill_Impact_Analysis.pdf.

35. Particularly, “two of the largest commercial fishing operations in the Gulf of Mexico are red snapper and shrimp. Brown shrimp is the most important species in the U.S. Gulf fishery, with principal catches made from June through October.” Fact Sheet, National Oceanic and Atmospheric Administration, NOAA’s Oil Spill Response: Fishing Industry in the Gulf of Mexico, http://response.restoration.noaa.gov/book_shelf/1885_fishing_industry_gulf2.pdf.

36. See Jim Snyder, *BP Spill Claims from 50 States Confront Administrator Feinberg*, BLOOMBERG, Aug. 16, 2010, <http://www.bloomberg.com/news/print/2010-08-16/bp-spill-claims-from-50-states-confront-administrator-feinberg.html>. (“BP has received more than 142,400 claims [as of August 16, 2010] representing every state.”).

37. See Michelle Miller, *Oil Spill’s Economic Impact Spans Country*, CBS, May 18, 2010, <http://www.cbsnews.com/stories/2010/05/18/eveningnews/main6496704.shtml>.

38. *Id.*

39. *Id.*

raised his prices in response to the anxieties of customers and fishermen caused by speculation as to the magnitude and severity of the effects of the spill on consumable seafood.⁴⁰ Chef Sandy Ingber, a head chef in an oyster restaurant in New York, experienced the higher seafood prices from seafood suppliers and her costs rose by almost 10 percent immediately following the spill.⁴¹

The domino effect continues beyond the immediate food chain. The spill forced many oyster beds to shutdown, either out of precaution or because of the actual presence of oil. As a result, industries that rely on a consistent flow of oysters were affected. For example, because of the slowdown in oyster harvesting, fewer burlap sacks were ordered for the oyster boats. This reduction impacts companies such as Steve's Burlap Sacks which is run out of Waveland, Mississippi, about sixty miles away from New Orleans.⁴² This is yet another example of the far reaching impact of the spill.

Another person along the production chain that is feeling an economic impact is the trucker who would otherwise be hauling oysters across the country from the Gulf States. Because of the downturn in production, "the weekly deliveries to Los Angeles, by way of El Paso, Tucson and Phoenix, have stopped, as have the deliveries to Las Vegas, where clients prefer smaller oysters from beds that were off limits following the spill."⁴³

Finally, at the end of the production chain is the Minnesota farmer who relies on the oyster shells to grind into his chicken feed. Because of the

40. *Id.* Hal raised the price of his oysters by \$10, from \$37 per gallon to \$47. Fish from the Gulf Coast were raised by one dollar a pound, and shell fish such as shrimp and crabs were raised from \$24 per hundred to \$30. *Id.*

41. *Id.* Ingber does not even buy seafood from the Gulf Coast but experienced higher prices as a result of supplier anxiety. Similarly, a West Virginia seafood business and restaurant felt the impact of higher seafood prices following the spill. See Keri Brown, WV Seafood distributors feel impact of oil spill, WEST VIRGINIA PUBLIC BROADCASTING, Sept. 1, 2010, available at <http://www.wvpubcast.org/newsarticle.aspx?id=16416>. Coleman's Fish Market in Wheeling, West Virginia procures most of its shrimp from the Gulf Coast. The fear of contamination caused Coleman's to change its seafood provider. *Id.* Another West Virginia fish market owner reflected on the higher prices and hard times his business experienced following Hurricane Katrina, which greatly impacted much of the seafood industry in the Gulf. Joe Harmon, the owner of Joe's Fish Market, noted, "The biggest thing I've seen as far as negative impact from the spill is on oysters. The Gulf supplied about 60 percent of all of the shucked oysters in the East and they are practically non existent." Keri Brown, *WV Seafood Distributors Feel Impact of Oil Spill*, WEST VIRGINIA PUBLIC BROADCASTING, Sept. 1, 2010, available at <http://www.wvpubcast.org/newsarticle.aspx?id=16416>. The price of oysters increased by more than \$40 per gallon. *Id.*

42. *Id.* While BP has paid the owner of Steve's Burlap Sacks \$20,000 so far for lost business, [this amount] "is no where near enough to cover the \$320,000, plus sweat equity, that he has invested in the company." *Id.*

43. *Id.*

slowdown in harvesting and shucking, the inventory of available oyster shells for chicken feed is depleted, forcing the Minnesota farmer to turn to more expensive alternatives to supplement his feed.⁴⁴ Unfortunately, this coast-to-coast economic domino effect is not unique to the fishing and seafood industry, however.

Tourism enterprises along the Gulf Coast also felt the effects of the spill and the resulting customer anxiety. Less than one month after the spill, in mid-May 2010, one Alabama hotel already experienced a loss between \$100,000 and \$200,000.⁴⁵ Over Memorial Day 2010, some hotels on the Florida panhandle experienced occupancy rates ranging from 50 percent to 15 to 19 percent, down from the typical 90 percent or higher.⁴⁶ A recent study found that the real estate market along the Coast experienced a slowdown, with “23.8 percent of respondents report[ing] a negative impact on their market[s] due to the oil spill.”⁴⁷ This statistic is noteworthy because only 3.2 percent of survey respondents reported physical property damage as a result of the oil spill.⁴⁸ It seems that what was driving much of the initial economic impact following the spill was consumer fear and the social stigma attached to the potential impact of the spill.⁴⁹

With the economic downturn of so many enterprises along the Gulf Coast spreading inland to states all across the country, it did not take long for those impacted to demand recourse from the federal government and BP for their losses.

44. *Id.*

45. Michelle Miller, *Oil Spill's Economic Impact Spans Country*, CBS, May 18, 2010, <http://www.cbsnews.com/stories/2010/05/18/eveningnews/main6496704.shtml>.

46. *Id.*

47. *Nearly 1-in-4 Real Estate Professionals Polled Report a Negative Effect on Real Estate Markets; Number of Home Sales Drop Dramatically Year-Over-Year, Even in Markets with No Physical Damage*, CLEAR CAPITAL, Aug. 20, 2010, <http://www.marketwire.com/press-release/Clear-Capital-Impact-of-BP-Oil-Spill-Reaches-Beyond-Gulf-Coast-1307524.htm>.

48. *Id.*

49. *Id.* (“While social stigma appears to be the largest factor influencing the slowdown in home buying activity, it is clear the effects of the spill are being felt inland from the coast.”). Social stigma is defined “as the belief that an area has been negatively affected because of its proximity to the Gulf.” *Id.* Another form of social stigma comes in the form of cancelled traveling plans, which had a rippling effect in other vacation or leisure-related industries. For example, spa workers and tanning salon operators in New Orleans reported that, following the oil spill, they felt a significant decrease in patronage. When they asked their regular customers why they were not coming in for their beauty regimens, many customers reported that they had cancelled vacation plans to Florida because of the oil spill. See Rebecca Mowbray, *Indirect Economic Damages From Gulf of Mexico Oil Spill Can be Hard to Define*, THE TIMES-PICAYUNE, Aug. 2, 2010, available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect_economic_damages_from.html.

III. LIABILITY AND THE BP COMPENSATION FUND

A. ESTABLISHMENT OF THE FUND

In early June,⁵⁰ BP executives met with President Obama to discuss how BP would assume financial responsibility for the damage—both physical and pecuniary—caused by the Horizon spill. BP agreed it would create a \$20 billion compensation fund from which loss claims over the next three and a half years would be paid.⁵¹ To ensure impartiality, the administration of the fund would be conducted by neither the federal government nor BP itself, but rather it would be put in an escrow account and administered by a third-party, Ken Feinberg, a prominent Washington, D.C. attorney best known for his experience in administering the 9/11 compensation fund.⁵²

50. See Press Release, BP Global, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7062966> (“Following a meeting with the President of the United States, the BP Board announces an agreed package of measures to meet its obligations as a responsible party arising from the Deepwater Horizon spill.”).

51. *Id.* Payments from this fund would not include any state or federal fines or penalties; it would only cover legitimate loss claims. *Id.* This fund also is entirely separate from the amount BP is responsible for under federal, specifically the Oil Protection Act of 1990, which is currently capped at \$75 million. See 33 U.S.C. §2702 (1990). President Obama, in a message to the nation, agreed that the \$75 million federal liability cap would “obviously be insufficient” and the establishment of this compensation fund was established to “provide substantial assurance that the claims people and businesses have will be honored.” President Barack Obama, Statement by the President After Meeting with BP Executives (June 16, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-withbp-executives>).

52. Mr. Feinberg was also responsible for claim administration for Vietnam veterans damaged by Agent Orange and women harmed by the defective Dalkon Shield birth control device. Editorial, *Mr. Feinberg and the Gulf Settlement*, N.Y. TIMES, Aug. 29, 2010, <http://www.nytimes.com/2010/08/30/opinion/30mon1.html>. With regard to the September 11 fund, it “was created to compensate people who were injured in the attacks and the families of people who were killed.” Michael Cooper, *Spill Fund May Prove as Challenging as 9/11 Payments*, N.Y. TIMES, Aug. 21, 2010, www.nytimes.com/2010/08/22/us/22spend.html. This kind of payment structure is very different than the one Mr. Feinberg would be administering to victims of the oil spill. Noting three differences between the funds, Feinberg said, “[First,] the [oil spill] claims are mostly for financial losses, not for traumatic deaths and severe injuries [as they were with the 9/11 fund].” Second, “the cause of the injury is ongoing—the leak [continued to leak as claims began filing in, making it difficult to assess] how long [a] business [would be] interrupted.” Third, “Feinberg . . . expected more fraud than in his past experiences . . . because the losses are ‘pervasive’ across four states . . . and with business losses, as opposed to death and personal injury, ‘there’s a tendency for some people to stretch the bounds of what’s reasonable.’” Jackie Calmes, *For Gulf Victims, Mediator with Deep Pockets and Broad Power*, N.Y. TIMES, June 22, 2010, <http://www.nytimes.com/2010/06/23/us/23feinberg.html>.

B. THE COMPENSATION FUND AND CAUSATION

In order to administer the fund, Feinberg established the Gulf Coast Claims Facility (GCCF), which endeavored to provide claim-filing instructions as well as answer frequently asked questions about the process, timing, and availability of funds. According to GCCF, Feinberg would entertain “all legitimate claims for damages resulting from the oil spill and necessary response costs. This includes: property damage, net loss of profits and earning capacity, loss of subsistence or natural resource damage, and necessary removal and clean up costs.”⁵³ The GCCF also included specific guidelines for claims of indirect economic damages. Surprisingly, the causation standard to find BP liable is the GCCF standard that BP lobbied for which is foreign to most commonly employed judicial compensatory schemes.⁵⁴ The guideline reads:

If your claim is for indirect economic damages, the GCCF will evaluate whether your claim is compensable and the appropriate amount of compensation based on *geographic proximity* to the Spill, whether you are dependent on injured natural resources, and the nature of your business.⁵⁵

Government officials, plaintiffs’ attorneys, and legal commentators immediately sounded the alarm with this chosen standard. Subsequent public comments from Kenneth Feinberg about this standard confirmed that geographic proximity would further complicate compensation for many plaintiff classes.⁵⁶

53. Frequently Asked Questions about the BP Claims Process, *available at* <http://www.bp.com/liveassets/bpinternet/globalbp/globalbpukenglish/incidentresponse/STAGING/localassets/downloadspdfs/FAQsabouttheBPClaimsProcess.pdf>. This list of claims is nearly identical to the ones listed under federal law in the Oil Protection Act of 1990. *See* 33 U.S.C. §2702 (1990).

54. *See* James C. McKinley, Jr., *Details Faulted in Plan to Pay Oil Spill Claims*, N.Y. TIMES, Aug. 20, 2010, <http://www.nytimes.com/2010/08/21/us/21fund.html>. (referencing the GCCF liability standard); *see also* Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011).

When asked why he chose the geographic standard, Mr. Feinberg indicated that it was not a foreign concept to compensation funds, and seemed appropriate for the BP fund. In administering the 9/11 Compensation Fund for physical injury claims, Feinberg instituted geographic-eligibility criteria, which required claimants to have been on the surrounding streets of the World Trade Center in order to recover. Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011). Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011).

55. Gulf Coast Claims Facility, Claim Facility Instructions, *available at* <http://www.gulfcoastclaimsfacility.com/faq#Q7>.

56. Rebecca Mowbray, *Indirect Economic Damages from Gulf of Mexico Oil Spill can be Hard to Define*, THE TIMES-PICAYUNE, (Aug. 2, 2010), *available at* http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect_economic_damages_from.html. This news article

Although Feinberg assured critics that the geographic standard would not be applied arbitrarily and that he “would look to state law and the Oil Protection Act⁵⁷ for guidance to resolve claims,” skepticism ran high.⁵⁸ Underscoring the “major impact” this definition of causation would have on “who receives compensation and who does not,” many critics believed that this geographic “requirement places a higher burden of proof upon a claimant” than other causation standards.⁵⁹ Among the initial critics was Florida Attorney General, Bill McCollum, who wrote an open letter to Feinberg, highlighting many of the potential difficulties in applying the geographic standard.⁶⁰ Specifically, Attorney General McCollum highlighted how the geographic standard would reduce claimants’ rights by requiring a more onerous burden than that in the Oil Protection Act, which allows a claimant “to recover damages which are ‘the result of’ the Spill.”⁶¹ Although Feinberg’s initial response was that he would look to applicable state law to guide the review of claims,⁶² he soon conceded to the accuracy

stated that, “[i]n testimony before Congress last week, [Ken Feinberg] said that figuring how indirect the damages can be will be his toughest challenge in administering the \$20 billion fund that BP set aside at the direction of the Obama administration.” *Id.* Furthermore, Mr. Feinberg testified, “[w]hat I’m going to have to decide . . . as part of this Gulf Coast claims facility, is what constitutes a direct claim, a direct claim that is immediately payable? And how far attenuated may a claim be from the spill?” *Id.*

57. See 33 U.S.C. §2702 (1990). While state law may have a clearer or more workable causation standard, the Oil Protection Act (OPA) has never been administered since its enactment following the *Exxon Valdez* spill. OPA’s statutory language provides a “due to” clause: “valid claims for lost profits and impaired earning capacity [must be] ‘due to’ the injury, loss or destruction of property or resources.” Memorandum from John C.P. Goldberg to Kenneth R. Feinberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* (Nov. 22, 2010) (available at <http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>). While this “due to” standard will be administered has yet to be seen. For further discussion of the three schools of thought with regard to this standard, see Memorandum from John C.P. Goldberg to Kenneth R. Feinberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill* (Nov. 22, 2010) (available at <http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf>).

58. Rebecca Mowbray, *Indirect Economic Damages from Gulf of Mexico Oil Spill can be Hard to Define*, THE TIMES-PICAYUNE, (Aug. 2, 2010), available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect_economic_damages_from.html.

59. Andrew Restuccia, *Distribution of BP Oil Spill Funds Still a Cloudy Issue Despite New Alternatives*, COLORADO INDEPENDENT, (Aug. 23, 2010), available at <http://coloradoindependent.com/60161/distribution-of-bp-oil-spill-funds-still-a-cloudy-issue-depsite-new-administrator>; see also *supra* notes 61-3, referencing Florida Attorney General, Bill McCollum’s criticism of the geographic requirement.

60. Letter from Bill McCollum, Florida Attorney General, to Kenneth R. Feinberg, Compensation Fund Administrator (Aug. 20, 2010) available at [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-88HRS4/\\$file/EmergencyAdvancePayments.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-88HRS4/$file/EmergencyAdvancePayments.pdf).

61. *Id.*

62. Andrew Restuccia, *Distribution of BP Oil Spill Funds Still a Cloudy Issue Despite New Alternatives*, COLORADO INDEPENDENT, Aug. 23, 2010, available at <http://coloradoindependent>

of his critics' claims.⁶³

The kind of impact this narrowly focused standard could have on claimants is substantial given that, absent any other constraints, it could "be used to exclude businesses farther inland whose bottom line were hit by the drop in tourism and fishing" as a result of the oil spill.⁶⁴

IV. FRAMING THE CAUSATION INQUIRY

A. REJECTING THE GEOGRAPHIC STANDARD

The problems raised by Feinberg's geographic standard are two-fold: it is both over-inclusive and under-inclusive. Specific instances of the over-inclusiveness of the geographic standard have not yet publically emerged. However, Feinberg has submitted about thirty potentially fraudulent claims to the United States Department of Justice for investigation. With more than 315,000 claims received since October 1, 2010,⁶⁵ it is plausible that some of the earlier compensated claims, prior to the influx of fraudulent claims,⁶⁶ may have been less strictly scrutinized if they met the baseline geographic standard. For example, Louisiana "boat owners have submitted pay stubs for far more deckhands than they would seem to need to operate their boats (the investigators do not look into the size of the fishing boats)."⁶⁷ This is but one example of how the geographic standard may be over-inclusive of claims in the Gulf region.

.com/60161/distribution-of-bp-oil-spill-funds-still-a-cloudy-issue-depsite-new-administrator.

Critics have attacked the state-law position as well, arguing that even this review method will do "claimants a disservice, because the Oil Protection Act goes further than state law, and arguably in state law, the line [that divides those who will receive compensation from BP and those who will not] is going to [be] drawn [much] closer to the shore." Rebecca Mowbray, *Indirect Economic Damages from Gulf of Mexico Oil Spill can be Hard to Define*, THE TIMES-PICAYUNE, Aug. 2, 2010, available at http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/08/indirect_economic_damages_from.html.

63. See *supra* notes 55-59 and accompanying text.

64. James C. McKinley, Jr., *Details Faulted in Plan to Pay Oil Spill Claims*, N.Y. TIMES, Aug. 20, 2010, www.nytimes.com/2010/08/21/us/21fund.html.

65. Brian Skoloff, *Number of Denied BP Claims Rises Sharply*, ASSOCIATED PRESS, (Nov. 1, 2010), http://www.msnbc.msn.com/id/39956880/ns/us_news-environment.

66. See John Schwartz, *Claims to BP Fund Attract Scrutiny*, N.Y. TIMES, (Oct. 2, 2010), <http://www.nytimes.com/2010/10/03/us/03feinberg.html> ("Take the businessman who explained that his part of the \$20 billion fund should be . . . \$20 billion. His income last year? Fifty thousand dollars. A restaurant worker asked for \$5.9 million in emergency payments, even though his earnings before the spill were just \$18,000. And then there are the 4,000 claims, using a one-page form letter, that flooded in from Plaquemines Parish a couple of weeks ago, some hand delivered to local claims offices. They asked for grocery money, from \$150 a month to hundreds of dollars, to make up for the fish they would have pulled from the gulf waters had there been no spill. Few offered any substantiation for the claim, though one person brought a dead fish.").

67. *Id.*

A more obvious problem is the under-inclusiveness of this standard, with geography excluding a substantial number of valid claims that are more than a certain miles away from the Gulf.⁶⁸ By focusing mainly on “commercial interests—like fishing, shrimping and food processing—[the majority of the compensation had gone to] people in Louisiana, Mississippi, and Alabama.”⁶⁹ However, as mentioned in Part II, the economic domino effect this spill has had on commercial enterprises throughout the country is vast. The geographic standard does not contemplate compensation for these sorts of domino claims.

On October 4, 2010, Feinberg announced that, “after hearing from elected officials in Florida . . . about their concerns regarding Floridians’ proximity to the spill and how, regardless of distance, there has been economic impact beyond the areas closest to the spill,” he decided that the geographic standard was now “unwarranted.”⁷⁰ What he did not announce, however, was the new standard he would now employ following the rescission of the geographic standard.⁷¹ He emphasized that he and his staff would “continue[] to review each claim on a case-by-case basis and claimants must prove damages resulting from the spill itself and not other causes, but physical proximity from the spill [would] not, in and of itself, bar the processing of legitimate claims.”⁷² With thousands of claims from each of the 50 states, 35,500 alone from Florida,⁷³ claimants, let alone the administrator, needed a sense of what would and would not be compensated as the November 23rd application deadline for emergency payouts approached.

As mentioned, Feinberg is not constrained by any recognized legal standards of causation as he is operating outside the confines of the court system. However, in formulating a new standard for distinguishing between

68. The guidelines do not specifically impose a distance requirement, but Feinberg has indicated that evaluating claims far from the coast would be problematic. *See supra* note 53 & accompanying text.

69. David Segal, *Should BP’s Money Go Where the Oil Didn’t?*, N.Y. TIMES, Oct. 23, 2010, <http://www.nytimes.com/2010/10/24/business/24claim.html>.

70. Press Release, “Feinberg Announces Clarification Regarding Geographic Proximity,” <http://www.gulfcoastclaimsfacility.com/press7.php>.

71. Mr. Feinberg did indicate that while he while he publicly announced that geography was no longer the causation standard, at the end of the day, it will be difficult for a business located fifty miles inland to prove, with verifiable evidence, that its damages were caused by the spill. “How can the business prove that it wasn’t the recession? Or bad weather?” Interview with Kenneth Feinberg, Fund Administrator, Gulf Coast Claims Facility, in Washington, D.C. (Jan. 7, 2011).

72. *Id.*

73. David Segal, *Should BP’s Money Go Where the Oil Didn’t?*, N.Y. TIMES, Oct. 23, 2010, www.nytimes.com/2010/10/24/business/24claim.html.

compensable and non-compensable claims, existing tort and contract causation principles can inform his inquiry.

B. GUIDANCE FROM EXISTING CAUSATION PRINCIPLES

Causation and formulating the appropriate standard for determining causation, and thus damages, has riddled scholars, litigants, and courts for as long as the law has recognized the foundational causes of actions that give rise to a causation inquiry. It seems that most who have discussed the subject have insisted that “the causal questions which they have to face must be determined on common-sense principles,” though in application, even common-sense principles have presented “ambiguit[ies] and vagueness” that do not lend themselves to a single concept of “causation.”⁷⁴ What underlies most causal inquiries, however, are two principal purposes. First, causation serves an explanatory function, i.e., a statement of what and why a particular unexpected event happened.⁷⁵ For this purpose, causation is a reactive tool that explains past events. However, causation can also be proactive—it often can “take the form of an inquiry as to the future consequences of alternative actions; here causal connections are *ex hypothesi* bounded by the horizon of the foreseeable.”⁷⁶ This second form of inquiry, causation as a means of limiting liability and responsibility to what is foreseeable, permeates “not only . . . the context of negligence, where [it is] to be expected, but also in”⁷⁷ the context of contracts.⁷⁸

1. TORT LAW — PROXIMATE CAUSATION

The widely accepted and terribly ambiguous common law “general rule of damages in tort action is that a successful plaintiff is entitled to all damages proximately caused by a wrongdoer’s actions with such an award aimed at making the plaintiff whole by providing compensation for injuries and losses proximately caused by the tortfeasor.”⁷⁹ Over time, scholars and courts have searched for a predictive test to measure which damages were “proximately caused” by the particular defendant, and thus recoverable, and which damages were unrecoverable for want of causality. What follows are two tests from the Restatements of Torts which have been widely accepted

74. H.L.A. Hart & Tony Honore, *CAUSATION IN THE LAW* (2d ed.) 26 (1985).

75. *Id.* at 62.

76. *Id.* at 63.

77. *Id.* at 254.

78. One scholar has even suggested that, “Except only the defendant’s intention to produce a given result, no other consideration has affected our feeling that it is or is not just to hold him for the result so much as its foreseeability.” H.L.A. Hart & Tony Honore, *CAUSATION IN THE LAW* (2d ed.) 254 (1985) (citing Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 352 (1924)).

79. Paul McDonald & Daniel J. Murphy, *Recovery of Lost Profits Damages: All is Not Lost*, 24 ME. B. J. 152 (2009) (internal citations omitted).

by most courts and scholars.

a. The Substantial Factor Test

The principles by which courts measure proximate cause have evolved from a basic *causa sine qua non*, or but-for standard,⁸⁰ to the “substantial factor” standard,⁸¹ to the “scope of the risk” and “foreseeability” standards adopted by the proposed Third Restatement of Torts.⁸² However, throughout this evolution, what has remained constant is the “predominant approach to the limits on liability reflected in proximate-cause [tort] rules: ‘that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and the class of person he put at risk by that conduct.’”⁸³

The Second Restatement, adopted by the American Law Institute in 1934, presented the “substantial factor” test for determining legal causation in negligence claims.⁸⁴ The comments to the Restatement explicated the specific language chosen by the Reporters, noting that the word “substantial” was selected “to denote the fact that the defendant’s conduct [must have] such an effect in producing the harm as to lead reasonable men to regard it as a cause, using ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred.”⁸⁵ Likely realizing that this definition provides little practical guidance for determining proximate causation, the Reporters of the Restatement proceeded with section 443, which lists factors to be considered when determining whether an action is a “substantial factor” in bringing about the harm.⁸⁶ While the enactment of the Second Restatement

80. BLACK’S LAW DICTIONARY (9th ed. 2009).

81. See RESTATEMENT (SECOND) OF TORTS §431 (1965).

82. See RESTATEMENT (THIRD) OF TORTS §29 (2010)

83. RESTATEMENT (THIRD) OF TORTS §29, cmt. d (2010) (citing Dan B. Dobbs, THE LAW OF TORTS §181, at 444 (2000); see also 4 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, HARPER, JAMES AND GRAY ON TORTS §20.5, at 167 (3d ed. 2007) (“The view currently prevailing in the country, however, does limit the scope of duty to do or refrain from doing a given act to (1) those persons that are likely to be endangered by the act or omission, and (2) harm (to such person or interest) from a *risk of likelihood* of which made the act or omission negligent.”) (emphasis added).

84. See RESTATEMENT (SECOND) OF TORTS §431 (1965) (“The actor’s negligent conduct is a legal cause of harm to another if . . . (a) his conduct is a substantial factor in bringing about the harm.”).

85. RESTATEMENT (SECOND) OF TORTS §431, cmt. a (1986).

86. RESTATEMENT (SECOND) OF TORTS §433 (1986) (“The following considerations are in themselves or in combination with one another important in deciding whether the actor’s conduct is a substantial factor in bringing about harm to another: (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor’s conduct has created a force or a series of forces which are in continuous and

and the “substantial factor” test was to eliminate the “the myriad definitions of proximate cause [that] began to coalesce around foreseeability based conceptualization[s]”⁸⁷ prior to its enactment, it was received with hostility and criticism.⁸⁸ Much of the disapproval focused on the narrowness of the “substantial factor” consideration, and how, by the standard’s very language, does not account for other factors, such as foreseeability of the risk and other limitations on the scope of the duty.⁸⁹ Despite the harsh criticism, “the substantial factor test as a measure of proximate cause . . . not only endured, but, in many jurisdictions, prevailed”⁹⁰ until 1996 when the viability of the test was undermined when the American Law Institute Council commenced drafting of the Third Restatement.

b. The Scope-of-the-Risk Test

The Third Restatement of Torts, to be published in 2011,⁹¹ marks an explicit rejection of two details of the Second Restatement: one, the “substantial factor” test as the standard for proximate cause, and two, the very title of “proximate causation” for the causation standard for negligence.⁹²

active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (c) lapse of time.”). When the Restatement was first adopted in 1934, the list of factors in Section 433 included a foreseeability factor, that was later “transferred to Section 435, entitled ‘Foreseeability of Harm or Manner of its Occurrence’” when the Restatement was revised in 1948. Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Result-With-In-The-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1015 (2008) (“[W]hether after the event and looking back from the harm to the actor’s negligent conduct it appeared highly extraordinary that it should have brought about the harm.”).

87. Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Result-With-In-The-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1004 (2008).

88. See Leon Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 606 (1934) (“Likewise when [the Restatement] defines “legal cause” in terms of ‘substantial factor’ it confuses not only the policies which control the determination of duties with the mere minor matter of causal relation, but it likewise confuses the functions of judge and jury.”); Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS 278 (5th ed. 1984); 4 Harper et al., THE LAW OF TORTS 182 (2d ed. 1986); Dan B. Dobbs, THE LAW OF TORTS 452 (2000).

89. See 4 Harper et al., THE LAW OF TORTS 182 (2d ed. 1986) (“If defendant’s wrong is a substantial cause in fact of plaintiff’s harm, recovery should not be denied because of any further consideration of cause. To be sure recovery may be prevented by other kinds of considerations such as limitations on the scope of duty. But the term substantial factor is no more appropriate to describe these considerations than is any of the other cause formulas.”).

90. Peter Zablotsky, *Mixing Oil and Water: Reconciling the Substantial Factor and Result-With-In-The-Risk Approaches to Proximate Cause*, 56 CLEV. ST. L. REV. 1003, 1021 (2008).

91. For more information regarding the publication deadline of the Third Restatement, see AMERICAN LAW INST., Current Projects, available at http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16.

92. See RESTATEMENT (THIRD) OF TORTS §29, cmt. b (2010) (Coincidentally, the comments reject the term “proximate cause” for limiting the scope of liability and for establishing causation).

The rejection of the “proximate cause” title rests solely on what is at issue with BP’s geographic standard of causation—it is too narrowly focused.⁹³ The Restatement comments explain that “[e]mploying the term ‘proximate cause’ implies that there is but one cause—the cause nearest in time *or geography* to the plaintiff’s harm—and that factual causation bears on the issue of scope of liability.”⁹⁴ However, as previously mentioned, time or geography are rarely determinative of legal causation in any field of law, and in fact, “[m]ultiple factual causes always exist [in tort], and multiple causes are often present. [The Third Restatement accepts that an] actor’s . . . conduct need not be close in space or time to the plaintiff’s harm to be a” legal cause of damages.⁹⁵

The Reporters spend considerable time explaining that the “substantial factor” test originally was intended to guide the determination of legal cause, or but-for cause,⁹⁶ but over time, came to encompass the judicial analysis of proximate cause⁹⁷ and can no longer “[withstand] the test of time, as it has proved confusing and . . . misused.”⁹⁸ In its place, the Reporters first recognize that “[courts] have increasingly moved toward adopting a foreseeability test for scope of liability in negligence cases.”⁹⁹ In light of this movement back to the foreseeability standard applied prior to the adoption of the Second Restatement,¹⁰⁰ the Third Restatement proposes a standard which encompasses foreseeability—the “Scope of the Risk” standard.

“Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently foreseeable at the time of the actor’s tortious conduct.”¹⁰¹ “Sufficiently foreseeable” is arguably just as unusable a standard as the much-criticized “substantial factor” standard.

93. See *supra* Part IV.A. (rejecting the geographic standard).

94. RESTATEMENT (THIRD) OF TORTS §29, cmt. b (2010) (emphasis added).

95. *Id.*

96. See RESTATEMENT (SECOND) OF TORTS §26, cmt. j. (1986).

97. See RESTATEMENT (THIRD) OF TORTS §29, cmt. a. (2010).

98. See RESTATEMENT (SECOND) OF TORTS §26, cmt. j. (1986).

99. RESTATEMENT (THIRD) OF TORTS §29, cmt. e. (2010).

100. See 57A AM. JUR. 2D NEGLIGENCE §469 (2010). (“In an apparent attempt to limit liability consequences which have a reasonably close connection with the defendant’s conduct and the harm which it originally threatened or to the source and range of harm reasonably to be anticipated from the defendant’s conduct, many courts commonly make foreseeability of injury or harm an element or test of proximate cause for negligence not amounting to wanton wrong, by stating or holding that for negligence to be the proximate cause of an injury it must be shown that the actor foresaw or should reasonably have foreseen the injurious consequences of his or her act or omission.”). *Id.* (“Foreseeability has been described as the touchstone and the ultimate test of, and the key to, legal proximate causation.”).

101. RESTATEMENT (THIRD) OF TORTS §29, cmt. j. (2010)

However, the Reporters also provide a two-step inquiry to determine the risks involved in any given claim and thus what was sufficiently foreseeable to meet the scope-of-the-risk test. First, “what injury or other harm should the defendant have foreseen, and by what general chain of causation, and [second,] is the plaintiff’s harm within what should have been foreseen? [The Reporters further clarify that] [t]he test of foreseeability does not require all the details of what happens to be foreseeable; it is enough if it is foreseeable in general outline.”¹⁰² Much of what drives the foreseeability determination is reasonableness and common-sense,¹⁰³ not “prescience, omniscience, or clairvoyance.”¹⁰⁴

This theory of proximate cause and foreseeability will likely predominate the field of tort law for many years to come.¹⁰⁵ It addresses many of the weaknesses of the previous Restatement, namely the conflation of standards for proximate cause and but-for cause, and provides an arguably more workable framework for evaluating causation. How the framework is then applied practically has yet to be seen, but the scope of the risk test is “a simple, powerful theory . . . that well resolves many remoteness issues.”¹⁰⁶

2. CONTRACT LAW—THE RULE OF HADLEY V. BAXENDALE

The concept of “causation” in contract law is often not referred to as such, and scholarly discussions of “causation are much less prominent in books about contract than in books about tort,” mainly because the causation problems that arise in contract “are often relatively simple in comparison with the difficulty of determining the scope of the duty to pay damages.”¹⁰⁷ As a result, much of the attention in contracts rests on that duty determination, rather than on causation.¹⁰⁸ Nevertheless, causation, as with torts, is essential to limiting liability for breach of contract. Specifically, courts most frequently discuss causation when determining

102. RESTATEMENT (THIRD) OF TORTS §29, cmt. h. (2010) (citing Glanville Williams, *The Risk Principle*, 77 L.Q. REV. 179, 183 (1961)).

103. 57A AM. JUR. 2D NEGLIGENCE §470 (1999) (“In determining questions relating to the foreseeability element of proximate cause, the courts have uniformly applied what might be termed a practical, common-sense test, the test of common experience.”). This approach is consistent with many early scholars’ suggestions that causation should be based on common-sense. See H.L.A. Hart & Tony Honore, CAUSATION IN THE LAW (2d ed.) 26 (1985).

104. 57A AM. JUR. 2D NEGLIGENCE §470.

105. *Contra* Joseph W. Little, *Palsgraf Revisited (Again)*, 6 PIERCE L. REV. 75, 75 (2007) (discussing how the Restatement (Third) of Torts has “bulldozed one of the enduring nuggets of common law wisdom to the pile of discarded relics of legal history”).

106. David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1299 (2009).

107. H.L.A. Hart & Tony Honore, CAUSATION IN THE LAW (2d ed.) 308 (1985).

108. *Id.*

whether and what amount of consequential damages a party may be entitled to as a result of the breach.¹⁰⁹

Innumerable studied, discussed, debated, and cited, the seminal case for determining when consequential damages will be awarded for breach of contract is the old English case of *Hadley v. Baxendale*.¹¹⁰ The holding in *Hadley* limited recovery of consequential damages to those which “may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”¹¹¹ Subsequent courts and scholars have taken this language to require reasonable foreseeability of the damages; reasonable means “that which any reasonable person should have foreseen” at the time of contracting.¹¹² This is an objective standard so that,

the extent of the recovery is to be measured, not by what the [breaching party] actually foresaw when he made the contract, but [rather] by what a hypothetical, reasonable person in the position of the [breaching party], with the [breaching party’s] knowledge of the circumstances surrounding the transaction, could reasonably have been expected to foresee, had he directed his attention to the effect of a breach.¹¹³

This imputed foreseeability requirement as a limitation on recovery of consequential damages has been codified in both the Second Restatement of Contracts and Article 2 of the Uniform Commercial Code.

a. The Uniform Commercial Code and Foreseeability

Section 2-715 of the Uniform Commercial Code adopts a broad foreseeability test in determining the breaching party’s liability. It adopts a “reason to know” objective standard, “which holds a seller responsible not

109. Plaintiffs in contract potentially can recover two classes of damages as a result of the breach. First and most frequently, he will recover “direct damages,” or those “damages that the law presumes follow from the type of wrong complained of.” BLACK’S LAW DICTIONARY (9th ed. 2009)—damages. And, the plaintiff may try to recover in addition to direct damages, “consequential damages,” which are “losses that do not flow directly and immediately from an injurious act but that result indirectly from the act.” BLACK’S LAW DICTIONARY (9th ed. 2009)—damages.

110. 9 Exch. 341 (1854). *Hadley* has had two substantial impacts on the area of contract law. First, *Hadley* “is best known for its impact on a nonbreaching party’s ability to recover consequential damages,” and second, for “[confirming] the principle that the nonbreaching party may recover damages that arise naturally from the breach.” BLACK’S LAW DICTIONARY (9th ed. 2009)—The *Hadley v. Baxendale* Rule.

111. 9 Exch. 341 (1854).

112. MURRAY ON CONTRACTS §120.

113. *Id.*

only for his actual knowledge but also for that of a reasonable person standing in similar circumstances at the time of contracting.”¹¹⁴ The Code makes an important distinction in deciding what a reasonable person would have knowledge of at the time of contracting; it distinguishes between the general and specific needs of the buyer and only imputes knowledge for the general needs.¹¹⁵ While the law imputes knowledge for the *general* needs of the buyer on the seller, the burden rests with the buyer to make his *particular* needs known to the seller in order for the buyer to recover for those losses.¹¹⁶ If the seller had no “reason to know” of the particular need of the buyer, likely because the buyer did not make clear that particular need, then the law does not impute knowledge for that need, and the seller is not held liable for any damages resulting from the breach in connection to that particular need. This is an exact codification of the *Hadley* Rule—that the seller is only liable for damages within reasonable contemplation; particular needs of the buyer are placed outside the reasonable contemplation of the seller.

b. Restatement (Second) of Contracts

Section 351 of the Second Restatement of Contracts explicitly limits damages to those that could have been “foreseen as a probable result of the breach when the contract was made.”¹¹⁷ To determine what losses are sufficiently foreseeable for recovery, the Restatement provides that the foreseeable losses “follow[] from the breach, (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.”¹¹⁸ What results are bifurcated standards of recovery. The standard in subsection (a) charges the breaching party with losses that are probable, “as distinguished

114. U.C.C. §2-715, cmt. 2.

115. See U.C.C. §2-715(2) (“Consequential damages resulting from the seller’s breach include (a) any loss resulting from *general* or *particular* requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”) (emphasis added).

116. U.C.C. §2-715, cmt. 3 (“Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.”). For example, in the case *Neville Chemical Co. v. Union Carbide Corp.*, a jury concluded that Union Carbide, a processor of natural gas, had reason to know that Neville Chemical Co. would use the particular resin former oil it purchased in production of resins that were then purchased by the manufacturers of floor tile, shoe soling, rubber matting, adhesives, inks, paints and chewing gum, which were finally then sold to consumers. The court held that Union Carbide could be indemnified for the consequential damage claims Neville Chemical Co. had settled with its own customers after the resin component broke down, which required the removal or destruction of the finished products. 294 F.Supp. 649, 651-52 (D.C.Pa. 1968).

117. RESTATEMENT (SECOND) OF CONTRACTS §351 (1981).

118. *Id.*

from necessary,”¹¹⁹ and the standard in subsection (b) provides an objective standard, “charging the breaching party not only with damages arising from special circumstances of which he has *actual* knowledge but also of those which a *hypothetical* reasonable person would have knowledge.”¹²⁰ Essentially, subsection (b) imputes knowledge of the general needs of the non-breaching party, and provides recovery for those damages, regardless of actual knowledge, and limits recovery of the non-breaching party’s particular or special needs to those which have been made known to the breaching party prior to the breach.¹²¹ Generally and practically speaking, the imputed knowledge extends to the expected use of goods¹²² and, in some cases, to foreseeable lost profits.¹²³

This imputed knowledge, generally referred to as a foreseeability requirement, is a way to fairly apportion the burdens in the contracting process. The allocated burden on the breaching party is responsibility for all

119. RESTATEMENT (SECOND) OF CONTRACTS §351, cmt. a (1981).

120. Roy Ryden Anderson, *Incidental and Consequential Damages*, 7 J.L. & COM. 327, 352 (1987).

121. *See id.* at 353-54 (This approach is “a much broader standard of charging the breaching party for all losses of which he ‘had reason to know.’ This is an objective test, which holds the seller responsible not only for his actual knowledge but also for that of a reasonable person standing in similar circumstances at the time of contracting.”); *id.* (“It is not necessary that the seller foresaw the specific injury or amount of harm, only that the a reasonable person in the seller’s position would foresee such harm flowing from the breach in the usual course of events.”).

122. *Id.* at 355 (“As a practical matter, commercial sellers have good reason to know that commercial buyers’ general need for contracted goods is to generate profits, either through resale of the goods or through use of goods in the manufacturing process. Under the ‘reason to know’ standard, commercial sellers are responsible for such losses as a matter of course.”); *see also* U.C.C. §2-715, cmt. 6 (“In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a).”); *Kunststoffwerk Alfred Huber v. R. J. Dick, Inc.*, 621 F.2d 560 (3d Cir. 1980) (“Where the seller knows that the buyer’s general requirement for the goods is to resell them, it is unnecessary for the seller to agree to be responsible for consequential damages in order to be liable for them, and the buyer does not have to prove that he made the seller specifically aware of potential consequential damage claims.”); *Agricultural Services Assoc. v. Ferry Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977) (“A seller may have reason to know of the buyer’s general resale purpose from the facts and circumstances at the time of contracting, including the nature of the goods, the quantity of the goods or the nature of the buyer’s business.”).

123. Roy Ryden Anderson, *Incidental and Consequential Damages*, J.L. & COM. 327, 357 (1987); *see also* *Draft Systems, Inc. v. Rimar Mfg., Inc.*, 524 F. Supp. 1049 (E.D. Pa. 1981), *aff’d without opinion*, 688 F.2d 820, (3d Cir. 1982) (seller knew buyer had a beer key dispensing unit business and that the nylon tubing ordered from seller would be immersed in beer and had to possess a specific resistance to liquid absorption); *Clark v. International Harvester Co.*, 581 P.2d 784 (1978) (buyer entitled to lost profits arising from delivery of defective goods where seller knew at the time of purchase of the tractor and other equipment that it would be used in buyer’s custom farming business); *Dold v. Sherow*, 552 P.2d 945 (1976) (buyer entitled to consequential damages for loss of calf crop where seller knew at the time of contracting that cows were being purchased purely for breeding purposes).

general needs of the non-breaching party. Conversely, the allocated burden on the non-breaching party is to make known to the breaching party any specific needs that could be implicated upon breach of the contract.

C. FORESEEABILITY IN TORT VS. FORESEEABILITY IN CONTRACT— WHAT'S THE BIG DIFFERENCE?

From the plain meaning of both the Uniform Commercial Code and Restatement of Contracts language, it would seem that this liability limitation mirrors that of foreseeability and scope-of-the-risk in the Third Restatement of Torts. Looking beyond the textual language, both areas of law rely on an objective reasonable person standard to determine foreseeability, and do not require a clairvoyant breaching party or tortfeasor in order to impose liability.¹²⁴ And yet, despite the seemingly undifferentiated standards, the weight of authority has found the two are distinct and should remain separate inquiries in each's respective areas of law.¹²⁵ The Reporter's comments to the Second Restatement of Contracts explicitly note that there is a difference in the foreseeability standards in contract and tort, with the standard in contract being "a more severe limitation of liability than . . . the requirement of . . . 'proximate' cause in the case of an action in tort."¹²⁶ Authorities that support the proposition that

124. Compare RESTATEMENT (THIRD) OF TORTS §29, cmt. h (2010) ("The test of foreseeability does not require all the details of what happens to be foreseeable; it is enough if it is a foreseeable in general outline."), with Roy Ryden Anderson, *Incidental and Consequential Damages*, J.L. & COM. 327, 354 (1987) ("[To recover in contracts, it] is not necessary that the seller foresaw the *specific injury* or *amount* of harm, only that a reasonable person in the seller's position would foresee such harm flowing from a breach in the usual course of events."); see also *Barnard v. Compugraphic Corp.*, 667 P.2d 117, 120 (1983) ("It is not necessary that the specific injury or amount of harm be foreseen, but only that a reasonable person in the seller's position would foresee that in the usual course of events, damages would follow from its breach.").

125. See, e.g., Karl Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 346 n.315b (1960) ("One recalls from the Legal Apocrypha: 'And the Lord said: Let there be contracts and let there be torts. And it was so. And He divided contracts from torts.'"); *Christianson v. Chicago, St. P., M. & O. Ry.*, 69 N.W. 640, 641 (1896) ("The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of *Hadley v. Baxendale*, 9 Exch. 341. This mode of stating the law is misleading, if not positively inaccurate."); *Petition of Kinsman Transit Co.*, 338 F.2d 708, 724 (2d Cir. 1964) ("[T]he rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854), has no place in negligence law.")

126. RESTATEMENT (SECOND) OF CONTRACTS §351, cmt. a (1981); see also W.P. Keeton, et al., *PROSSER AND KEETON ON TORTS* §92, at 655 (5th ed. 1984) ("Generally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases, if only because it will so often permit the recovery of greater damages. Under the rule of *Hadley v. Baxendale*, the damages recoverable for breach of contract are limited to those within the contemplation of the defendant at the time the contract was made, and in some jurisdictions, at least, to those for which the defendant has tacitly agreed to assume responsibility."); E.A. Farnsworth, *CONTRACTS* 874-75 (1982) ("By introducing [the] requirement of 'contemplation'

the two standards are in fact different focus much attention on the compensatory goals of each area of law. For tort law, “by designating conduct as tortious, the law [has] made a conclusive determination that such conduct is so reprehensible,” that the tortfeasor is then liable for whatever economic consequences ensue.¹²⁷ In contract law, “the analysis differs[] [b]ecause breach of contract is not so reprehensible or dangerous as to constitute a tort, it is improper to presume that as a matter of social policy, breach must be deterred through expansive liability.”¹²⁸ This difference in perspective, along with various other arguments,¹²⁹ have driven courts to divorce the two foreseeability standards.

But, should this distinction be maintained? When the two standards are stripped of their ambiguous language and doctrinal titles, what remains is the same¹³⁰—a general premise for limiting liability for consequential losses, a “problem [that] arises in tort just as much as in contract.”¹³¹ Accordingly from this general premise, if one were to look at what actually happens in court when these distinct standards are supposedly applied, rather than what the court says is being done, it would become clear that “the tendency . . . has been to apply *Hadley*-style criteria to consequential claims in tort as much as in contract.”¹³²

for the recovery of consequential damages, the court imposed an important new limitation on the scope of recovery that juries could allow for breach of contract. The result was to impose a more severe limitation on the recovery of damages for breach of contract than that applicable to actions in tort . . . , in which substantial or proximate cause is the test.”); Andrew Tettenborn, *Hadley v. Baxendale: Contract Doctrine or Compensation Rule?*, 11 TEX. WESLEYAN L.REV. 505, 514 (2005) (“*Hadley* cannot logically be applicable to the tort of negligence, because the degree of foreseeability of harm necessary to create the liability is admittedly a great deal lower than that required under *Hadley*.”).

127. Thomas A. Diamond & Howard Foss, *Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale*, 63 FORDHAM L. REV. 665, 674 (1994).

128. *Id.* at 675.

129. Andrew Tettenborn, *Hadley v. Baxendale: Contract Doctrine or Compensation Rule?* 11 TEX. WESLEYAN L.REV. 505, 514-15 (2005) (Other reasons for limiting *Hadley* to contract include: “[One, a] defendant takes the plaintiff as he finds her [in tort], without reference to the foreseeability or otherwise of her condition. [Two, the] issues of remoteness in contract and tort are simply not the same. In tort, remoteness serves an essentially social, fairness or balancing function . . . In contract, by contrast, the matter is essentially about choice. [Three, the] incidents of various torts differ more than those of breaches of contract.”).

130. See, e.g., Peter Linser, *Hadley v. Baxendale and the Seamless Web of Law*, 11 TEX. WESLEYAN L. REV. 225, 228 (2005) (“*Hadley* is the contractual analog to proximate cause [in tort].”).

131. Andrew Tettenborn, *Hadley v. Baxendale: Contract Doctrine or Compensation Rule?*, 11 TEX. WESLEYAN L.REV. 505, 506 (2005).

132. *Id.* at 512. This is particularly true when it comes to jury trials. (“Apart from anything else, it is as often as not that a jury be given an issue whether a given head of consequential loss is foreseeable enough to be recoverable, and with juries merely instructed to find whether the head was foreseeable to the defendant, or presented with some other equally unfocused question, it is

One notable judge has been willing to admit that he is actually applying a uniform foreseeability test with no regard to a particular theory of recovery. Judge Richard Posner of the Seventh Circuit, after discussing *Hadley* at length, rebuffed any clear distinction between the two theories of recovery. In *Evra Corp v. Swiss Bank Corp.*, a ship charterer sued a bank in tort for failing to make a timely payment in accordance with a request, alleging that this failure amounted to negligence and resulted in consequential damages from a cancelled contract for the charterer.¹³³ After thorough analysis of the *Hadley* principle and its underlying policies, Posner questions “what difference it should make whether the parties are or are not bound to each other by contract.”¹³⁴ Noting the compensation goals most courts cite as reasons for maintaining the doctrinal distinctions,¹³⁵ Posner then equates the two standards as general limitations on liability, thus eviscerating any meaningful distinction between the two. When the *Hadley* rule is “stated in the form of [a limitation,] that only foreseeable damages are recoverable in a breach of contract claim, . . . it corresponds to the tort principle that limits liability to the foreseeable consequences of the defendant’s carelessness.”¹³⁶ By focusing on the standards’ roles as a general compensation limitation, Posner accepts that foreseeability, regardless of whether in tort or contract, is the only applicable test, and the idea of different rules applying according to whether the claimant sues in negligence or for breach of contract is questionable.¹³⁷

V. THE FORESEEABILITY STANDARD

The imposition of a foreseeability requirement serves two basic roles—“a justificatory and a practical role. Its justificatory role is to legitimate the treatment of a defendant as one who has violated a legal duty. Its practical function is to provide a device to limit liability.”¹³⁸ The justificatory role is often referred to as a “social justice” theory—the compensation of a “private wrong committed by one [individual or entity]

normally not clear which foreseeability test – the contractual or the tortious – is being applied.”) *Id.*

133. *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir. 1982).

134. *Id.* at 956.

135. *Id.* (“On the one hand, it seems odd that the absence of a contract would enlarge rather than limit the extent of liability. On the other hand, contract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor’s control – a strike, fire, the failure of a supplier to delivery an essential input.”).

136. *Id.* at 958.

137. See Andrew Tettenborn, et al., *THE LAW OF DAMAGES* §6.50-6.68 (2003) (discussing that the only test for recovery is what was reasonably foreseeable in the ordinary course of things at the time of the defendant’s actions).

138. Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RES. L. REV. 286 (1985-86).

against another.”¹³⁹ On the other hand, the practical function serves as a limitation on liability, holding wrongdoers “accountable only for harms that they reasonably should contemplate as possible consequences of the wrongful aspect of their conduct.”¹⁴⁰ The very nature and objective of public compensation such as the BP fund are best served when both roles of the foreseeability are acknowledged and balanced.

A. THE SOCIAL JUSTICE THEORY

While much of the discussion on foreseeability would seem to logically focus on the defendant—what a reasonable defendant in the same situation would have foreseen at the time of the action—it must not be forgotten that foreseeability can also be viewed from the other side of the compensatory relationship—from the plaintiff’s or claimant’s perspective. From this perspective, it is more about the fact that the defendant knew or should have known that this kind of harm could have resulted from his action or inaction, and as a result, the plaintiff should be vindicated and the harm remedied. Remembering that it is the claimant who “commence[s] and maintain[s] [the action], . . . and its purpose is to compensate *him* for the damage *he* has suffered at the expense of the wrongdoer,” it is important to consider part of the foreseeability inquiry from the perspective of the private wrong suffered by the particular claimant, not only from the imposition of liability on the defendant.¹⁴¹ In other words, “what is central [under the social justice theory of compensation] . . . is not how the injurer, [in this case BP,] conducted himself but instead what has happened to the victim.”¹⁴²

This theory provides a different perspective as well as a consideration when trying to strike the appropriate level of responsibility and liability. A just compensation scheme would strike a balance between righting a wrong and appropriating a fair amount of responsibility to the acting party. While this Paper focuses more of its attention on the level of appropriated responsibility, the social justice theory could not go ignored as a common and necessary consideration in all compensation schemes.

B. THE INSURANCE THEORY

On the other hand of compensation is the economically-driven

139. Richard A. Epstein, *The Contextualization of Tort Law*, 88 TEX. L. REV. 105, 105 (2010).

140. David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1294 (2009).

141. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 923 (2010) (emphasis added).

142. *Id.* at 941.

“insurance theory,” which strives to limit compensation to the optimal level, meaning to a level that makes it “economically rational to insure.”¹⁴³ If a harm or injury falls outside the scope of what a rational actor would hypothetically or actually insure against, the actor should not be required to pay damages for that harm or injury. This compensation theory rests on the premise that compensable risks should be ones that are insurable, and in order for an insurance system to be viable, the risks insured against must be ascertainable and quantifiable ahead of time. Essentially the argument is one of foreseeability—if a risk is foreseeable, it will be insured against, and thus it is compensable. This argument rests on the premise that the compensation schemes are “intended to provide adequate monetary protection for the injured party, [so] foreseeability functions to identify the amount and sources of the injured party’s recovery.”¹⁴⁴

Once the duty to compensate has been established, the party on which it falls can fulfill this duty by compensating damages of “the types and amounts” that a reasonable person in his shoes would “insure against.”¹⁴⁵ Typically, a reasonable person would insure against “conventional damages unless he could foresee special damages, in which event he [would] insure against those special circumstances.”¹⁴⁶ This distinction between conventional and special damages exactly parallels the distinction made by the Uniform Commercial Code between general and specific needs of a buyer, which ultimately rests on what is foreseeable, and thus compensable.¹⁴⁷

C. IMPORTING THESE THEORIES IN THE ADMINISTRATION OF PRIVATE FUNDS

The BP compensation fund embodies both theories of compensation—the social justice and insurance theories. After admitting responsibility for damages arising from the Deepwater Horizon Spill,¹⁴⁸ BP established the fund most obviously to compensate victims’ legitimate claims (the social justice theory) but also as a means of achieving the optimal level of responsibility and liability. This optimal level is the one that makes the

143. Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1567 (1997).

144. Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RES. L. REV. 286, 320 (1985-86).

145. *Id.* at 321.

146. *Id.* at 320.

147. See *supra* Part IV.B.2.a., (discussing the foreseeability in the Uniform Commercial Code).

148. See Press Release, BP Global, BP Establishes \$20 Billion Claims Fund for Deepwater Horizon Spill and Outlines Dividend Decisions (June 16, 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentID=7062966>.

establishment of the fund worthwhile in the first place (insurance theory). If the fund itself is viewed as a form of insurance, meaning a calculated estimate of the amount of responsibility that BP could have foreseen and internalized, then claims to be paid out from this insurance system should be the ones that were originally foreseen at the time the fund was established. In other words, if the fund provided compensation for all claims, regardless of how foreseeable the damages were, it would be more economically rational for BP to avoid establishing a fund at all and take its chances defending against these claims in court. Instead, the fund aims to strike the appropriate balance of liability, avoiding costly litigation against illegitimate claims but expeditiously compensating deserving claimants. As posited in the previous discussion, a foreseeability inquiry can achieve this balance and thus yield a more favorable result for both BP and claimants.¹⁴⁹

By importing the standard of foreseeability, the administrators of the fund can conduct analyses of the claims that closely resembles those undertaken by judges and juries in both contract and tort cases but avoid a lengthy presentation of evidence, counterclaims, and mitigating factors that delay or hinder the judicial process.

What this Paper suggests is not a formulaic or rigid foreseeability test but rather a series of considerations an administrator can examine when analyzing loss claims. These considerations are pulled from the core concepts of foreseeability in both tort and contract law and are a means of striking a balance among all of the competing interests: the efficient resolution of claims, appropriately limiting BP's liability, and compensating deserving claimants for their proven losses.

The inquiry involves three (possibly four)¹⁵⁰ questions for the administrator to consider, all driven by the foreseeability inquiries employed in contract and tort law. By not restricting the concept of foreseeability to exclusively that of tort or contract but rather drawing from each area of the law, the administrator can formulate a workable inquiry

149. It should be noted again that, being an alternative compensatory scheme, BP and the administrators of the fund are in no way bound by any legal principles, including that of foreseeability. However, claimants who first seek recourse through the compensation fund potentially give up their right to sue BP. These claimants deserve a system in which their claims are handled in a manner consistent with the one they would receive in actual court. It is the argument of this Paper that inherent in an effective compensation fund is peace of mind for the claimants that they are not surrendering their rights to fair consideration of their claims in favor of expeditious compensation.

150. The fourth consideration may be mitigation and what steps a particular plaintiff has taken in order to minimize the extent of the damages. This is a core concept in all areas of the law, but most particularly in assessing contract damages. It is, however, outside the purview of this Paper. See *infra* note 160 and accompanying text.

that promotes both the practical and justificatory roles of compensation generally.

1. WHAT IS THE SCOPE OF THE RISK CREATED?

This first consideration is drawn mostly from the tort test of foreseeability, though it has overtones in contract law as well.¹⁵¹ As previously discussed, the Third Restatement of Torts provides a two-step inquiry to determine the risks involved with the defendant's action, and thus what is sufficiently foreseeable for compensation. Step one of this inquiry is to define the scope of the risk—what did or should the defendant have foreseen.¹⁵² Recognizing that BP is entitled to structure its compensatory scheme without regard to formalistic legal principles and allowing the administrator to initially define the scope of the risk will ultimately yield a positive result for BP: it can define the scope of the risk it believed it was responsible for at the time of the establishment of the fund. This will insure that the scope of compensation accords with the insurance component of the fund.¹⁵³ In determining the scope, the administrator can consider the general nature of oil spills, with reference to the particular spill's size, location, and time. The administrator can also define from the outset what sorts of risks are created by the spill at issue. The three general categories of risks created by this sort of catastrophe are physical, economic, and environmental. To be more specific, the administrator can define the scope of the risk more narrowly by providing what types of specific damage claims will be considered.¹⁵⁴ This inquiry will “set the stage” so-to-speak for claim analysis by properly defining the scope of the damages for which BP has conceded responsibility by establishing the fund.

2. WHAT IS THE CLAIMANT'S GENERAL “NEED” OR HARM SUFFERED?

After defining the scope of the risk—what general categories of damages BP may be liable for—the administrator should consider the nature of the claimant's purported injury or “need,” and whether that falls

151. See *supra* Part IV.B.2.a. (discussing Article 2's handling of general vs. specific needs of the non-breaching party).

152. RESTATEMENT (THIRD) OF TORTS §29 (2010).

153. See *infra* Part V.B.

154. The BP Gulf Coast Claims Facility did just that. Environmental claims generally are handled through the federal and state governments, whereas claims of bodily injury and economic losses are handled through the compensation fund. BP announced that it would “pay all legitimate claims for damages resulting from the oil spill and necessary response costs, [which] includes: property damage, net loss of profits and earning capacity, loss of subsistence or natural resource damage, [and] necessary removal and cleanup costs.” Gulf Coast Claims Facility, Claim Filing Instructions, http://www.gulfcoastclaimsfacility.com/Instructions_GCCF_ClaimForm.pdf.

within one of the damage categories and thus within the scope of the risk.¹⁵⁵ This inquiry is simply a mechanism for filtering claims that fall outside the general scope of the risk. For instance, if BP has limited the scope of the risk for the compensation fund to claims of economic and physical bodily injury, a claim for emotional distress would fall outside the scope of the risk and thus could be discarded as unforeseeable.¹⁵⁶ While this inquiry may seem obviously necessary and elementary, it is far more inclusive than the geographic inquiry first proposed by BP. The geographic standard would discard claims without reference to the particular injury, even if the injury fell within the scope of the defined risk. While basic, it is an essential step in applying a foreseeability standard of liability.

3. IS THE CLAIM FOR A PARTICULAR OR GENERAL NEED?

After determining that the general claim falls within the scope of the risk, it is necessary to consider the specific components of the claim—the actual losses claimed. This inquiry rests on the premise that while a claim may fall broadly within the scope of the risk, the particular injury may not be one that was foreseeable. Drawing from the law of contracts and what knowledge this area of the law will impute to the defendant,¹⁵⁷ the administrator can consider the differences between a general and particular injury. For example, a general injury may be documented lost profits of a beachside restaurant, whereas a specific injury may be lost profits of a beachside restaurant for cancellation of a one-time promotional fish fry.¹⁵⁸ While it may be a legitimate claim that the beachside restaurant had to cancel an event, it may be a claim that falls outside the foreseeable scope of the risk and thus should not be compensated. This limitation accords with what kind of damages BP likely was insuring against in creating the compensation fund and achieves a better balance between the aforementioned factors.

VI. IN APPLICATION—THE PROTOTYPICAL CLAIMS

To illustrate how this test will yield more positive results for both claimants and BP, consider the following examples of two prototypical

155. This inquiry is drawn from the second step of the Third Restatement's scope of the risk test—whether the plaintiff's harm is within what should have been foreseen. See RESTATEMENT (THIRD) OF TORTS §29, cmt. h (2010).

156. See ASSOCIATED PRESS, *Tuna Anglers Sue BP, Other Companies for Emotional Distress*, (July 22, 2010), http://www.fox10tv.com/dpp/news/local_news/baldwin_county/ala.-tuna-anglers-sue-over-bp-rig-blast ("Three anglers who were fishing for tuna near the Deepwater Horizon rig when it exploded are suing BP and other companies for emotional distress over the disaster.").

157. See *supra* Part IV.B.2.

158. See *infra* Part VI.B.

claims that may be evaluated by an oil spill fund administrator.

**A. NEW YORK CITY RESTAURANT FORCED TO PAY HIGHER PRICES
FOR GULF COAST SEAFOOD**

As discussed, the oil spill's impact was spread far and wide across the country. Take, for example, a hypothetical New York City restaurant. It is obviously far from the spill's impact in terms of geography—meaning its real estate was in no way threatened or jeopardized by the oil's contact with the coast—but it is still impacted economically by higher seafood prices as a result of Gulf coast suppliers' inability to harvest while coastal waters are closed. Under the geographic standard, and according to Feinberg himself, these sorts of claims “face an uphill battle” under the compensation fund scheme.¹⁵⁹

However, under the proposed framework in this Paper, the claim may be compensable. Assume that the scope of the risk created by the oil spill encompasses both environmental and economic harms. Then, looking to the nature of this specific claim, assume that this is a claim for economic harm, higher seafood prices, which on its face, falls squarely within the determined scope of the risk. The administrator must then consider whether this is a general or specific claim, whether it is a general claim for which the oil company is presumed to have known and foreseen in accord with the imputed knowledge concept, or whether it is a specific need, for which the fund will not impute knowledge. This determination will entail an analysis of the facts. Was this particular seafood supplier a consistent market participant? Did this supplier just enter the market this year? Did this supplier actually have a contract to provide seafood to restaurants in New York? What were the terms of that contract? The administrator may also consider the specific restaurant in New York City. Did the restaurant consistently rely on the Gulf Coast for its seafood needs? Did it have any other sources for its seafood? Did it pursue any of these other sources?¹⁶⁰ Finally, the administrator may consider the specific seafood at issue. Was it a general component of the restaurant's menu or a novelty item? Is it easily attainable from other sources? Does the Gulf have a reputation for

159. Andrew Restuccia, *Distribution of BP Oil Spill Funds Still a Cloudy Issue Despite New Administrator*, COLORADO INDEPENDENT, Aug. 23, 2010, available at <http://coloradoindependent.com/60161/distribution-of-bp-oil-spill-funds-still-a-cloudy-issue-despite-new-administrator>.

160. This is a key issue when it comes to cover and mitigation, and whether the claimant has taken appropriate steps to minimize the economic harm. The Uniform Commercial Code specifically contemplates the concept of cover. See U.C.C. §2-715(2)(a) (“Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover.”) (emphasis added).

providing this kind of seafood? Is it of a kind that its harvesting was impacted by the timing of the closed waters?¹⁶¹

What this discussion should illustrate is how this standard allows for the consideration of far more variables than mere geography. It is difficult to predict what a fund administrator would ultimately decide with regard to this claim, but what is clear is that the claimant would not be foreclosed immediately as it would be under the rigid geographic standard.¹⁶²

B. BEACHFRONT HOTEL IN ALABAMA CANCELS PROMOTIONAL EVENT

Unlike the previous example, this claim would not be immediately foreclosed from recovery because it falls within the relevant geographic region. However, assume that, as part of a promotional deal to generate new business, the hotel plans a family-friendly beach party weekend, reserving food and beverage vendors, entertainment, and securing additional personnel to cater the event. Upon word of the oil spill, all registered guests cancel, regardless of whether traces of oil have actually washed up on shore. The hotel wants to submit a claim for both the costs incurred for cancelling the vendor contracts as well as the projected lost profits. Again, assuming that the scope of the risk created by the oil spill encompasses both economic and environmental harms, and that this claim is economic in nature, it would fall within the determined scope of the risk. Turning to whether this is a general or specific need, the administrator may determine that this is not the kind of claim for which knowledge should be imputed to the oil company. Despite the geographic proximity to the spill, this kind of claim embodies a very specific kind of economic harm—lost profits not ordinarily gained through a regular course of business. Conceivably, an oil company would know that beachfront hotels could experience reservation cancellations as a result of the threat of or actual traces of oil reaching shore. These kinds of lost-profit claims would likely be recoverable under either standard—geography or foreseeability. However, under the proposed foreseeability standard, this claim may fail the generality requirement, so as to be unrecoverable. The fund will not impute knowledge for specific needs that could not be foreseen; this would likely be one of those needs.

This example illustrates how the foreseeability standard could actually

161. For an example, *see supra* note 35 and accompanying text discussing red snapper and brown shrimp.

162. It cannot be ignored, however, that with this deeper consideration of claims comes a tradeoff—a less expeditious settlement of claims. This paper assumes that the administrator will devise a system that will continue to promote prompt payouts without sacrificing a searching analysis of claims.

benefit oil companies. Under the geographic standard, this claim would fall under the umbrella of recoverable claims. Under the foreseeability standard, the generality requirement would preclude recovery and thus limit the amount of responsibility and liability attributable to the oil company.

VII. CONCLUSION

Expect another oil spill. Expect it to be bigger in all respects—gallons spewed, miles across, and damages incurred. With about “172 [oil] rigs [positioned] in the Gulf of Mexico [producing] 79 [percent] of the oil and 72 [percent] of the natural gas that comes from U.S. coastlines,” the prospect of another oil spill is no longer an unrealistic risk, it is a cognizable reality.¹⁶³

Because of this palpable threat, it is also realistic that future compensation funds will be administered. What must be learned from the BP compensation fund is how unworkable and inequitable a causation standard like geography is. Instead, what must be balanced is what is balanced in all compensation schemes—the right to have a private wrong remedied and the need to appropriate the optimal level of responsibility and liability. Drawing on basic doctrinal concepts of causation across both torts and contracts, foreseeability, “bound up, inextricably, in notions of both wrongfulness and how far responsibility for wrongfulness should extend,” emerges as a practical framework by which claims can be analyzed and this balance can be achieved.¹⁶⁴

163. Rick Jervis, William M. Welch & Richard Wolf, *Worth the Risk? Debate on Offshore Drilling Heats Up*, USA TODAY, July 14, 2008, available at, http://www.usatoday.com/money/industries/energy/2008-07-13-offshore-drilling_N.htm. Ironically, in 2008, the head of Governor’s Office of Coastal Activities for the state of Louisiana emphatically believed that offshore drilling in the Gulf of Mexico, about 175 miles from the Louisiana coast, that “[it was] absolutely worth [the risks],” citing the \$1.5 billion annually in oil and gas revenue the state receives. *Id.* Following the oil spill, this same state official announced a coastal revitalization plan “to address the Deepwater Horizon spill and the historic coastal losses” that such natural disasters as Katrina caused. Written Statement, Nat’l Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Garret Graves, July 2010, available at [http://www.oilspillcommission.gov/sites/default/files/documents/Garret Graves Written Statement.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/Garret%20Graves%20Written%20Statement.pdf).

164. David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1280 (2009).