

PREPARATORY NEGLIGENCE

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This Essay discusses the appropriate significance in tort law of a negligent attempt to perform an injurious activity when the evidence is insufficient to show the actual performance of the activity was negligent. The author calls such a negligent attempt uncoupled with sufficient evidence of negligent performance “preparatory negligence.” An example would be driving a car when one is so inebriated that the decision to drive is negligent but those injured in a subsequent accident are unable to show the inebriated driver’s actual driving was negligent. The author argues that preparatory negligence alone should never warrant tort liability. Rather, those injured must show negligence in some aspect of the performance of the activity. The least confusing way to describe this rule in terms of the usual elements of negligence liability is to hold that preparatory negligence alone is never a proximate cause of injury. But because a person’s preparatory negligence often increases the likelihood that his performance of his activity was negligent, the author describes some circumstances when preparatory negligence provides relevant and admissible evidence of negligent performance and on that ground should come to the attention of the fact finder.

Introduction	787
I. Part One	789
II. Part Two.....	800
III. Part Three	807
Conclusion.....	812

INTRODUCTION

There is a type of negligence which, for lack of a more euphonious name, I call preparatory negligence. It consists of creating an unreasonable risk of injury to others by undertaking (i.e., attempting to perform) an activity a person knows or should know he is not qualified to perform with reasonable safety.¹ Examples include driving while drunk or while visually impaired, or performing a medical procedure or piloting a passenger plane without any training and without satisfying

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1. I am assuming that there is no emergency, broadly defined, that would justify defendant’s otherwise negligent attempt. By “emergency” I mean any scenario outside the ordinary where the utility of, say, driving despite knowing one is drunk is so great that it swamps the substantial risks created by such driving.

the requirements that help to assure reasonable safety.² Perhaps surprisingly, preparatory negligence is closely related to another type of negligence familiar to every tort student, sometimes called enabling negligence, such as negligent entrustment of one's car to a dangerous driver, and negligent hiring or retention of inappropriately dangerous employees.³ It is also closely related to some further examples of negligent facilitation of culpable behavior by others. Examples include negligently serving alcohol to a person who is obviously both drunk and about to drive and who then is involved in a car accident that injures another, or negligently leaving unlocked on a public street a car which is then stolen and involved in an accident that injures another. The close relation lies in a common issue these types of negligence present: what is the legal significance, if any, of this negligence when the defendant's activity results in injury to another, but the evidence is not sufficient to establish that the *actual performance* of the activity by the defendant or the enabled third party (e.g., the driving, as opposed to the attempt to drive while drunk in the first place) was negligent, reckless, intentionally wrongful, or otherwise unreasonably dangerous?⁴

2. Notice that in these examples the preparatory negligence plainly does increase a risk of harm. It invariably increases the odds that the subsequent performance by defendant (e.g. his driving) will be less safe. This Essay is not concerned with what might be called "technically criminal preparatory behavior" which does not in any way affect the risk that defendant's performance will be less safe. So, for example, practicing medicine when a doctor lacks a license only because he has not yet satisfied the state's residency requirement is not preparatory negligence as the term is used here. Nor would be driving a car when a person's license is no longer valid only because he has not renewed it in a state in which the renewal process involves no testing, monitoring, or filtering of drivers for safety purposes whatsoever. *Cf.* RESTATEMENT (SECOND) OF TORTS §§ 286, 288 (1965) (criteria for assessing significance of statutory violations in a civil case).

3. See, e.g., Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436-43 (1999) (discussing enabling torts and assuming implicitly that the defendant enabler will only be liable if the third party's performance of the activity is culpable or otherwise unreasonably dangerous). On negligent hiring, retention, and supervision, see 1 J. D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY & LITIGATION* § 7:3 (rev. ed. 1994).

4. "Unreasonably dangerous" may seem redundant but it is needed because the performance of the activity may be unreasonably dangerous and yet not culpable. An example would be a car driver who suffers a sudden heart attack, stroke, epileptic seizure, or bout of insanity and thus drives head on into opposing traffic. In these examples, courts agree that even though the defendant driver's sudden incapacity frees him from culpability for his poor driving performance, any preparatory negligence in deciding to drive with knowledge of his special susceptibility to such sudden incapacity should trigger liability as long as the driving, objectively considered, was unreasonably dangerous. *Breunig v. Am. Family Ins. Co.*, 45 Wis. 2d 536, 540-44, 173 N.W.2d 619 (1970). In *Breunig*, the defendant's preparatory negligence lay in her decision, while lucid, to attempt to drive knowing that she was occasionally having visions that

Part I below discusses the polar extremes of affording preparatory negligence either no significance or dispositive significance. By dispositive significance I mean allowing prima facie liability to those injured by defendant to be predicated on preparatory negligence alone. Part I also reviews the significance courts have afforded preparatory negligence when they have addressed it. Parts II and III argue for what I contend is the proper significance. Part II argues against affording preparatory negligence dispositive significance, and Part III argues for allowing it to be admitted as evidence of negligent performance under certain circumstances.

I. PART ONE

Most authorities accord preparatory negligence no significance whatsoever, holding that it constitutes neither ground for liability to the injured plaintiff nor evidence relevant to any element of that liability. Hence, it should never come to the attention of the fact finder.⁵ The Third Restatement of Torts posits the case where a motorist rear ends a defendant drunken driver who is waiting in traffic with the result that some further person, such as the defendant's passenger or the driver of

created an unreasonable risk she would drive dangerously. *Id.* That preparatory negligence was a sufficient basis for liability when she drove over the centerline into plaintiff. *Id.* Although driving over the centerline was unreasonably dangerous, no culpability attached to that driving because her visions at that moment rendered her incapable of proper driving. *Id.*

This Essay does not deal with cases like *Breunig* where all parties agree that the performance of the activity was "unreasonably dangerous." *See id.* at 539. In such cases the law already accords dispositive significance to defendant's preparatory negligence in attempting an activity with forewarning that his condition is unusually likely to render him incapable of performing the activity with reasonable safety. Rather, this Essay deals with cases where plaintiff has failed to present sufficient evidence that defendant's performance of his activity was "unreasonably dangerous."

5. *E.g., Phass v. MacClenathen*, 85 N.Y.S.2d 643, 644-46 (N.Y. App. Div. 1948) (stating that preparatory negligence is irrelevant); *Westfall v. Kottke*, 110 Wis. 2d 86, 105-06, 328 N.W.2d 481 (1983) (stating that preparatory negligence in failure to secure a license is irrelevant); *Leahy v. Kenosha Mem'l Hosp.*, 118 Wis. 2d 441, 448-51, 348 N.W.2d 607 (Ct. App. 1984) (stating that preparatory negligence in violating a statute limiting those who could treat patient is irrelevant); Charles O. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622, 625-34, 641-42 (1951); Larry D. Scheafer, *Liability of One Who Sells Gun to Child for Injury to Third Party*, 4 A.L.R.4th 331, 332, 337-38 (1981). The denial of significance to preparatory negligence stretches back in time. *See Brown v. Buffalo & State Line R.R. Co.*, 22 N.Y. 191, 195-99 (1860); THOMAS M. COOLEY, *THE LAW OF TORTS* 653 (1879). The British rule is similar. *In re The Empire Jamaica*, [1955] P. 52, 57-59 (U.K.) (stating that preparatory negligence of ship's captain is irrelevant); *see also* H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 119-20 (2d ed. 1985).

the car in front of the defendant, is injured.⁶ The Restatement editors conclude that the defendant's negligence in driving drunk should not lead to his liability to the plaintiff injured in the accident and, furthermore, should be deemed irrelevant and inadmissible as evidence in any suit involving the accident.⁷ It follows from the Restatement's example that that the negligence of the defendant-owner of a car who knowingly entrusted his car to a drunken driver who was subsequently rear ended would likewise be irrelevant in any suit brought by a plaintiff injured in the accident. Equally irrelevant would be the negligence of the defendant who knowingly served alcohol to a drunk who thereafter drove and was rear ended. Presumably, the same reasoning would also deem irrelevant the negligence of the defendant car owner in leaving his car unlocked, provided that the car thief, like the drunken driver, was rear ended in an accident injuring the plaintiff. The Restatement editors suggest in their hypothetical that a plaintiff cannot establish a prima facie negligence case, no matter how drunk defendant was, when defendant's performance of his driving was not negligent. The editors elsewhere imply that plaintiff should establish a prima facie case whenever defendant's performance of his driving was negligent,⁸ no matter how sober and otherwise qualified to drive defendant was. Given the above, one might think that defendant's preparatory negligence in opting to drive while drunk, and defendant's preparatory behavior generally, will *never* be relevant.

Perhaps the most famous case for so nullifying the legal significance of preparatory negligence is *Brown v. Shyne*.⁹ There the

6. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010).

7. *Id.* Although the Restatement is silent on the matter, the editors plainly assumed in their hypothetical that the driver's negligence in being drunk did not reduce his chance of avoiding injury to the plaintiff by, for example, slowing down his ability to swerve or to brake. *See id.* Likewise, the editors evidently assumed the driver's negligence in being drunk in no way increased the plaintiff's injuries. *See id.*

The Restatement was not dealing with the issue of whether the drunk driver's preparatory negligence would be relevant to a contributory negligence claim should the drunk driver be injured and sue the person who negligently rear ended him. *See id.* The logic of the Restatement approach would deem the drunkenness irrelevant to the driver's contributory negligence and, hence, would not deem the drunken driver guilty of contributory negligence. *See id.*

8. To be precise, the Restatement says that plaintiff will establish a prima facie case whenever defendant's driving performance was negligent and that negligence was a cause-in-fact of the plaintiff's injury and within the scope of liability. *See id.* § 6.

9. 151 N.E. 197 (N.Y. 1926). Virtually all editors of torts casebooks touch on preparatory negligence in treating *Brown* and in treating more generally the issue of when courts should displace "ordinary care" as the test for negligence with a statutory, regulatory, or administrative rule. *E.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 273-77 (9th ed. 2008). Editors could also treat *Brown* and touch on

defendant's preparatory negligence consisted of attempting to provide medical treatment to the plaintiff-patient even though defendant had never attended medical school or taken the examinations New York required of licensed physicians.¹⁰ The plaintiff sued the defendant for negligence, and the jury found the defendant liable, awarding \$10,000.¹¹ While the defendant's criminal liability for practicing medicine without a license was clear, the issue there, as in this paper, was the significance to the plaintiff's tort case of the defendant's criminal attempt to practice medicine (behavior that must have been intentionally wrongful).¹² On appeal it was assumed that but for the defendant's attempt to treat the plaintiff, the plaintiff would not have suffered the injury for which she was suing—paralysis.¹³ Indeed, that connection between defendant's preparatory negligence and plaintiff's injury, which I somewhat contentiously call the "but for" connection, can be assumed to exist in all preparatory negligence cases. Writing for the Court of Appeals, Justice Irving Lehman reversed the jury's verdict for the plaintiff, finding reversible error in one of the trial court's jury instructions.¹⁴ That instruction, Lehman held, wrongly accorded significance to defendant's preparatory negligence.¹⁵ The erroneous instruction said:

If the defendant attempted to treat the plaintiff and to adjust the vertebræ in her spine when he did not possess the requisite knowledge and skill as prescribed by the [licensing] statute to know what was proper and necessary to do under the circumstances, or how to do it, even if he did know what to do, you can find him negligent.¹⁶

preparatory negligence when they treat the issue of "proximate cause," or, as the Third Restatement calls it, the issue of "scope of liability." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010).

10. *Brown*, 151 N.E. at 197–98.

11. *Id.* at 198.

12. *Id.*

13. *Id.* at 198–99.

14. *Id.* at 197–99.

15. *Id.* at 198.

16. *Id.* Granted, the instruction would not err if one interprets it as allowing liability only upon a jury finding that defendant in the performance of his treatment of plaintiff did not do what was proper and necessary to do, or even if he did do what was proper and necessary to do, he did not do it in the proper and necessary manner. So interpreted, the instruction would ground liability on the defendant's performance of his negligent treatment rather than his mere attempt to perform and hence is unexceptional and irreproachable. The error of the instruction, as Lehman said, lies in allowing liability to be based solely on a wrongful attempt to perform treatment. *See id.*

In finding this instruction erroneous, Lehman held, in effect, that the only theories of negligence on which plaintiff could reach the jury and prevail (i.e., the only theories of negligence which would be, in Lehman's words, a "proximate cause" of plaintiff's injury)¹⁷ would be negligence in the actual performance of defendant's medical treatment.¹⁸ Examples would be negligence in how the defendant manipulated plaintiff's spine, or negligence in deciding to manipulate plaintiff's spine (i.e., negligent diagnoses). According to Lehman, a plaintiff can only reach the jury and prevail by adducing sufficient evidence of one of those theories of negligence.¹⁹ Any preparatory negligence by the defendant based on defendant's attempt to treat the plaintiff while knowing that he was not qualified to treat or that his treating created an unreasonable risk of injury to the patient was,

17. *Id.* While Lehman denied preparatory negligence any significance on the ground that it was not a "proximate cause" of plaintiff's injury, other courts deny preparatory negligence significance on the grounds that it was not a cause-in-fact of plaintiff's injury. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010) (no cause-in-fact); *Massey v. Wright*, 447 So. 2d 169 (Ala. 1984) (no cause-in-fact); *Snapp v. Harrison*, 699 So. 2d 567 (Miss. 1997) (no cause-in-fact). Other courts deny preparatory negligence any significance on the ground of "no duty." *E.g.*, *Sabina v. Yavapai Cnty. Flood Control Dist.*, 993 P.2d 1130 (Ariz. Ct. App. 1999) (no duty); *Scovill v. City of Astoria*, 921 P.2d 1312 (Or. 1996) (no duty). This multiplicity of grounds for denying significance to preparatory negligence breeds confusion. I contend the least confusing ground is to say that defendant's preparatory negligence was not a proximate cause of plaintiff's injury.

I do not find helpful the claim that preparatory negligence is irrelevant because it is not a cause-in-fact. I call for resisting locutions that dismiss preparatory negligence on this ground. One example of such a locution is: there is no cause-in-fact because the particular characteristic of the defendant or the third party (e.g., the drunkenness) was not a but-for cause of the plaintiff's injury. *See Kahlenberg v. Goldstein*, 431 A.2d 76, 85 (Md. 1981) (dicta). Another example would be: while the defendant's medical treatment in *Brown* might have been a but-for cause of plaintiff's paralysis, the defendant's negligence in attempting that treatment without training was not a but-for cause unless the treatment was performed negligently. A further example would be: there is no cause-in-fact because the plaintiff would have been injured just as he was had the defendant been perfectly qualified.

Accepting that cause-in-fact is satisfied simply because plaintiff would not have been injured but for defendant's negligent attempt better avoids confusion. *See* Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 474 (1933) (criticizing the claim that such negligence is not a cause-in-fact of plaintiff's injury).

18. *See Brown*, 151 N.E. at 199 ("In order to show that the plaintiff has been injured by defendant's breach of the statutory duty, proof must be given that defendant in such treatment did not exercise the care and skill which would have been exercised by qualified practitioners within the state, and that such lack of skill and care caused the injury.").

19. *See id.* at 198. Naturally, the plaintiff in *Brown* would also need to show cause-in-fact, namely, that but for defendant's negligent performance plaintiff would probably not have been injured. But the appeal in *Brown* did not concern this element.

Lehman insisted, “irrelevant.”²⁰ Such preparatory negligence, therefore, should not be admitted into evidence nor otherwise come to the attention of the jury. The editors of the Third Restatement of Torts appear to endorse Lehman’s approach in *Brown*:

“In light, then, of the combination of the statutory-purpose doctrine and ordinary principles of scope of liability, the lack of a license is not negligence per se on the part of the actor, nor is it evidence tending to show the actor’s negligence.”²¹

The reasoning for denying significance to preparatory negligence is familiar to every tort student once he is introduced to “proximate cause,” now called by the Third Restatement of Torts “scope of liability.”²² “Defendant’s preparatory negligence was not a proximate cause of plaintiff’s injury,” the (admittedly exceptional) student will insist, “because the unreasonable risks it created, and which led us to deem it negligent, are that the activity which defendant attempted or set in motion will be performed in a culpable or, if not culpable, unreasonably dangerous manner. The drunk, the car thief, and the insane driver who the defendant negligently entrusted to drive, will drive in an unreasonably dangerous fashion. The ex-con who defendant negligently employed or retained will use his employment to create an unreasonable risk of harm to others. The impostor-doctor and impostor-pilot will practice medicine or pilot the plane so poorly that injury to others becomes unreasonably likely. But in the absence of evidence (other than the preparatory negligence itself)²³ of such culpable or otherwise unreasonably dangerous performance of the activity—in the absence of other evidence that one of these risks for which we deem defendant’s preparatory behavior negligent materialized in injury to the plaintiff—defendant’s preparatory negligence should be irrelevant.

20. *See id.*

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010).

22. *Id.*

23. Again, the preparatory negligence itself almost invariably increases, however slightly, the odds that the performance was negligent and thus provides at least some evidence of negligent performance. Even in the Restatement’s example of the defendant drunken driver who was rear ended, the fact that the defendant driver sitting in his car was drunk arguably possesses some slight probative value in showing he performed his driving negligently. His drunkenness, for instance, tended to make it more likely that he did not react with ordinary care to being rear ended, and his poor reaction (i.e., his poor driving) may have intensified his collision with the plaintiff driver in front of him. Nevertheless, as discussed below, I would admit this preparatory negligence as evidence of negligent performance only when other threshold evidence suggests that defendant’s performance was negligent.

When the result is not within the risk, when, that is, plaintiff's injury does not stem from one of the risks for which we deem defendant negligent, defendant's negligence should be deemed inconsequential.²⁴ As Shakespeare said of a malicious thought that never materialized into behavior, such a thought should be ignored as having "perish'd by the way."²⁵ Therefore, a plaintiff who proves only preparatory negligence should never reach the jury. The courts have rightly dismissed such plaintiffs short of the jury, with the ground being usually no "proximate cause,"²⁶ but occasionally "no cause-in-fact"²⁷ or "no duty."²⁸ Tort law should not consider the character, morality, or misconduct of parties unless those characteristics have a sufficient connection to the harm that occurred.²⁹

On the other hand, our language is rich enough for a court to justify giving preparatory negligence dispositive significance—holding a defendant prima facie liable because his preparatory negligence led to plaintiff's injury—regardless of how the behavior that more immediately caused plaintiff's injury was performed.³⁰ The courts can

24. Professor Wex Malone referred to a "universally accepted proposition that courts will ignore" behavior that is only deemed negligent because it creates unreasonable risks unrelated to "the type of risk that produced the injury in question." Wex S. Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 STAN. L. REV. 779, 784 (1961).

25. WILLIAM SHAKESPEARE, *Measure for Measure*, act 5, sc. 1, l. 454, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE (W. J. Craig ed., 1964).

26. *E.g.*, *Brown v. Shyne*, 151 N.E. 197, 198–99 (N.Y. 1926); *see also Enis v. Ba-Call Bldg. Corp.*, 639 F.2d 359 (7th Cir. 1980) (no proximate cause); *Fox v. Bartholf*, 374 So. 2d 294 (Ala. 1979) (no proximate cause).

27. *E.g.*, *Massey v. Wright*, 447 So. 2d 169 (Ala. 1984) (no cause-in-fact); *Snapp v. Harrison*, 699 So. 2d 567 (Miss. 1997) (no cause-in-fact).

28. *E.g.*, *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995) (no duty); *Scovill v. City of Astoria*, 921 P.2d 1312 (Or. 1996) (no duty).

29. To repeat, this reasoning precludes prima facie liability for all negligent entrusters, enablers, or facilitators unless the person who entrusted, enabled, or facilitated also performed culpably or unreasonably dangerously. In such entrusting, enabling, and facilitating cases, therefore, showing that this third party performed culpably or unreasonably dangerously is an element of plaintiff's prima facie case. Probably the least confusing way to express this in terms of the usual elements is to say that absent sufficient evidence of such culpable or unreasonably dangerous performance by the third person so entrusted, enabled, or facilitated, plaintiff has not established proximate cause against the defendant entruster, enabler, or facilitator.

30. Even those who attribute this "dispositive" significance to defendant's preparatory negligence would allow the defendant a defense if defendant showed that the same injury would have resulted had a more qualified person performed the behavior. *See* Aaron D. Twerski & Neil B. Cohen, *Comparing Medical Providers: A First Look at the New Era of Medical Statistics*, 58 BROOK. L. REV. 5 (1992). Professors Twerski and Cohen accord dispositive significance to a doctor's attempt to perform a procedure for which statistics show him to have a poor record of outcomes compared to alternative doctors. Although they call for that attempt to lead to liability

decry defendant's obvious negligence for attempting his activity knowing it was unreasonably dangerous for him to do so.³¹ Tort liability should help to deter culpable behavior such as attempting to drive while drunk.³² The less drunken driving, the fewer car accidents and injuries. The Learned Hand test for negligence, after all, easily deems the costs of driving knowing one is drunk to outweigh the benefits of doing so, at least when no emergency requires driving.³³

In the enabling torts, the defendant negligently put a dangerous instrumentality or opportunity into the hands of an irresponsible third party thereby creating a foreseeable risk of harm to someone like the plaintiff.³⁴ Tort law should help suppress that negligence as well. Courts can then emphasize the clear "but for" connection between defendant's negligence and plaintiff's injury—by which, again, I mean nothing more than the obvious fact that plaintiff would not have been injured if defendant had not attempted to drive while drunk, attempted to treat plaintiff medically without training, entrusted his car to the irresponsible third-party driver, hired or retained the irresponsible third-party employee, served the third-party drunk more drinks, or left his car doors unlocked on a public street.³⁵ Courts can finesse

without any showing of negligent performance of the procedure, they concede that the doctor should be able to defend himself by showing performance by a better doctor would have caused the same injury. *Id.*

31. *Johnson v. Bos. & M. R. R.*, 143 A. 516 (N.H. 1928) (condemning a party for driving when unqualified to do so).

32. The many examples of preparatory negligence that tort law may wish to deter are suggested by the following behaviors performed while drunk by a defendant who should know his drunken condition renders his attempt at performance unreasonably dangerous: performing as an air traffic controller, performing surgery, performing certain police duties, piloting a ship, or serving as a mountain-climbing guide.

33. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *see also* RESTATEMENT (SECOND) OF TORTS §§ 291–93 (1965).

34. *E.g., Leake v. Cain*, 720 P.2d 152, 153–54 (Colo. 1986) (discussing wrongful death suit brought against drunken driver and police officers who released the driver to the custody of his younger brother); *Franklin v. Wilson*, 422 P.2d 51, 51 (Colo. 1966) (discussing personal injury suit against contractor in which employee of subcontractor entered construction site and was injured after falling from a ladder that he was using without authorization).

35. Readers of tort opinions may immediately respond that courts are unanimous in agreeing on the insignificance of any negligence that merely puts the parties into the place in time and space where the accident occurs. *E.g., Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899) (declaring that negligent speeding that coincidentally put a street car underneath a tree at the moment the tree fell has no significance). While I enthusiastically support the approach in *Berry*, I believe confusion is better avoided if, using the 'but for' test in a simple, factual sense, one finds the 'but for' test satisfied in *Berry* and thus finds cause-in-fact there. The negligent speeding in *Berry* should be deemed irrelevant on the ground of no proximate

defendant's argument—that the risks created by his preparatory negligence were not shown to have materialized—by describing those risks more generally. They can then point out the statistical correlation between defendant's preparatory negligence and those general risks.³⁶ For example, the risks created by a defendant's preparatory negligence in driving drunk could be described not as “culpable driving that injures another” but more generally as “involvement in a car accident that injures another.”³⁷ Defendant's preparatory negligence in driving drunk has increased the likelihood of defendant being involved in a “car accident that injures another,” at least as a statistical matter.³⁸ And of course the drunken driving risk of “involvement in a car accident that injures another” can be said to be the very risk that has materialized in the plaintiff's injury.

So a tort student may argue: “Tort law should stand against defendant's preparatory negligence by imposing liability to suppress

cause because the risks from speeding did not increase, and were wholly unrelated to, the type of risk (i.e., the risk of a tree falling on an object passing underneath) that materialized. The argument made in this paragraph of text (an argument I reject) is that preparatory negligence, in contrast to the speeding in *Berry*, is adequately related to the type of risk that materialized in plaintiff's injury, and thus should be viewed as a proximate cause of plaintiff's injury. The argument thus supports giving preparatory negligence dispositive significance.

36. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS 2009 DATA: ALCOHOL-IMPAIRED DRIVING (2009), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811385.pdf> (stating that “[i]n 2009, 10,839 people were killed in alcohol-impaired-driving crashes,” accounting for nearly one-third (32%) of all traffic-related deaths in the United States).

37. *E.g.*, *Stinson v. Daniel*, 414 S.W.2d 7 (Tenn. 1967) (finding the risks adequately related and supporting the dispositive approach).

38. I am not aware of any statistics which actually show that drunk drivers are involved in more accidents per mile driven that injure others than are sober drivers. But in light of the very high percent of accidents that involve drunken drivers, that must be the case. Of course the degree of drunkenness can vary considerably and would certainly bear on the likelihood the driver performed his driving negligently.

The tendency of drunken driving to increase car accident injuries in which no negligence was shown has been said to create a “causal link” between drunk driving and these injuries. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975). According to the Third Restatement of Torts, showing such a “causal link” between the negligence of driving while drunk and plaintiff's injury will not suffice for imposing liability on the drunken driver, a result with which I agree. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010). But the Restatement also suggests that showing such a causal link between drunken driving and the injury should only rarely provide admissible evidence that a drunk-driving defendant was performing his driving negligently. *See id.* With that result, I disagree. I believe that when there is threshold evidence that defendant was driving negligently, the fact that defendant was drunk while driving should often constitute admissible evidence to show that negligence.

that negligence. Doing so will reduce accidents and injuries. Defendant's preparatory negligence, after all, foreseeably subjected plaintiff to an unreasonable risk of harm. But for defendant's preparatory negligence, plaintiff would not have been injured. Moreover it is not true that the risks for which we deem defendant's preparatory behavior negligent are wholly unrelated to the risks that materialized in plaintiff's injury. On the contrary, the risks created by that preparatory negligence increased the risks that materialized. Drunk drivers and car thieves are involved in more car accidents that injure others per mile driven than are sober and lawful drivers.³⁹ The ex-cons the defendant negligently hired or retained are probably more likely to be involved in work-related incidents injuring others than are employees without a criminal record. Medical treatment by impostor doctors probably yields a higher rate of bad results than medical treatment by the trained and licensed. And who would seriously maintain that passengers in an airplane piloted by an impostor are no more likely to be injured than if the pilot was trained and licensed?⁴⁰ In this sense defendant's preparatory negligence has increased the likelihood of the (generally defined) risk that resulted in injury to plaintiff and hence should be deemed a proximate cause of that injury."⁴¹

39. Cornelius J. Peck, *An Exercise Based upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909, 915 (showing that drivers of stolen cars are involved in more accidents per mile driven that injure others than are drivers who own the car or who have the permission of the owner to drive); see also *Hill v. Yaskin*, 380 A.2d 1107, 1110 (N.J. 1977) ("[T]he accident rate for stolen cars is 47 times . . . the [accident] rate for the general public.") (citing DAVID BARRY ET AL., U.S. DEP'T OF JUSTICE, PRELIMINARY STUDY OF THE EFFECTIVENESS OF AUTO ANTI-THEFT DEVICES app. B (1975)).

40. Again, I am not aware of any statistics actually showing the rate of involvement in job-related injuries to others of ex-con employees compared to other employees or of impostor doctors or pilots compared to trained and licensed doctors or pilots.

41. Two tort scholars support giving preparatory negligence this dispositive significance, at least in medical malpractice. See generally Aaron D. Twerski & Neil B. Cohen, *Comparing Medical Providers: A First Look at the New Era of Medical Statistics*, 58 BROOK. L. REV. 5 (1992). The authors would hold prima facie liable a defendant doctor whose preparatory negligence lay in performing a medical procedure with the knowledge that his record of outcomes for that procedure was significantly and substantially worse than the record of outcomes of alternative doctors. *Id.* at 13-18. The defendant doctor would be prima facie liable for his patient's injury without regard to his performance of the procedure. *Id.* at 17-18. His negligent decision to perform the procedure would suffice for such liability. *Id.* Nevertheless, the authors allow the defendant doctor to avoid liability by showing the same injury to the plaintiff would have occurred if the procedure were performed by a "fully competent practitioner" (i.e., an alternative doctor with a better record of outcomes). *Id.* at 26. Such a showing, the authors claim, would negate cause-in-fact. *Id.*

On such reasoning, courts may adopt the dispositive approach to preparatory negligence and find defendant prima facie liable with no insistence that plaintiff address how the drunk driver, car thief, ex-con employee, or impostor doctor or pilot actually performed in plaintiff's case.⁴² In effect, defendant's preparatory negligence renders him strictly liable for any injuries from his activity.

This reasoning gains persuasive power when the preparatory negligence violates a statute, ordinance, or administrative regulation (particularly a criminal one), the command of which the court has decided should displace the usual negligence test of "ordinary care."⁴³ For the court now to deny the preparatory negligence any significance arguably insults the judgment of the legislators, city council members, or administrators.⁴⁴ In *Brown v. Shyne*, for example, the legislators who passed the criminal statute against practicing medicine without a license plainly hoped the statute would help to assure the people of New York that anyone treating them medically would have studied at

42. In the negligent entrustment, enabling, and facilitation cases, a practical reason for the law ignoring how the injurious activity was performed is that the performer will often be a judgment-proof third party not before the court. The third party may not even be identified. *Nellsch v. Westland Ford, Inc.*, 646 P.2d 736, 737 (Utah 1982) (explaining how defendant negligently left keys in ignition, car thief drove negligently and injured plaintiff but the thief was never identified). If the approach recommended here is adopted, the plaintiff must establish culpable performance by the third party that caused plaintiff's injury in order to satisfy the proximate cause element of his prima facie case against the negligent entruster, enabler, or facilitator.

43. Most statutes specify requirements for performing an activity, rather than requirements for attempting performance. A maximum speed statute for drivers is an example. When these statutes are violated the issues discussed in the Essay do not arise. The literature on when a court should "borrow," as it were, such a legislative measure to displace the "ordinary care" test as the test for negligence in a particular case is legion. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmts. f & g (2005) (stating that for legislation to set the standard for ordinary care, the plaintiff must be within the class of persons the legislation meant to protect and the risk that materialized must be one of the risks the legislation was designed to reduce); RESTATEMENT (SECOND) OF TORTS §§ 286, 874A (1965); see also Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Charles O. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622 (1951); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). Admittedly, deciding whether to "borrow" a legislative measure as the test for negligence will sometimes entail assessing the very issue with which this Essay is dealing, namely, the significance of preparatory negligence.

44. To be sure, the legislature's passage of a penal statute does not indicate clearly the legislature's desire to change the mode of determining civil liability. The Second Restatement of Torts persuasively rejected the claim that Lehman's approach insulted the legislature. See RESTATEMENT (SECOND) OF TORTS §§ 285-288 (1979).

medical school and have passed the requisite exams.⁴⁵ Lehman's approach ignores the opportunity to use tort law to reinforce that assurance and further this legislative mission. One need not agree with Justice Oliver Wendell Holmes—that the primary goal of torts is to supplement the criminal law⁴⁶—to give greater significance than Lehman gave to the defendant's violation of the legislature's criminal decree.⁴⁷ Arguably Lehman's approach collides with the principle of statutory interpretation, which enjoins courts to interpret legislation

45. In fact the New York legislators attempted to reverse the result in *Brown* the next year with a statute, since updated. The *McKinney's Consolidated Laws of New York Annotated* provide:

(d) Proof of negligence; unauthorized practice of medicine. In any action for damages for personal injuries or death against a person not authorized to practice medicine . . . for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

N.Y. C.P.L.R. 4504 (McKINNEY 2003). Because Lehman's opinion can be read as holding that the defendant's failure to comply with the statute was not a proximate cause of plaintiff's injury, this legislative attempt, by limiting admissibility to cases where proximate cause exists, may fail to reverse the result in *Brown*.

46. See generally O. W. HOLMES, JR., *THE COMMON LAW* 161–62 (1881). Professor Clarence Morris also supported this goal: “However, it is notorious that the criminal law is not particularly efficient, and [tort] liability based on fault is a desirable complement to the criminal law if conduct which is [unreasonably] risky is to be discouraged.” Morris, *supra* note 43, at 458 n.11.

47. *Brown v. Shyne*, 151 N.E. 197, 198 (N.Y. 1926). There are many arguments in support of Lehman's refusal to give the violation of this statute any significance. Lehman could have pointed out that the statute is a penal one and the penal remedy, the only remedy mentioned in the statute, can still be imposed. Lehman could have disparaged the statute as special interest legislation (i.e., an example of the American Medical Association using the legislature for protection against the competition of chiropractors like defendant). On this ground he could have claimed, however implausibly, that the statute was not a safety statute at all. That a statute is designed, at least in part, for safety purposes is a universal requirement for attributing any significance in a tort case to its violation. See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 14 cmt. c (2010). Lehman could also have flatly rejected the Holmesian notion that the primary goal of torts is to supplement the criminal law, positing instead that torts as a common law subject is primarily a matter of private law. Because of his view of torts as private law, Lehman could have also emphasized the lack of evidence that defendant misrepresented his training and qualifications to the plaintiff patient. Apparently the defendant never said to plaintiff that he had attended medical school or obtained an M.D. See *Brown*, 151 N.E. at 202. Defendant's honesty and forthrightness on these matters show that his treating Mrs. Brown was not, according to Lehman, a “private wrong.” *Id.* at 199. Finally, Lehman could have pointed to the relatively modest criminal penalty for violation of the statute and claimed that giving the violation any relevance in a tort case would link a comparatively small fault to disproportionately heavy liability.

liberally so as to further and to fulfill the legislative purpose.⁴⁸ Thus, the legislative measure—by emphasizing the defendant’s clear, and perhaps flagrant, preparatory negligence—helps plaintiff distract the court’s attention from whether the behavior that more immediately caused plaintiff’s injury was performed negligently.⁴⁹

II. PART TWO

The legal realists have long taught that the richness of our language enables courts to write defensible opinions that reach opposite conclusions.⁵⁰ So there is nothing exceptional in finding that students

48. *E.g.*, Gregory, *supra* note 5, at 629 (“Hence, a court should liberally interpret the legislative intent to make it include the avoidance of situations not specifically foreseen but closely allied to those which the legislature had actually intended to cover.”).

49. To be sure fewer cases accord such dispositive significance to defendant’s preparatory negligence than accord no significance. *See, e.g.*, *Duty v. E. Coast Tender Serv., Inc.*, 660 F.2d 933, 938, 942 (4th Cir. 1981) (dispositive significance); *Johnson v. Bos. & M. R. R.*, 143 A. 516, 517, 523 (N.H. 1928) (dispositive significance); *Stinson v. Daniel*, 414 S.W.2d 7, 11 (Tenn. 1967) (dispositive significance); *see also Nw. Door Co. v. Lewis Inv. Co.*, 180 P. 495, 501 (Or. 1919). In *Beauchamp v. Sturges & Burn Mfg. Co.*, the defendant employer violated a criminal statute that prohibited hiring underage workers. 95 N.E. 204, 204 (Ill. 1911). Those workers were then injured on the job and sued their employer in tort for their job-related injuries. *Id.* While the statute says nothing about its significance in a civil case, the court in this civil case uniformly adopted the statutory prohibition against hiring the under-aged as the ground for finding the employer negligent. *Id.* at 207. The court then imposed liability on the employer (or allowed the jury to do so) without any inquiry into whether the underage worker’s injury came about through the on-the-job negligence of the employer or of another employee for whose negligence the employer would be vicariously liable. *Id.* No matter how innocent the employer and his other employees were in their on-the-job performance, the preparatory negligence of the employer in hiring the underage worker in the first place sufficed for liability. *Id.*

Jewish law tends to grant preparatory negligence dispositive significance. Under halacha (Jewish law) a doctor who fails during treatment to defer to or consult with more experienced and skillful colleagues who are readily available becomes liable for any subsequent injury regardless of how the doctor performed the treatment. *Ramat Rachel No. 22*, in LEGAL RESPONSES OF TZITZ ELIEZER ¶ 5 (1957) (s.v. “u’vevogeah”).

The dispositive approach to preparatory negligence was also taken by Justice Traynor in his dissent in *Stickel v. San Diego Elec. Ry. Co.*, 195 P.2d 416, 424 (Cal. 1948) (Traynor, J., dissenting) (arguing that plaintiff’s negligence in driving while drunk constitutes contributory negligence that bars recovery regardless of how she was driving).

50. *See, e.g.*, Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67–68 (1956) (the richness of our language allows defensible opinions to be written on any side of the cause-in-fact issue); *see also* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 239 (1950); Morris Raphael Cohen, *The Process of Judicial Legislation*, 48 AM. L. REV. 161, 171–72 (1914); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20, 24 (1924). The legal realist Karl Llewellyn

can advance defensible but opposing opinions about the significance of preparatory negligence. According to the legal realists, this fruitful insight about the richness of our language should direct scholars to consider the underlying, and often unmentioned, policy concerns that have led the courts to opt for one conclusion, and its corresponding legal opinion, rather than another.⁵¹ Following this pragmatic approach, at least some legal realists discourage the search for cross-contextual principles that would bring some conceptual order to an issue like the significance of preparatory negligence.⁵² This ordering effort, the legal realists insist, will inevitably disappoint.⁵³ The real world, to our bemusement and delight as well as chagrin, will not succumb. The

admitted that the number of defensible opinions was limited. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 81 (1930) (“For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly.*”).

51. Modern tort casebooks suggest the policies bearing on the significance accorded preparatory negligence include the following: (1) the judicial perception of the egregiousness of the preparatory negligence; (2) the intensity of the judicial desire to suppress the preparatory negligence; (3) the perceived dangerousness of the preparatory negligence both absolutely and compared to better preparatory behavior; (4) the cost and difficulty to the defendant of avoiding the preparatory negligence; (5) the closeness of the fit between the preparatory negligence and the type of injury plaintiff suffered; (6) the difficulty of establishing that defendant was negligent in his performance; (7) the absence of a non-safety rationale for the legislation prohibiting the preparatory behavior; and (8) the judicial perception of the relative ability to assess negligence of two institutions, the legislature, which often has condemned the preparatory behavior, and the jury, which is more able to evaluate the particular defendant’s performance. *E.g.*, RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* (2009); *see also Hudson v. Craft*, 204 P.2d 1, 4 (Cal. 1949) (“[T]he controlling factor is whether or not the expressed public policy [reflected in the legislation] is sufficiently urgent, explicit and comprehensive.”); Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350, 1389–91 (1981) (the judicial perception of the relative reliability of the legislature and the jury informs judicial decisions); Malone, *supra* note 50, at 61 (policy concerns such as the intensity of the judicial desire to suppress the negligence or the closeness of the fit between the negligence and the type of injury to plaintiff drive the judicial treatment of even a “fact” issue like cause-in-fact).

52. For a summary of legal realism’s slaying of conceptualism, see LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 10 (1986); *see also* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19–61, 121–32, 178–219 (1960); Dewey, *supra* note 50, at 26–27; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453–57 (1930); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 713–15 (1982). For an early dismissal of cross-contextual principles, albeit in a different context, *see Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”).

53. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 832–34 (1935).

policy concerns actual cases cast before the courts will drive results and mock the categorizations and generalizations that seem so sound in the armchair.

With expectations duly lowered, I nevertheless hazard two general rules regarding the significance of preparatory negligence. The first is described immediately below. The second is described in Part III.

The first general rule is that preparatory negligence should never be accorded the dispositive significance described above. A court may be outraged by defendant's preparatory negligence. A court may see that the legislature has condemned that negligence stridently. Nevertheless, imposing liability without sufficient evidence that the behavior that more immediately injured the plaintiff was performed culpably or unreasonably dangerously does too much violence to the common law's long insistence on a greater causal connection between defendant's culpability and plaintiff's injury.⁵⁴

Preparatory negligence alone is an insufficient wrong vis-à-vis the plaintiff to warrant the heavy consequence of tort liability. Defendant's apparently⁵⁵ faultless performance discharges his moral responsibility to the plaintiff and should trump defendant's preparatory negligence. Giving preparatory negligence dispositive significance denigrates the defendant's successful effort to overcome or compensate for his poor preparation and to pull himself together in order to perform his activity with ordinary care. Whatever defendant's culpability in attempting his behavior in the first place, a court will not justify imposing liability by saying, in effect, that it does not care how the behavior that more immediately injured the plaintiff was performed. Nor should a court's sense of justice be offended when a defendant, guilty of preparatory negligence, avoids liability simply through random good luck, namely, the random good luck that led defendant or some enabled third party to perform their activity with ordinary care. The Third Restatement of Torts was sound in saying the injured plaintiff's case against the defendant drunken driver who was rear ended should not reach the jury absent sufficient evidence that the activity which more immediately

54. This insistence is more helpfully thought of as being reflected in the proximate cause element, not the cause-in-fact element. Of course, those advancing more ambitious goals for torts, such as loss-spreading or wealth distribution, show little concern with the insufficient causal connection. They cannot be expected to support this first rule. *See, e.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970). Others have pointed out the undesirable implications of attempting to achieve these more ambitious goals. *See, e.g.*, PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

55. This Essay deals with cases in which plaintiff, although clearly showing defendant's preparatory negligence, has failed to adduce sufficient evidence of defendant's negligent performance. Thus, plaintiff should lose on directed verdict if defendant's negligent performance is deemed an element of liability.

injured the plaintiff, in this instance the defendant's driving, was performed negligently.⁵⁶

It follows that the plaintiff injured because the defendant has negligently entrusted another to perform an activity should also fail to reach the jury absent sufficient evidence that the activity was performed by the other culpably or unreasonably dangerously.⁵⁷ Similarly, the employer who has negligently hired or retained an obviously dangerous employee should prevail as a matter of law absent sufficient evidence that the employee behaved culpably or unreasonably dangerously in injuring the plaintiff. Likewise, the defendant car owner who negligently left his car unlocked or otherwise negligently facilitated the car's theft should prevail against the plaintiff injured by that thief absent evidence that the thief drove culpably or unreasonably dangerously. And the defendant who negligently served alcohol to one already drunk and about to drive should prevail against the plaintiff injured by that drunken driver absent evidence that the drunken driver drove culpably or unreasonably dangerously. Once again, the least confusing ground for explaining this result is that absent evidence showing that the activity that more immediately injured the plaintiff was performed culpably or unreasonably dangerously, defendant's negligent entrustment, negligent hiring, or negligent retention was not a proximate cause of the plaintiff's injury.

Denying dispositive significance to preparatory negligence also means Justice Lehman was correct in *Brown v. Shyne* when he deemed the trial court's jury instruction erroneous.⁵⁸ That instruction provided:

If the defendant attempted to treat the plaintiff and to adjust the vertebræ in her spine when he did not possess the requisite knowledge and skill as prescribed by the [licensing] statute to know what was proper and necessary to do under

56. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010).

57. Once again, "unreasonably dangerous" is needed to cover the possibility that the person entrusted behaves in an unreasonably dangerous way but cannot be said to be culpable. For example, a defendant who entrusts his car to one he knows to be so insane as to be an unreasonably dangerous driver should be liable when the insane driver drives in an unreasonably dangerous manner, even if the driver, because of his insanity, would not be deemed culpable. See *Breunig v. Am. Family Ins. Co.*, 45 Wis. 2d 536, 543-44, 173 N.W.2d 619 (1970) (stating in dicta that the insane will not be held negligent or liable if their mental illness affects their ability to understand and appreciate their duty to drive with ordinary care or affects their ability to control their car in an ordinarily prudent manner). If the insane driver drives properly, and another is injured nevertheless, the defendant's negligent entrustment of the driver should not be deemed a proximate cause of the other's injury.

58. See 151 N.E. 197, 199 (N.Y. 1926).

the circumstances, or how to do it, even if he did know what to do, you can find him negligent.⁵⁹

Lehman correctly saw that the instruction erred because it allowed the jury to impose liability on the defendant merely because of his preparatory negligence in attempting plaintiff's treatment.⁶⁰ The instruction did not require the jury to find anything amiss with defendant's treatment of the plaintiff him or herself.⁶¹

This first rule also calls for rejecting the action supported by Aaron Twerski and Neil Cohen and described in a note above.⁶² If provider-specific records of outcomes show that a doctor's outcomes from performing a particular procedure, like open-heart surgery, are significantly and substantially worse than the outcomes of alternative doctors, Twerski and Cohen would deem the doctor liable for all injuries that come from the doctor thereafter attempting the procedure (knowing his relatively poor record of outcomes). The defendant-doctor would be *prima facie* liable for his patient's injury even when the plaintiff-patient fails to produce any evidence of something amiss with the doctor's performance of the procedure. His decision to perform the procedure—a procedure that all agree is medically indicated—would be deemed negligent and would suffice for such liability. In effect, the doctor with a poor record of outcomes would be subject to strict liability when he performed the procedure.

To be sure, the authors allow the defendant-doctor to avoid liability by showing the same injury to the plaintiff would have occurred if the procedure were performed by a "fully competent practitioner" (i.e., a doctor with a significantly better record of outcomes).⁶³ Such a showing, the authors say, would negate cause-in-fact, thereby constituting a defense.⁶⁴ However the authors take care to emphasize that this defense requires more from the defendant doctor than a showing that his performance was free from negligence.⁶⁵ After all the authors insist that the negligence or breach element of the patient's case is shown merely by the doctor's attempt at the procedure. Hence the doctor can only avoid liability by negating cause in fact.⁶⁶

59. *Id.* at 198.

60. *See id.* at 199.

61. *See id.*

62. *See* Twerski & Cohen, *supra* note 41, at 11–22.

63. *Id.* at 14 n.23.

64. *Id.* at 19 n.33.

65. *See id.* at 18–19 & n.33.

66. *See id.*

The authors then clarify that as a practical matter few, if any, doctors will ever be able to establish this defense.⁶⁷

The doctor's decision to perform the procedure knowing of his poor record of outcomes, if it is indeed negligent as the authors claim, is a quintessential example of preparatory negligence. So when the authors insist that such negligence warrants liability for all injuries from the procedure,⁶⁸ without any evidence of how the procedure was performed, they are according preparatory negligence with what this Essay calls dispositive significance. They are saying the plaintiff-patient should reach the jury merely by putting into evidence the provider-specific record of outcomes. Then, based on these statistics, plaintiff's attorney may ask the jury to find that the defendant-doctor was negligent (i.e., committed malpractice) by attempting to perform the procedure instead of sending the patient to a doctor with a better record of outcomes. While the authors also interpret the informed-consent doctrine to compel the doctor to inform his patients of his poor record of outcomes, they do not limit the doctor's obligation to the giving of this (humbling, if not humiliating) information.⁶⁹ Even if a patient, upon being told these statistics, prefers to have the doctor perform the procedure, the doctor is nonetheless negligent and liable to the patient if the doctor goes ahead. Although the authors do not address the point, their approach logically suggests that even a patient who enjoys a good result can sue for the wrong done to him by the doctor's negligent attempt at the procedure, with the good result merely reducing the amount of damages the patient should collect.

This description of the action Twerski and Cohen propose suggests the shortcomings generally of according preparatory negligence dispositive significance. Allowing liability based only on preparatory negligence shows a breathtaking disregard for the performance of the doctor in treating this particular patient. Admittedly, proving the doctor's performance negligent may present problems for the plaintiff. But when the plaintiff cannot fault that performance—when, as far as the evidence shows, the defendant has somehow overcome the poor odds surrounding his attempt and performed properly—imposing liability because of that attempt alone treats the defendant unjustly and unduly offends our notions of proximate cause. The negligent attempt should not trump the apparently non-negligent performance. On the contrary, the apparently non-negligent performance has nullified the risks created by the negligent attempt. In the end it is the proper performance which the law most tries to incentivize, and which the

67. *Id.* at 26 & n.40.

68. *Id.* at 14.

69. *See id.* at 26–33.

patient desires, not any benefit the patient derives from his doctor possessing a good record of outcomes.

Twerski and Cohen also ignore the severe effect of their proposed action on the doctors to whom it applies. Their action in effect subjects doctors with a poor record of outcomes for a procedure to strict liability should they continue to attempt the procedure.⁷⁰ Doctors may have devoted their careers to the procedure. They may have spent years training and working to obtain the opportunity to perform it. Twerski and Cohen's examples make clear that their action will apply to high-risk procedures that may lead to severely harmful results despite the procedure being performed impeccably. Hence, Twerski and Cohen's rule threatens to increase dramatically the liability of the specialists to whom their rule applies. Indeed, under their rule the publication of a poor record of outcomes might sound the death knell of a specialist's career. What malpractice liability insurer would willingly offer a policy to such a specialist?

According preparatory negligence dispositive significance, therefore, may lead to tort law usurping the role of the legislators and administrators historically charged with identifying the doctors deemed qualified to attempt medical procedures. Because Twerski and Cohen's rule could impose such a prohibitive amount of liability, it also offends our notions of fair opportunity in that it seizes on one criterion alone—record of outcomes—for, in effect, selecting those who will be given an opportunity to perform a procedure. It ignores that legislators, administrators, and patients might want to consider other criteria about a doctor before deciding whether he should be allowed to perform a procedure, such as his ethical record, his success during simulations, examinations, or training, his bedside manner, his relationship with the patient, his location (especially his willingness to locate to rural areas), and even his costs and his generous approach to collecting. Regulation through tort liability would displace not only market forces but the wishes of traditional regulators as well.

Nor do Twerski and Cohen offer any method for a doctor with a poor record of outcomes from his early years to start afresh.⁷¹ A doctor's improvement may be such that his current and future performance of the procedure offers as good a chance of a positive outcome as any doctor would offer. But Twerski and Cohen's rule does not allow a way for a doctor saddled by a poor early record to establish this and thereby avoid being deemed *prima facie* negligent. True, such

70. *See id.* at 11–22.

71. The Twerski and Cohen approach makes doctors who are just starting the rising part of the learning curve extremely dependent on the results of their beginning performances.

a doctor could in theory pay tort damages to his patients until his record of outcomes finally improves, although Twerski and Cohen do not indicate the time period over which a doctor's record is to be assessed for this purpose. Once the doctor is judged by his improved record, he presumably would again be *prima facie* liable only for negligent performance. But no malpractice liability insurer is likely to stay with the doctor through his years of strict liability. And not many doctors will possess deep-enough pockets to stay the course. Fewer still will be willing to subject themselves to such an ordeal. Put simply, the Twerski and Cohen rule forecloses any doctor comeback.⁷²

In sum, preparatory negligence should never be accorded what I call dispositive significance.⁷³ That is, plaintiff should never establish a *prima facie* case merely by showing that defendant engaged in preparatory negligence and but for defendant's preparatory negligence plaintiff's injury would probably have been avoided. Courts should reject Twerski and Cohen's proposed action. That action, by allowing the plaintiff-patient to establish a *prima facie* case on the mere showing that the doctor's past outcomes were relatively poor overall, imposes liability on a doctor regardless of how he has performed his treatment of the plaintiff.

III. PART THREE

The second general rule I propose regarding the significance of preparatory negligence is that such negligence, though never sufficient in itself to establish a *prima facie* case, should presumptively be admitted as *some* evidence of defendant's negligent (or otherwise culpable)⁷⁴ performance whenever other evidence, what might be called threshold evidence, suggests that defendant's performance was negligent.⁷⁵ In other words, once plaintiff adduces other threshold

72. As discussed *infra*, the provider-specific statistics, which the rule of Twerski and Cohen accord this dispositive effect, suffer the vulnerability of all statistical evidence. See *infra* text accompanying notes 93–95.

73. See *supra* text accompanying notes 54–56.

74. The proposed general rule would apply to claims based on recklessness or intent as well as negligence. For brevity, I refer here to all three levels of culpability as “negligence.”

75. As indicated *supra* note 23, defendant's preparatory negligence may possess probative value in showing defendant's performance was negligent regardless of whether plaintiff adduces other evidence of defendant's negligent performance. But in the absence of any other evidence of defendant's negligent performance, the probative value of preparatory negligence in showing negligent performance will often be so slight that a presumption against admitting it into evidence is warranted.

evidence of defendant's negligent performance,⁷⁶ defendant's preparatory behavior should be admitted as further evidence of that negligent performance.⁷⁷ Whether a plaintiff's claim of negligent performance reaches a jury should depend on whether the evidentiary value of plaintiff's preparatory negligence in showing defendant's negligent performance in combination with plaintiff's other evidence of defendant's negligent performance satisfies the sufficiency-of-the-evidence test.

Thus, Justice Lehman erred in *Brown* when he kept out of evidence entirely the fact that the defendant had never attended medical school or received the required training.⁷⁸ We can assume with Lehman that the negligence issue in *Brown* was whether the defendant's performance of his treatment of Mrs. Brown was negligent in that it did not conform to the customary practice of medical doctors. The bad result of defendant's treatment—plaintiff's paralysis—may have provided at least a little evidence that defendant's performance failed to meet that standard. If it did, that bad result very likely amounted to the threshold evidence the rule proposed here would require. Because defendant's failure to attend medical school further reduced the probability that his performance met that standard, defendant's preparatory negligence in treating the plaintiff without such training should have been admitted.⁷⁹ It is no answer to say, as Lehman did, that

76. Naturally, the necessary threshold evidence of defendant's negligent performance need not amount to sufficient evidence of defendant's negligent performance for plaintiff to reach the jury. For example, the circumstances of plaintiff's injury need not justify a *res ipsa loquitur* inference of defendant's negligent performance. Those circumstances may possess much less probative value in showing defendant's negligent performance and yet still supply the necessary threshold evidence of negligent performance. Generally, other evidence of negligent performance will constitute the threshold needed to admit defendant's preparatory negligence whenever that evidence renders the claim of defendant's negligent performance non-frivolous under Rule 11 of the Federal Rules of Civil Procedure. Certainly if an impostor pilot crashes a plane, and the crash investigation concludes pilot error was one of the possible explanations, that investigation would constitute ample threshold evidence.

77. It is important to keep the issue here, whether defendant's preparatory negligence should be admissible evidence of defendant's negligent performance, separate from the much discussed issue of the effect a jurisdiction should give to a defendant's violation of a statutory, regulatory, or administrative command that has been adopted as the test for negligence. Conventional wisdom identifies three possible effects: negligence *per se*, presumption of negligence, and mere evidence of negligence. This Essay does not concern the choice between these effects. For a discussion of that issue, and especially a discussion of when and why defendant's violation should constitute only evidence of negligence, see Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932).

78. *Brown v. Shyne*, 151 N.E. 197, 198 (N.Y. 1926).

79. *Id.* (pointing out that defendant's treatment resulted in plaintiff's paralysis).

the defendant-chiropractor might still have performed the treatment properly.⁸⁰ The evidence issue always turns on probabilities about defendant's performance, and defendant's preparatory negligence typically raises the probability that his performance was negligent.

This second general rule supports the Third Restatement of Tort's position that the preparatory negligence of the defendant-driver in opting to drive while drunk should not be admissible when that driver is rear ended.⁸¹ In the Restatement hypothetical the defendant drunk driver was merely waiting in traffic, and there was no evidence that the performance of defendant's driving was negligent.⁸² In line with the rule I suggest, although not expressly embracing it, the Third Restatement goes on to observe that occasionally the defendant's preparatory negligence should be admitted as evidence that the defendant performed negligently.⁸³ And the examples they give support my claim that admissibility turns on whether there is other evidence of defendant's negligent performance.⁸⁴ Thus, the editors agree that the flat exclusion of preparatory negligence from evidence is unwarranted.

The limitations of this second rule, and a reason I only call for a presumption of admissibility, become apparent when the rule is applied to the provider-specific records of outcomes discussed by Twerski and Cohen.⁸⁵ Those scholars would grant dispositive significance to the preparatory negligence of a doctor attempting a procedure when the doctor's record of outcomes for that procedure is sufficiently poor—a proposal I reject.⁸⁶ Under my second rule, however, once the plaintiff-patient produced some threshold evidence that the doctor performed the procedure negligently, the doctor's poor record of outcomes would presumptively be admitted as further evidence of such negligent performance. Evidence scholars, however, could argue on several grounds for overcoming any such presumption and refusing to admit the outcome records. Accordingly, the value of this preparatory negligence as evidence of negligence performance deserves a brief review.⁸⁷

80. *Id.* at 198–99.

81. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. h (2010).

82. *Id.*

83. *See id.*

84. *See id.* (giving the example of a motorcyclist whose preparatory negligence lay in cycling despite failing his cycling test and whose cycling offers some evidence of negligent performance).

85. *See* Twerski & Cohen, *supra* note 41, at 34.

86. *See* Twerski & Cohen, *supra* note 41 and accompanying text.

87. This discussion of the evidence issue largely tracks that of Paul D. Rheingold. *See* Paul D. Rheingold, *The Admissibility of Evidence in Malpractice*

Federal Rule of Evidence 401 would seem to favor admission. It defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁸⁸ Plainly a poor record of outcomes would seem to have a “tendency” to make defendant’s performance more likely negligent.

On the other hand, a poor record of outcomes admitted to show defendant’s negligent performance in plaintiff’s case suffers the infirmities of all “similarity evidence” (i.e., evidence of what a defendant does generally being admitted to show what defendant did on a specific occasion). Evidence of other crimes a criminal defendant committed offered to show defendant committed the crime for which he is charged is the classic example of similarity evidence.⁸⁹ However high the statistical correlation between those committing the other crimes and those committing the crime in question, Federal Rule of Evidence 404(b), and its state law equivalents, exclude other-crimes evidence when offered “to show action in conformity therewith.”⁹⁰ Especially in civil cases, however, courts have often found some other ground for admitting similarity evidence despite Rule 404(b).⁹¹

A further argument against the admission of a defendant doctor’s poor record of outcomes arises from Federal Rule of Evidence 403 and its state equivalents.⁹² The argument lies in the possible prejudice to defendant created by admitting his poor record of outcomes. The fear is

Cases: The Performance Records of Practitioners, 58 BROOK. L. REV. 75, 76–78 (1992).

88. FED. R. EVID. 401 (2006).

89. *See, e.g., People v. Donoho*, 788 N.E.2d 707, 716–18 (Ill. 2003) (discussing whether prior sexual offenses provide admissible evidence that defendant committed the sexual offense charged).

90. FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

91. M. C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 326 (1956) (other grounds for admitting similarity evidence); *see also* FED. R. EVID. 405(b) (specific instances of conduct sometimes admissible); FED. R. EVID. 406 (evidence of habit admissible to show conforming behavior); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1523–24 (11th Cir. 1985) (mechanic’s practice of carrying cooler of beer admissible to show his likely drinking on the job); *Rivera v. Anilesh*, 869 N.E.2d 654, 655 (N.Y. 2007) (dentist’s routine admissible to show dentist’s behavior).

92. FED. R. EVID. 403 (stating that the court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”). State equivalents include Iowa Evidence Rule 5.403 and Ohio Evidence Rule 403. IOWA R. EVID. 5.403 (2009); OHIO R. EVID. 403 (LexisNexis 2001).

that the jury will give too much weight to these statistics especially if the jury has difficulty deciding whether the doctor's performance in plaintiff's case was negligent.

No doubt, some instances of preparatory negligence should be excluded on this ground. An example would be driving without having renewed one's license in a state where the requirements for renewal evince some safety purpose and serve as some filter against continued licensing of unsafe drivers.⁹³ Even though this preparatory negligence should not be disregarded on the ground of being wholly unrelated to safety or to the risk of negligent driving, this preparatory negligence may increase so slightly the probability that defendant was driving negligently in this particular case that its probative value is *de minimis*. In contrast, I assume that the preparatory negligence of driving drunk increases the probability of defendant driving negligently much more. Whether any preparatory negligence is admissible under Rule 403 will naturally enlist the judge's common sense.

These considerations and others bear on whether to admit into evidence the outcomes records that Twerski and Cohen accord such dispositive significance. Even if these records are admitted, defendant's counsel can attack their probative value in showing defendant's negligent performance on the same grounds statistical evidence can be attacked generally. Briefly, defense counsel can point out:

- 1) errors in the collection of the data and math errors in the data's manipulation, unrelated to whatever theories are involved;
- 2) bias errors—failure to consider factors that may confound the numbers . . . ;
- 3) demonstration of internal contradictions, such as a great year-to-year variability of performance . . . ; and
- 4) lack of significant differences— . . . how many standard deviations would be required?⁹⁴

Although those undertaking the studies and reporting the statistical results of doctor outcomes certainly strove to account for all measurable variables and satisfy the highest standards of risk analysis,⁹⁵ their studies do not eliminate the possibility that a doctor's poor record of

93. *E.g.*, NEV. REV. STAT. § 483.384 (2011) (license renewal requires an eye exam or report from an optometrist).

94. Rheingold, *supra* note 87, at 79.

95. The study appears in Edward L. Hannan et al., *Adult Open Heart Surgery in New York State: An Analysis of Risk Factors and Hospital Mortality Rates*, 264 JAMA 2768 (1990).

outcomes stems from the doctor's focus on patients with especially high risk conditions. Nor do the studies consider the possibility, for example, that some immeasurable but observable feature of a patient signals to some doctors whether the patient's condition is high or low risk, and thereby enables those doctors to select for the procedure only the low risk. Furthermore, the studies do not consider the possibility that the record of outcomes—which constitutes the starting point for the studies—may be influenced by the doctors themselves. Finally, the doctor can argue that the plaintiff differed from his other patients in the database, or that his practice differed in ways not studied.

CONCLUSION

A student's effort to build a mental framework for analyzing torts often hits a wall when the student encounters the preparatory negligence issue in a case like *Brown v. Shyne*. Assuming the untutored defendant's attempt to treat the plaintiff medically was negligent, if not even more culpable, what significance should courts accord that negligence? When a driver is involved in a car accident, what significance should attend the negligence of the driver in opting to drive while drunk? The element-by-element framework of duty, breach, cause in-fact based on the "but for" test, and proximate cause fails to yield an obvious or definitive answer.

This Essay offers a pair of conceptual, cross-contextual rules that should at least provide a starting point. When, as in the Restatement example of the drunken driver who was rear ended, there is no other evidence suggesting defendant's performance was culpable, defendant's drunkenness while attempting to drive, and his preparatory negligence generally, should neither count as a basis for liability in itself nor be admitted as evidence of defendant's negligent performance.

But once there is threshold evidence that defendant's performance was negligent then automatically excluding defendant's preparatory negligence from evidence can no longer be justified. Rather, a court may rationally conclude that the probative value of defendant's preparatory negligence in showing defendant's negligent performance warrants its admission on that issue. Whether plaintiff has presented a prima facie case should depend on whether that evidence combined with the other evidence of defendant's negligent performance satisfies the usual "sufficiency of the evidence" test for submitting the issue of defendant's negligent performance to the jury. The significance of preparatory negligence should be neither greater nor less.

Granted, the legal realists leave us wary of such general propositions. We doubt especially that general propositions will help us solve the next hard case. We suspect instead that courts will refer to

that welter of policy concerns that the legal realists suggest are more likely decisive. Here these policies include, once again: (1) the judicial perception of the egregiousness of the preparatory negligence, (2) the intensity of the judicial desire to suppress the preparatory negligence, (3) the perceived dangerousness of the preparatory negligence both absolutely and compared to better preparatory behavior, (4) the cost and difficulty to the defendant of avoiding the preparatory negligence, (5) the closeness of the fit between the preparatory negligence and the type of injury plaintiff suffered, (6) the difficulty of establishing that defendant's performance was negligent, (7) the absence of a non-safety rationale for any legislation prohibiting the preparatory behavior, and (8) the judicial perception of the relative ability to assess negligence of two institutions, the legislature, which probably condemned defendant's preparatory negligence, and the jury, which is more able to evaluate defendant's performance in the particular case.⁹⁶ But our predictions about what courts *will* actually consider in reaching their decisions does not nullify the value of suggesting what they should.

96. See EPSTEIN, *supra* note 51. The legal realist Karl Llewellyn would deem determining the legal significance of preparatory negligence on these grounds a "triumph of the felt needs of the case, with a consequent ignoring or reshaping of doctrine to fit the result." KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* x-xi (1930).